



Republic of the Philippines
DEPARTMENT OF FINANCE
Roxas Boulevard Corner Pablo Ocampo, Sr. Street
Manila 1004

DOF OPINION NO. 002.2022

ATTY. ELEANOR L. ROQUE

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1200, Makati City

**SUBJECT: Request for Review of Bureau of Internal Revenue
International Tax Affairs Division Ruling No. 015-21**

Dear **Atty. Roque**:

This refers to the Request for Review dated 08 October 2021 ("Request for Review"), which you filed with this Department on behalf of your client, Taganito HPAL Nickel Corporation ("THPAL") requesting the review of Bureau of Internal Revenue ("BIR") International Tax Affairs Division Ruling No. 015-21 dated 25 May 2021, which that guarantee fees paid by THPAL to Sumitomo Metal Mining Company Ltd. ("SMM") and Mitsui and Company Ltd. ("Mitsui") is subject to 12% value-added tax ("VAT").

The Request for Review prays for the reversal of the BIR's finding that the guarantee fees paid by THPAL to SMM and Mitsui are subject to VAT, the pertinent portion of BIR ITAD Ruling No. 015-21 provides:

Nonetheless, the guarantee fees are subject to VAT under Section 108(A) of the Tax Code, which provides:

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In this case, Mitsui and SMM assumed THPAL's payment obligations to its creditor, JBIC, in the Philippines as evidenced by the Indemnity Agreement signed and/or notarized in the Philippines. Considering that the sale by Mitsui and SMM of their services to THPAL, i.e., provision of guarantee to THPAL, was done in the Philippines, the guarantee fees are, therefore, subject to VAT under Section 108(A) of the Tax Code.

THPAL argues that the guarantee fees paid to SMM and Mitsui are not subject to VAT based on the following:

- a. The guarantee fees are paid for services rendered in Japan and thus shall be exempt from VAT. The signing and notarization in the Philippines of the Indemnity Agreements signify only the perfection of the contract and not the performance thereof; and
- b. Assuming *arguendo* that the services were performed in the Philippines, THPAL is a PEZA-registered company, thus, it is exempt from VAT pursuant to Section 109(K) of the Tax Code.

We agree.

***The Payment of Guarantee Fees to SMM
and Mitsui are not subject to VAT***

Section 108 of the 1997 National Internal Revenue Code, as amended ("Tax Code") provides the basis to impose value added tax on sale of services or lease of properties, to wit:

SEC. 108. (A) Rate and Base of Tax. - There shall be levied, assessed and collected, a value-added tax equivalent to twelve percent (12%) of gross receipts derived from the sale or exchange of services, including the use or lease of properties.

VAT is essentially a tax on consumption which is imposed at each stage of the sale or exchange of goods or services until it finally reaches the consumer.¹ As VAT is based on consumption, the destination principle applies, to wit:

Under the Destination Principle, goods and services are taxed only in the country where these are consumed.

The destination principle is codified in our Tax Code when Section 108 of the Tax Code defined the meaning of “sales or exchange of services” under the said provision, to wit:

The phrase “*sale or exchange of services*” means the **performance of all kinds of services in the Philippines** for others for a fee, remuneration or consideration, including those performed or rendered by construction and service contractors; stock, real estate, commercial, customs and immigration brokers; lessors of property, whether personal or real; warehousing services; lessors or distributors of cinematographic films; persons engaged in milling processing, manufacturing or repacking goods for others; proprietors, operators or keepers of hotels, motels, rest houses, pension houses, inns, resorts; proprietors or operators of restaurants, refreshment parlors, cafes and other eating places, including clubs and caterers; dealers in securities; lending investors; transportation contractors on their transport of goods or cargoes, including persons who transport goods or cargoes for hire another domestic common carriers by land relative to their transport of goods or cargoes; common carriers by air and sea relative to their transport of passengers, goods or cargoes from one place in the Philippines to another place in the Philippines; sales of electricity by generation companies, transmission by any means entity^[92], and distribution companies, including electric cooperatives;^[92] services of franchise grantees of electric utilities. telephone and telegraph, radio and television broadcasting and all other franchise grantees except those under

