REPUBLIC OF THE PHILIPPINES
DEPARTMENT OF FINANCE
BUREAU OF INTERNAL REVENUE

Quezon City

Section 32(B)(6)(a) of the Tax Code of 1997, as amended
Section 287 of the Labor Code, as amended
OT-159-2021
NOV 17 2021

RIZAL COMMERCIAL BANKING CORPORATION
TRUST & INVESTMENT GROUP
Yuchengco Tower, RCBC Plaza
6819 Ayala Avenue, Makati City

Attention: **Jerik T. Balisi**
Head, Trust Operations Division

Atty. Sherma Cecile O. Miranda
Trust Legal Counsel

Gentlemen:

This refers to your letter dated August 11, 2021 requesting for clarification on BIR Ruling No. 1151-OT-038-2021 which addressed the queries of Mr. Manuel F. Variacion ("Mr. Variacion") in this wise:

"*xxx xxx xxx*

In this case, since there is no separate retirement benefit plan for managerial employees, the retirement benefits set forth under RA No. 7641 shall apply, i.e., at least one –half (1/2) month salary for every year of service if an employee who has reached the age of sixty (60) years or more, but not beyond sixty-five (65) years, and rendered at least five (5) years of service in the company. The retirement benefits of employees who met the age and length of service requirement under RA No. 7641 shall be exempt from withholding income tax by express provision of Section 32 (B)(6)(a) of the Tax Code of 1997, as amended.

Since you are more than sixty (60) years of age and have more than five (5) years in the service of the company, you meet the age and length of service requirement under RA No. 7641. Thus, your retirement benefits received under RA No. 7641 are exempt from income tax, and consequently to withholding tax.

xxx xxx xxx"

It is represented that:

(1) The Philippine Associated Smelting and Refining Corporation ("PASAR") and Rizal Commercial Banking Corporation – Trust and Investment Group ("RCBC Trust") entered into a Trust Agreement dated September 20, 2000 wherein RCBC Trust, as the trustee, shall administer the retirement fund contributions for the benefit of the officers and employees of PASAR and as provided under the "Philippines Associated Smelting and Refining Corporation Employees' Retirement Plan" ("PASAR Retirement Plan"), under Trust Account No. 75-799-3.

(2) The Bureau of Internal Revenue ("BIR") issued the following tax exemption certificates in favor of the PASAR Retirement Plan, qualifying it as reasonable retirement benefit plan in accordance with Revenue Regulations (RR) No. 1-68, as amended by RR No. 1-83 and Section 32(B)(6)(a) of the National Internal Revenue Code (Tax Code) of 1997, as amended:

(a) BIR Letter dated April 1, 1991;
(b) BIR Ruling No. ERP 087-2013 dated July 24, 2013; and
(c) Certificate of Tax Exemption No. RP-076-2021 dated May 4, 2021.

(3) PASAR has confirmed that its officers, including Mr. Variacion, are "Members" of the PASAR Retirement Plan and may receive the retirement benefit upon qualification in accordance with the specified conditions, quoted as follows:

"Article II
DEFINITIONS

The following words and phrases as used in these rules and regulation shall have the following meaning:

xxx xxx xxx

c) "Member" shall mean an employee eligible to participate in the Plan subject to the provisions of Article III hereof.

xxx xxx xxx

Article III
ELIGIBILITY FOR PARTICIPATION

Any regular or permanent full-time employee of the Company as of the effective date of this Plan who is below age 65 years shall be eligible for membership in the Plan as of the effective date.

All other employees who are not eligible for membership in the Plan as of the effective date of the Plan and all such future employees shall be eligible for membership on the date they attain the regular or permanent status of employment. However, they should be below age 65 years and working on a full-time basis."

PASAR sent its letter of instruction (LOI) dated August 4, 2012 directing RCBC Trust to determine and compute the Normal Retirement Benefit of Mr. Variacion in accordance with the PASAR Retirement Plan. Based on this LOI, the tax determined to be withheld amounted to P575,547.95.

(4) Under the PASAR Retirement Plan, the Normal Retirement Date shall mean the date on which a member attains age of 60 years. In BIR Ruling No. ERP-097-2013 dated July 24, 2013, the BIR states the following:

> *"It is observed, however, that paragraph (f) of Article II of the amended RETIREMENT PLAN defines "Normal Retirement Date" to mean the date when the member attains sixty (60) years of age without qualification as to length of service. Thus, this provision of the RETIREMENT PLAN allows the retirement of an employee who has rendered less than ten (10) years of service to the company. The benefits payable to the retiring member shall not be exempt from income tax because Section 32 (B)(6)(a) of the Tax Code of 1997 requires the presence of two (2) conditions in order that the employee benefits may be granted tax exemption: (1) the employee has been in service of the same private firm for at least ten (10) years; and (2) he is at least fifty (50) years old at the time of retirement."*

The foregoing same two (2) conditions provided under Section 32 (B)(6)(a) of the Tax Code of 1997, as amended is reiterated by the BIR in the Certificate of Tax Exemption (CTE) No. RP-076-2021 dated May 4, 2021.

