



Republic of the Philippines  
**DEPARTMENT OF FINANCE**

Roxas Boulevard Corner Pablo Ocampo, Sr. Street  
Manila 1004

495  
JUN 03 2019



06-11-2019  
left

**GORRICETA AFRICA CAUTON & SAAVEDRA**  
15/F and 4/F Strata 2000, F. Ortigas Jr. Road  
Ortigas Center, Pasig City, 1605

DOF Opinion No. 007.2019

**SUBJECT: REQUEST FOR REVIEW OF BUREAU OF INTERNAL REVENUE INTERNATIONAL TAX AFFAIRS DIVISION RULING NO. ITAD 048-18**

Gentlemen:

This refers to your Request for Review, on behalf of RP International Resources Pte. Ltd.'s (RPIR), of Bureau of Internal Revenue International Tax Affairs Division (BIR-ITAD) Ruling No. ITAD 048-18 dated 26 March 2018, which found that the service fees of RPIR are subject to 30% income tax under Section 28(B)(1) and value-added tax (VAT) under Section 108 (A) of the National Internal Revenue Code of 1997 (NIRC), as amended.

**RP International Resources Pte. Ltd. (RPIR)** is a foreign corporation organized and existing under the laws of Singapore. It is a specialist recruiter to global telecommunication, media, and technology industries, and provides specialist executive search, contingent, contract and launch and transformations resource solutions. RPIR is not licensed to do business in the Philippines. **Amdocs Philippines, Inc. (API)**, on the other hand, is a domestic corporation organized and existing under the laws of the Philippines. API is an affiliate of **Amdocs Singapore Pte. Ltd. (ASPL)**,<sup>1</sup> a foreign corporation organized and existing under the laws of Singapore.

On 15 May 2011, RPIR and ASPL entered into a 2-year Professional Service Agreement (PSA) wherein the former agreed to provide professional services to the latter and its affiliates,<sup>2</sup> including API, (collectively hereinafter referred to as the Amdocs Group). The PSA was renewed several times as follows:

<sup>1</sup> Formerly called Amdocs Billing Pte. Ltd. See Addenda to Agreement and Professional Service Order.

<sup>2</sup> Section 20 of the PSA states:  
"20. Amdocs Affiliates. Any Amdocs Affiliates shall be entitled to place Orders with Supplier under this Agreement. In such event, the references in this Agreement to Amdocs shall be deemed to be references to the applicable Amdocs Affiliate.

Date of Amendment	Extended Term
26 June 2013	14 May 2014
20 May 2014	14 May 2016
15 April 2016	14 May 2018

Procurement of experts by the Amdocs Group is done through the submission to RPIR of a "Professional Services Order".<sup>3</sup> Compensation rates, the duration of the assignment, payment instructions, and other terms and conditions of an expert's deployment are embodied in a "Work Order" issued by RPIR.

During the life of the PSA between RPIR and ASPL, the following personnel were assigned to API with a summary of their respective deployments:

Name	Job Description	Start Date	End Date	Service Period
Michael B. Calimag	Technology Engineer	15 Dec 2015	12 Jun 2017	545 days
Erljohn Peterson G. Bides	Radio Frequency Engineering Expert	4 Apr 2016	3 Apr 2017	365 days
Resfiando Aphelino	Radio Frequency Engineering Expert	4 Apr 2016	3 Apr 2017	365 days
Kalil Christian B. Almonte	Consultant	9 May 2016	8 May 2017	365 days
Geric A. Agawin	Technology Specialist	13 Jun 2016	12 Jun 2017	365 days
Andrei Y. Guarin	Project Management Office Professional	12 Dec 2016	11 Jun 2018	547 days

Based on the start dates and end dates of each respective expert's Work Order, the aggregate service period in the Philippines by RPIR personnel from 15 December 2015 to 11 June 2018 was **909 days<sup>4</sup>** for the duration of the PSA, with **each deployment lasting for more than 183 days per expert.**

On 26 September 2016, RPIR, through counsel, Gorriceta Africa Cauton & Saavedra, filed for Tax Treaty Relief Application (TTRA) with the BIR requesting for confirmation that the service fees paid by API to RPIR are exempt from income tax pursuant Article 7 in relation to Article 5 of the Philippines-Singapore Tax Treaty (RP-SG Tax Treaty) which states that:



<sup>3</sup> A template of the Professional Service Order was provided for under Exhibit "A" of the PSA

<sup>4</sup> Year 2015 (17 days); 2016 (366 days); 2017 (365 days); and 2018 (162 days)

## “ARTICLE 7 - BUSINESS PROFITS

1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on or has carried on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.” (emphasis ours)