¹ *Fort Bonifacio Development Corporation v. Commissioner of Internal Revenue et al.*, G.R. No. 158885, 02 April 2009

section 119 of this Code, and non-life insurance companies (except their crop insurances), including surety, fidelity, indemnity, and bonding companies; and similar services regardless of whether or not the performance thereof calls for the exercise or use of the physical or mental faculties. (Emphasis Supplied)

In analyzing whether the contract of guarantee is subject to VAT, it is then essential to determine the nature of a guarantee contract. A contract of guaranty is one where a person called the guarantor binds himself to the creditor to fulfill the obligation of the principal creditor in case the latter should fail to do so.² A contract of guaranty cannot exist by itself and there must be a principal obligation. This is because the obligation of the guarantor will only take effect once the principal debtor fails to fulfill his obligation.

Here, the principal contract is the Loan Agreement between THPAL and JBIC. JBIC is a bank residing and operating in Japan. Under the Loan Agreement, SMM and Mitsui obligated themselves to guarantee 85% and 15%, respectively, THPAL's loan obligation to JBIC as a precondition before the bank extends a 750,166,000.00 USD loan to THPAL.³ A careful look at the Loan Agreement shows that THPAL's payment⁴ of its loan obligation shall be made in Tokyo, Japan, to wit:

ARTICLE VII Payments and Currency

(1) (Place and Time of Payment) All payments to be made by the Borrower to JBIC shall be paid in the Eligible Currency) (or, if made pursuant to Article XII, in the Relevant Currency) in immediately available funds to the JBIC's account stipulated in Section (2) of Article VII, not later than 11:00am, Tokyo time, on the due date for payment thereof, and any such payment made on such date but after such time shall be deemed to have been made on the immediately succeeding Business Days and Overdue Interests

² Civil Code, Art. 2047.

³ See page 126 of the BIR docket.

⁴ See page 121 of the BIR docket.

pursuant to Paragraph (a) of Section (2) of Article VI above shall accrue and be payable upon any payment so made.

(2) (JBIC's account) For the purposes of Section (1) of Article VII, the following account is specified:

Account Bank:	the Bank of Tokyo – Mitsubishi UFJ Ltd. Head Office
Account Name:	Japan Bank for International Cooperation
Account Number:	No. xxxx

In the event of THPAL's failure to pay its loan obligation according to the amortization schedule, SMM and Mitsui are obligated to pay JBIC in the same manner provided under Loan Agreement. Hence, the guarantee obligations of SMM and Mitsui will be performed outside of the Philippines.

The fact that THPAL did not default in its obligation, hence, SMM and Mitsui did not perform its obligation under the Loan Agreement is not essential. It bears emphasis that during the period of the Loan Agreement, SMM and Mitsui obligated themselves to undertake to pay JBIC in the event of a default. This is the service that SMM and Mitsui provided to THPAL in Japan where these two companies reside.

Furthermore, SMM and Mitsui's representative offices have no participation in the Loan Agreement and Indemnity Agreement. SMM's general manager Masahiro Kamiya issued a notarized Certification⁵ affirming that SMM's representative office in the Philippines has no participation, directly or indirectly, in the Indemnity Agreement for guarantee between THPAL and SMM on 08 September 2011. Aside from SMM, THPAL's President also issued a Certification of Non-Rendition of Services in the Philippine Territory⁶ affirming the fact that SMM and Mitsui did not send any of its employees/personnel for the purpose of rendering services in the Philippines for the period covering the loan agreement.

⁵ See pages 76 and 77 of the BIR docket.

⁶ See pages 75 and 74 of the BIR docket.

In view of the foregoing, this Office grants the request for review. Kindly further note that this ruling is being issued on the basis of the foregoing facts as represented. However, if upon investigation, it will be disclosed that the facts are different, then this ruling shall be considered as null and void.

Thank you.

Very truly yours,



CARLOS G. DOMINGUEZ
Secretary of Finance

Digitally signed by
Carlos G. Dominguez
Date: 2022.01.28
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DEPARTMENT OF FINANCE
Republic of the Philippines



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