REPUBLIC OF THE PHILIPPINES
DEPARTMENT OF FINANCE
BUREAU OF INTERNAL REVENUE
National Office Building
Quezon City

Sections 251 and 255 the Tax Code; Sections 2.57.2, 2.57.3, 2.57.4 and 2.57.5 of Revenue Regulations No. 2-1998, as amended	OT- 003 - 2025

Person to Contact: Chief, Law & Legislative Division
Tel. Nos. 926-55-36/927-09-63

Date: JAN 06 2025

ENERGY REGULATORY COMMISSION
Pacific Center Building
San Miguel Avenue, Ortigas Center
1605, Pasig City

Attention: **ATTY. ALEXIS M. LUMBATAN**
Commissioner

Gentlemen:

This refers to your letter on behalf of the Energy Regulatory Commission (**"ERC"**) relating to the claim filed by SKK Steel Corporation (**"SKK"**) against the Power Sector Assets and Liabilities Management Corporation (**"PSALM"**) for the refund of: (1) the two percent (2%) expanded withholding tax (**"EWT"**) amounting to PhP it allegedly paid to the Bureau of Internal Revenue (**"BIR"**); and (2) interest charge of PhP paid to PSALM for late payment, or a total amount of PhP

Background

1. On July 21, 2005, SKK and the National Power Corporation (**"NPC"**) executed a Contract for Supply of Electricity Energy (**"CSEE"**). Considering that NPC is exempt from payment of income tax, sales by the same to SKK were not subjected to withholding tax.

2. On May 11, 2009, NPC assigned to PSALM, a government-owned and controlled corporation (**"GOCC"**), all its rights and obligations in, to and under its contracts for CSEE and other similarly or substantially equivalent power supply contracts, including that of SKK, pursuant to Section 49 of Republic Act No. 9136, otherwise known as the EPIRA (the **"Assignment"**). After the Assignment, SKK was not withholding any tax from its income payments to PSALM.

3. In July 2014, pursuant to the audit conducted by the BIR, it was revealed that SKK, being an entity belonging to the Top 10,000 corporations in the Philippines, is mandated to withhold tax from all its suppliers, including PSALM.

4. In accordance with Republic Act No. 9337, otherwise known as the E-VAT Law, sale of electricity by generation companies, transmission and distribution companies is subject to value-added tax (**"VAT"**). The BIR issued Revenue Memorandum Circular (**"RMC"**) No. 11-2012 wherein it confirmed that the transactions of PSALM are subject to the twelve percent (12%) VAT.

5. Per computation of SKK, the total amount of taxes that it should have withheld from its income payments to PSALM amounted to PhP (**"Back-Withholding Tax"**). Consequently, SKK deducted the said Back-Withholding Tax from the December 2014 billing of PSALM. SKK claimed that it remitted the same to the BIR.

6. PSALM disallowed the deductions made by SKK and billed the same for such amount plus interest charge of PHP for late payment (collectively, the **"Outstanding Balance"**).

7. On February 5, 2015, SKK paid under protest the Outstanding Balance.

In reply, please be informed that entities belonging to the Top 10,000 Corporations[1] are required or have the duty to withhold EWT from its income payments to its local/resident supplier of goods and local/resident supplier of services at the time such income payment is paid or payable, or the income payment is accrued or recorded as an expense or asset, whichever is applicable, in the payor's books, whichever comes first, pursuant to Sections 2.57.2, 2.57.3, and 2.57.4 of Revenue Regulations (**"RR"**) No. 2-1998, as amended.[2] The obligation to withhold applies on the income payments to "regular suppliers," which refers to suppliers with whom such income-payor has transacted at least six (6) times, regardless of the amount per transaction, either in the previous or current year.[3] Further, a single purchase which involves ten thousand pesos (PhP10,000.00) or more shall also be subject to the one percent (1%) or two (2%) EWT, as the case may be. Please note that GOCCs are not exempt from withholding taxes.[4]

Applied in this case, it is clear that SKK, being one of the Top 10,000 Corporations and a GOCC, is required to withhold two percent (2%) EWT from its income payments to PSALM at the time it is paid or payable. It bears stressing that Section 2.57.3 of RR No. 2-1998, as amended, provides that the obligation to withhold lies with SKK (as the buyer-payor).