Article 5 of the RP-SG Tax Treaty defines permanent establishment, to wit:

## “ARTICLE 5 - PERMANENT ESTABLISHMENT

1. For the purpose of this Convention, the term ‘permanent establishment’ means a fixed place of business in which the business of the enterprise is wholly or partially carried on.”

xxx

2. The term ‘permanent establishment’ includes specially but is not limited to:

xxx

j) The furnishing of services, including consultancy services, by a resident of one of the Contracting States through employees or other personnel, provided activities of that nature continue (for the same or a connected project) within the other Contracting State for a period or periods aggregating more than 183 days.” (Emphasis ours)

However, the TTRA for tax exemption was denied by the BIR in BIR Ruling No. ITAD No. 048-18, reasoning that RPIR carried on its business in the Philippines through a permanent establishment, thereby effectively negating the exemption invoked by RPIR.

The BIR maintains that the performance of services by RPIR employees in the Philippines for more than 183 days created a permanent establishment (PE) therein. Hence, the BIR ruled that the service fees paid by API to RPIR are subject to income tax. As such, the service fees are likewise subject to VAT since the services were rendered in the Philippines, thus:

“Accordingly, since [RPIR] (through employees thereof) will be furnishing professional services in the Philippines for more than 183 days, specifically, for 910 days from 2015 to 2018, [RPIR] is deemed to have a permanent establishment in the Philippines under paragraph 2(j), Article 5 of the Philippines-Singapore tax treaty. This being the case, service fees paid by [API] to [RPIR] for such rendered in the Philippines are subject to income tax in the Philippines under paragraph 1, Article 7 of the treaty; specifically, the fees are subject to the rate of 30% under Section 28(B)(1) of the Tax Code.



Moreover, since the services are rendered in the Philippines, the service fees paid by [API] to [RPIR] are subject to value-added tax ("VAT") under Section 108(A) of the Tax Code, xxx."

Aggrieved, RPIR filed the instant Request for Review.

Verily, RPIR raised the issue of "whether [it] is exempt from Philippine taxes under Article 7 of the RP-SG Tax Treaty, if [it] does not deploy its own employees or other personnel, and not deemed to be maintaining a permanent establishment in the Philippines."

In its Request for Review, RPIR reasons that it has no PE in the Philippines as said personnel/experts who were deployed to API and who performed the services were not its employees, thereby making paragraph 2(j), Article 5 of the RP-SG Tax Treaty inapplicable.

RPIR further maintains that (a) the Professional Service Agreement (PSA) is not conclusive proof of an employer-employee relationship between RPIR and the personnel deployed to API; and (b) that RPIR merely performed recruitment services and it did not deploy personnel to API such that, its function is merely to liaise with these third parties who are the actual employers of the experts. Further, the following documentary requirements were presented:

- a. Affidavit dated 9 March 2018 by Jeremy Charles Hopwood, Regional Director;
- b. Payroll for the period of 2 June 2008 to 28 February 2018 attached to such Affidavit showing that none of the experts deployed to API appear therein; and
- c. A supposed employee list from the Ministry of Manpower of Singapore on all employees as of date of Request for Ruling.

*We agree with the BIR* since RPIR carried on its business in the Philippines through a PE by furnishing services in the Philippines through its personnel for more than 183 days.



***RPIR carried on its business in the Philippines through a PE situated therein.***

The Commentaries of the Organization for Economic Cooperation and Development (OECD) Model Tax Convention on Income and on Capital<sup>5</sup> define “personnel” to refer to “*entrepreneur or persons who are in a paid-employment relationship with the enterprise. These personnel include employees and other persons receiving instructions from the enterprise (e.g. dependent agents).*” They are the persons who, in one way or another, are dependent on the enterprise and conducts the enterprise’s business.<sup>6</sup>

As it stands, it is RPIR who makes sure that these personnel possess the required qualifications prior to deploying them to API, otherwise, RPIR shall remove that person immediately in case of API’s dissatisfaction for any reason.<sup>7</sup> It is also RPIR’s obligation to ensure that these personnel comply with all the legal requirements and obtain all necessary permits at its own expense.<sup>8</sup> It also appears that RPIR’s “recruits” are expected to produce Time Sheets detailing the hours that [they] have worked to the client’s satisfaction. The Time Sheets must be approved by the client and where approval has not been obtained, this may result in a delayed payment whilst [RPIR] ascertain that the hours worked have been done satisfactorily.<sup>9</sup> Lastly, API is required to compensate RPIR should the former decide to hire RPIR’s personnel<sup>10</sup> and after completion of a contract, RPIR’s personnel are restricted from working with RPIR’s clients, like API, except through RPIR.<sup>11</sup>

All these factors are indicative of RPIR’s control, on one hand, and that these personnel are dependent on RPIR, in one way or another, in conducting RPIR’s business in the Philippines.