(5) Applying the terms of the PASAR Retirement Plan and BIR Ruling No. ERP-087-2013 as cited in CTE No. RP-076-2021 it is very clear that the retirement benefits of Mr. Variacion is not tax exempt from income tax, hence, subject to withholding tax. Further, as confirmed by PASAR that its "officers" are "Members" of the PASAR Retirement Plan, the provisions of Republic Act (RA) No. 7641 shall not apply to Mr. Variacion.

Prefatorily, this Office has previously determined that the retirement benefits of Mr. Variacion are exempted from income tax and withholding tax pursuant to RA No. 7641. Said conclusion was predicated on the following representations, to wit:

> *"As represented, you were employed by the Philippine Associated Smelting & Refining ("PASAR" or "the Company") on April 16, 2003. On August 18, 2012, you retired at the age of sixty (60) years old after nine (9) years and four (4) months of service to the Company. At the time of your retirement, you were holding a managerial position in the Company, While PASAR has a retirement plan under its Collective Bargaining Agreement with the Union the same is applicable only to rank and file employees only."*

Nonetheless, this Office is not precluded from extricating its previous findings especially when grounded upon reasonable facts that would render the preceding conclusions inapplicable.

Article 287 of the Labor Code, as amended, provides for the rules on retirement pay to qualified private sector employees in the absence of any retirement plan in the establishment, *viz*:

> *"Article 287. Retirement.* ***Any employee may be retired upon reaching the retirement age established in the collective bargaining agreement or other applicable employment contract.***
>
> *In case of retirement, the employee shall be entitled to receive such retirement benefits as he may have earned under existing laws and any collective bargaining agreement and other agreements: Provided, however, That an employee's retirement benefits under any collective bargaining and other agreements shall not be less than those provided therein.*
>
> *In the absence of a retirement plan or agreement providing for retirement benefits of employees in the establishment, an employee upon reaching the age of sixty (60) years or more, but not beyond sixty-five (65) years which is hereby declared the compulsory retirement age, who has served at least five (5) years in the said establishment, may retire and shall be entitled to retirement pay equivalent to at least one-half (1 /2) month salary for every year of service, a fraction of at least six (6) months being considered as one whole year.* (Emphasis supplied)
>
> *xxx xxx xxx"*

It can be clearly inferred from the language of the foregoing provision that it is applicable only to a situation where, among others, there is no CBA or other applicable employment contract providing for retirement benefits for an employee[1]. Since it is established that PASAR maintains a reasonable retirement plan which is made available not only to rank-and-file employees but also to employees with managerial position, the application therefore of Article 287 of the Labor Code on Mr. Variacion case is illusory.

Parenthetically, for purposes of taxation, the retirement benefits of Mr. Variacion under the existing PASAR Retirement Plan, is governed by Section 32 (B)(6)(a) of the Tax Code of 1997, as amended, *viz*:

> *"SEC. 32. Gross Income. –*
>
> *xxx xxx xxx*
>
> *(B) Exclusions from Gross Income. – The following items shall not be included in gross income and shall be exempt from taxation under this Title:*
>
> *xxx xxx xxx*

[1] Philippine Airlines, Inc. vs. Arjan Hassaram, G.R. No. 217730, June 5, 2017

(6) Retirement Benefits, Pensions, Gratuities, etc. –

(a) Retirement benefits received under Republic Act No. 7641 and those received by officials and employees of private firms, whether individual or corporate, in accordance with a reasonable private benefit plan maintained by the employer: Provided, That ***the retiring official or employee has been in the service of the same employer for at least ten (10) years and is not less than fifty (50) years of age at the time of his retirement****: Provided, further, That the benefits granted under this subparagraph shall be availed of by an official or employee only once. For purposes of this Subsection, the term 'reasonable private benefit plan' means a pension, gratuity, stock bonus or profit-sharing plan maintained by an employer for the benefit of some or all of his officials or employees, wherein contributions are made by such employer for the officials or employees, or both, for the purpose of distributing to such officials and employees the earnings and principal of the fund thus accumulated, and wherein it is provided in said plan that at no time shall any part of the corpus or income of the fund be used for, or be diverted to, any purpose other than for the exclusive benefit of the said officials and employees.*

xxx xxx xxx"

It is undisputed that Mr. Variacion retired when he is sixty (60) years of age after nine (9) years and four (4) months of service with PASAR. Since the number of years falls short as to the required number of years provided in the PASAR Retirement Plan, the proceeds therefore shall be subjected to income tax and consequently, to withholding tax by operation of law.

This ruling is being issued on the basis of the foregoing facts as represented. However, if upon investigation, it will be ascertained that the facts are different, then this ruling shall be considered null and void.

Very truly yours,

CAESAR R. DULAY
Commissioner of Internal Revenue
0472 37

C.C.: **MANUEL V. MAPOY**
OIC Assistant Commissioner
Large Taxpayers Service

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