The issue now to resolve is, whether SKK was correct when it withheld all the Back-Withholding Taxes relating to its previous transactions with PSALM from the December 2014 billing of PSALM.

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[1] Pursuant to RR No. 14-2008, the number of top private corporations was increased to 20,000 and RR No. 6-2009 included the top 5,000 individual taxpayers; Revenue Memorandum Circular No. 143-19, Clarifications on the Inclusion of Taxpayers as Top Withholding Agents Who are Obliged to Remit the 1% and 2% CWT Pursuant to the Criteria of RR No. 7-2019, December 16, 2019.

[2] As amended by RR Nos. 6-2001, 12-2001, 14-2002, 30-2003 and 11-2018.

[3] Section 2.57.2 (I) of RR No. 2-1998, as amended.

[4] Section 2.57.5 of RR No. 2-1998, as amended.

As mentioned earlier, the withholding of taxes should be made at the time the income payment is paid or payable, or the income payment is accrued or recorded as an expense or asset, whichever is applicable, in the payor's books, whichever comes first. Moreover, once withheld, Section 58 of the National Internal Revenue Code of 1997, as amended, (**"Tax Code"**) and Section 2.58 (B) of RR No. 2-1998, as amended, provide that the income-payor (withholding agent), has to furnish the income-recipient, a withholding statement in the form of BIR Form No. 2307 within twenty (20) days from the close of the quarter, which will be used by the latter to support its claim for tax credit.[5]

Failure to withhold the required taxes may be assessed of deficiency EWT plus applicable penalties.[6] Likewise, considering that the obligation to withhold tax lies on the buyer-payor, the relating expense (income payment) of the buyer-payor will be disallowed as a deduction from its gross income for income tax purposes thereby resulting to an assessment for deficiency income tax plus applicable penalties.

Records show that: (1) SKK admitted that it did not withhold EWT on the payments it made to PSALM relating to its previous transactions; (2) PSALM included the said income payments of SKK in its tax returns without any deductions; (3) When SKK was advised by the BIR that it should have withheld such taxes, SKK deducted all the Back-Withholding Taxes from the December 2014 billing of PSALM and allegedly remitted the same to the BIR; and (4) PSALM claimed that SKK did not provide PSALM withholding tax statement in the form of BIR Form No. 2307 evidencing the remittance of the taxes withheld as averred by SKK.

Withholding of taxes is a method used by the government to ensure that taxes are remitted properly and on a timely basis. Revenue Memorandum Circular (**"RMC"**) No. 061-14[7] elucidated that the incidence and burden of taxation fall solely on the statutory taxpayer and not on the withholding agent, which merely collects and remits the tax to the government, to *wit*:

> *"On the other hand, in case of withholding taxes, the incidence and burden of taxation fall on the same entity, the statutory taxpayer. The burden of taxation is not shifted to the withholding agent who merely collects, by withholding, the tax due from income payments to entities arising from certain transactions and remits the same to the government."* (Underscoring supplied)

Thus, the liability of paying the income tax due on the income payments of SKK to PSALM, falls solely on PSALM. SKK merely collects (by withholding) the tax due and remits the same to the government.

Considering the purpose of the withholding tax system, while it is true that SKK failed to withhold EWT from its income payments to PSALM, however, such income payments have been reported in PSALM's income tax returns without any deductions in the year of sale and paid the appropriate income taxes thereon. Such being the case, this Office holds that there is substantial compliance with RR No. 2-98, as amended, implementing Sections 57 (A) and (B)

[5] Section 2.58.3 (A) of RR No. 2-1998, as amended.
[6] Sections 251 and 255 of the Tax Code.
[7] Revocation of BIR Ruling No. DA(OSL-A1)001-2008 dated October 17, 2008, July 28, 2014.

of the Tax Code, without prejudice however to the imposition of penalties upon SKK for failure to withhold said taxes pursuant to Sections 251 and 255 of the Tax Code.

Accordingly, PSALM has no liability to refund the Back-Withholding Taxes and the relating interest to SKK.

Further, if SKK can prove with supporting documents that it remitted the deducted Back-Withholding Taxes to the BIR (i.e., BIR Form No. 2307), it may claim for a tax refund of such taxes from the BIR, subject to the existing laws, rules and regulations.

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

Very truly yours,

ROMEO D. LUMAGUI, JR.
Commissioner of Internal Revenue

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