<sup>5</sup> OECD Commentaries on Article 5. Permanent Establishment. Full Version. As it read on 15 July 2014. Accessed at [https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-2015-full-version\\_9789264239081-en#page1](https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-2015-full-version_9789264239081-en#page1) on 09 February 2018. See OECD Model Tax Convention on Income and on Capital: Condensed Version 2017 at [https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-condensed-version-2017\\_mtc\\_cond-2017-en#page1](https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-condensed-version-2017_mtc_cond-2017-en#page1). See also United Nations Model Tax Double Taxation Convention between Developed and Developing Countries. Economic and Social Affairs. (2017).

<sup>6</sup> *Id.*

<sup>7</sup> Section 2(e) of the PSA.

<sup>8</sup> Section 2(g), in relation to Section 3 (c) of the PSA

<sup>9</sup> See RPIR’s website indicating their Terms and Conditions. Accessible at <https://www.RPIRnt.com/terms-conditions/> accessed on 09 February 2019.

<sup>10</sup> Section 23.2 of the PSA.

<sup>11</sup> See <https://www.RPIRnt.com/terms-conditions/> accessed on 09 February 2019.

Moreover, RPIR, in reneging that the personnel are its own, violates its obligations and warranties under the PSA.<sup>12</sup> It is also contrary to the *parol evidence rule* under Section 9, Rule 130 of the Rules of Evidence, which provides:

“SEC. 9. *Evidence of written agreements.* When the terms of an agreement have been reduced to writing, it is considered as containing all the terms agreed upon and there can be, between the parties and their successors in interest, no evidence of such terms other than the contents of the written agreement. xxx”<sup>13</sup>

Based on the *parol evidence rule*, RPIR cannot contradict the terms of the PSA because it has already been reduced into writing. As such, RPIR cannot now disavow the nature of its relationship with the experts (personnel) that were assigned to the Amdocs Group.<sup>14</sup>

Finally, RPIR’s argument that it does not have control over the deployed personnel because “control and the right to control are with the third party provider and API, respectively” and that RPIR is merely liaising between a third person and the Amdocs Group to provide the latter with experts, is belied by the PSA. Such deployed personnel are named its employees, thus:



<sup>12</sup> Section 2 (a) of the PSA, in relation to Section 3 and Section 9 thereof.

<sup>13</sup> See *Norton Resources Development Corporation v. All Asia Banking Corporation*, G.R. No. 162523, 25 November 2009, where the Supreme Court ruled that:

“The *parol evidence rule* forbids any addition to or contradiction of the terms of a written instrument by testimony or other evidence purporting to show that, at or before the execution of the parties’ written agreement, other or different terms were agreed upon by the parties, varying the purport of the written contract. When an agreement has been reduced to writing, the parties cannot be permitted to adduce evidence to prove alleged practices which, to all purposes, would alter the terms of the written agreement. Whatever is not found in the writing is understood to have been waived and abandoned.”

<sup>14</sup> The PSA has been repeatedly referring to the experts as RPIR’s employees, thus :

“2. Supplier’s Obligations.

(a) **Supplier** shall assign **its employees** specified in Exhibit A to perform the Professional Services (hereinafter separately and collectively “**Supplier Employees**” or “**Employees**”) and shall neither assign any portion of the work to any other person or third party, nor replace any of the Employees providing the Services, without prior written consent of Amdocs.

xxx

3. Supplier’s Warranties.

xxx

(c) Supplier hereby represents and warrants that it complies with all legal requirements in relation to **its Employees** including the payment of all compulsory payments (such as social security and income tax) in relation to **its Employees**.

xxx

9. Independent Contractor.

(a) **It is hereby understood and agreed that the Supplier Employees shall perform the Services hereunder as employees of Supplier** and that Supplier performs the Professional Services hereunder as an independent contractor. There shall be no employer/employee relationship between Supplier and Amdocs and/or between the Supplier Employees and Amdocs. Xxx” (emphasis supplied)

"9. Independent Contractor.

- (a) **It is hereby understood and agreed that the Supplier Employees shall perform the Services hereunder as employees of Supplier** and that Supplier performs the Professional Services hereunder as an independent contractor. There shall be no employer/employee relationship between Supplier and Amdocs and/or between the Supplier Employees and Amdocs. xxx"

In addition, RPIR failed to name and disclose the various third party providers whom RPIR claimed as employers of the deployed experts/personnel. Failing on this only means that the experts/personnel deployed to API are personnel of RPIR.

As such, we agree with the BIR that the services performed by these personnel-experts for more than 183 days in the Philippines created a PE herein. Accordingly, income attributable to that PE is not exempt from Philippine taxation.

***RPIR is engaged in trade and business within the Philippines. Hence, for income tax purposes, it is considered a resident foreign corporation.***

We agree with the BIR that the service fees of RPIR derived from its deployment of personnel to API are subject to Philippine taxation. However, we beg to differ that RPIR is a non-resident foreign corporation for income tax purposes.

The Tax Code, as amended, declares that the term "'resident foreign corporation' applies to a foreign corporation engaged in trade or business within the Philippines," as distinguished from a "'non-resident foreign corporation,' which applies to a foreign corporation not engaged in trade or business within the Philippines.<sup>15</sup> However, with regard to the term "doing" or "engaged in" business, there is no fixed or specific criterion as to what constitutes "doing" or "engaging" in business.<sup>16</sup> In the case of *The Mentholatum Co., Inc., et al. vs. Mangiliman, et al.*,<sup>17</sup> the Supreme Court had thoroughly and clearly explained the term this wise:



---

<sup>15</sup> Section 22 (H) and (I), NIRC, as amended.

<sup>16</sup> *State Investment House, Inc. v. Citibank and CA*. G.R. Nos, 79926-27. 17 October 1991

<sup>17</sup> 72 PHIL 524.

". . . There is no specific criterion as to what constitutes "doing" or "engaging in" or "transacting" business. Each case must be judged in the light of its peculiar environmental circumstances. The term implies continuity of commercial dealings and arrangements, and contemplates, to that extent, the performance of acts or works or the exercise of some of the functions normally incident to, and in progressive prosecution of commercial gain or for the purpose and object of the business organization."<sup>18</sup> (emphasis supplied)

xxx

"It is not really the grant of a license to a foreign corporation to do business in this country that makes it a resident; the license merely gives legitimacy to its doing business here. What effectively makes such a foreign corporation a resident corporation in the Philippines is its actually being in the Philippines and licitly doing business here, "locality of existence" being, to repeat, the "necessary element in (the) signification" of the term, resident corporation."<sup>19</sup> (emphasis supplied)

As the records reveal, the deployment of RPIR personnel to API for 909 days, from 15 December 2015 to 11 June 2018, implies continuity of RPIR's commercial dealings and arrangements within the Philippines. Through its personnel, RPIR established a permanent establishment in the Philippines thus, doing business therein. Its non-registration with the Securities and Exchange Commission (SEC)<sup>20</sup> does not affect the fact that it is a resident foreign corporation for income tax purposes.

The extension of RPIR's service contract (PSA) with ASPL to API and RPIR's act of deploying its personnel to API allowed it to engage in trade and business in the Philippines. Its personnel performed acts or works or exercises functions that are incidental and beneficial to the purpose of RPIR's business. Likewise, the activities or works of RPIR personnel bring profits to RPIR. Further, RPIR personnel must perform its functions according to the standards required by RPIR.<sup>21</sup>

Verily, RPIR is a resident foreign corporation, engaged in trade and business within the Philippines and therefore, liable to pay income taxes for income attributable to the PE.

However, in determining the profits of RPIR which will be subjected to income tax, the provisions of the treaty will govern. Article 7 (par. 3) of the RP-SG Treaty provides that:



<sup>18</sup> As cited in the case of *State Investment House v. Citibank*, *supra* fn. 17.

<sup>19</sup> *Id.*

<sup>20</sup> Per SEC Certification dated 21 September 2016.

<sup>21</sup> See *Air Canada v. Commissioner of Internal Revenue*. G.R. No. 169507, January 11, 2016.




"3. In the determination of the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment including executive and general administrative expenses so incurred, whether included in the State in which the permanent establishment is situated or elsewhere."

(emphasis supplied)

Finally, as regards the value-added tax aspect of the subject ruling, the same was not raised as an issue by RPIR. Nevertheless, there is no denying that the services were rendered in the Philippines. However, we refer the same to the BIR for proper adjudication as to whether the applicable thresholds were met.

In view of the foregoing, we regret to deny the request for review and hold that RPIR established a permanent establishment in the Philippines thus, income attributable to that permanent establishment is not exempt from Philippine taxation.

Respectfully yours,

  
CARLOS G. DOMINGUEZ  
Secretary  
MAY 28 2019

CC: CAESAR R. DULAY  
Commissioner  
Bureau of Internal Revenue  
BIR Road, Diliman, Quezon City

RP INTERNATIONAL RESOURCES LTD.

DIN 10:54  
JUN 03 2019  
registered