



Republic of the Philippines
DEPARTMENT OF FINANCE

Roxas Boulevard Corner Pablo Ocampo, Sr. Street
Manila 1004

DOF OPINION NO. 008.2022

MR. RICHARD J. NETHERCOTT
Independent Electricity Market Operator
9F Robinsons Equitable Tower,
ADB Avenue, Ortigas Center, Pasig City

**SUBJECT: Request for Review of Bureau of Internal Revenue Ruling
No. OT-323-021 dated 24 August 2021**

Dear **Mr. Nethercott**:

This refers to the subject letter dated 14 October 2021 ("Request for Review"), filed with this Department requesting the partial review of Bureau of Internal Revenue ("BIR") Ruling No. OT-323-021 dated 24 August 2021, relative to your request for exemption from income tax under Section 30(F) of the National Internal Revenue Code ("NIRC") of 1997, as amended.

Independent Electricity Market Operator ("IEMOP") represents that it is a non-stock, non-profit business league engaged in the management and operation of the market for the wholesale purchase of electricity and ancillary services in the Philippines (Wholesale Electricity Spot Market or "WESM"), and engaged in services related to the same, in accordance with Republic Act No 9136.

On 10 October 2018, IEMOP filed with the Bureau of Internal ("BIR") a request for ruling seeking confirmation of the tax status of IEMOP, and the implications of the transfer of assets and liabilities from the Philippines Electricity Market Corporation to IEMOP. A second request was also submitted on the same day, relative to the taxation of the transaction in the WESM.

On 17 September 2021, IEMOP received BIR Ruling No. OT-323-021 dated 24 August 2021. The BIR ruled as follows:

1. IEMOP cannot qualify as an income-tax exempt business league under Section 30(F) considering the nature and purposes of its incorporation;

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2. Accordingly, IEMOP is subject to income tax under Section 27 of the Tax Code, and consequently, to withholding tax under Section 57 of the same Code;
3. IEMOP's income from its properties and for activities conducted for profit is subject to income tax;
4. The payments received by IEMOP that are earmarked for other entities are not part of its gross income;
5. IEMOP, as an income payer, is constituted as a withholding agent;
6. The Customer/Buyer shall be the withholding tax agent for energy sold and paid through the WESM, while both the Customer/Buyer and Generator/Seller shall be the withholding tax agents for the Market Fees collected by IEMOP.
7. IEMOP, as an employer, is subject to final tax imposed on fringe benefits furnished its employees;
8. All the funds received by IEMOP for its own account as a result of its administration and operation of the WESM are subject to Value-added tax (VAT);
9. Funds received by IEMOP intended and actually earmarked for other entities are not included as part of IEMOP's gross receipts;
10. Transactions for the supply of energy and ancillary services made through the WESM shall be subject to the requirements of Section 237 of the Tax Code;
11. IEMOP is not exempt from pass-on VAT on its purchase of goods and services;
12. The use of the GMR to account for the zero-rated sales is proper;
13. The transfer of assets and liabilities from the Philippine Electric Market Corporation (PEMC) to IEMOP is not subject to income tax, VAT, DST, and donor's tax; and
14. The electricity purchased by renewable energy (RE) developers through WESM, if any, that is subsequently sold to WESM shall be generally subject to VAT.

Disagreeing with certain points of the ruling, IEMOP filed this Request for Review and submits the following issues for resolution:

1. Whether or not IEMOP is an exempt corporation under Section 30 of the Tax Code, and in relation thereto:



- a. Whether the Market Fees collected by IEMOP from Market Participants to defray the cost of the operation of the WESM is subject to income tax, and consequently, to withholding tax?
- b. Whether or not the net settlement surplus (NSS) amounts generated in the course of the settlement of transactions in the WESM is part of the gross income of IEMOP for purposes of taxation?
- c. Whether or not the remittance by IEMOP to PEMC of a portion of the Market Fees it collects from the trading participants is subject to taxation?

In its Request for Review, IEMOP argues the following in support of its position that it is a non-stock, non-profit business league exempt from income taxes under Section 30(F) of the NIRC, as amended, to wit:

1. IEMOP is a tax-exempt corporation under Section 30 of the Tax Code:
 - a. IEMOP is a non-stock and non-profit corporation as stated in its Articles of Incorporation, with responsibilities as Market Operator of the WESM set out in the WESM Rules¹; and
 - b. The activities of the IEMOP as Market Operator are conducted not for profit and are intended to promote the interest of the WESM and the WESM participants;
2. The Market Fees collected by IEMOP from WESM participants are not subject to income tax and, consequently, to withholding tax:
 - a. The collection of Market Fees is provided for in Section 30 of Republic Act No. 9136, otherwise known as the Electric Power Industry Reform Act (EPIRA Law); and
 - b. The Market Fees collected by IEMOP from WESM participants constitute capital, rather than income, and thus, are not taxable;
3. The net settlement surplus (NSS) are funds earmarked for other entities and do not form part of the gross income of IEMOP as the Market Operator of the WESM; and

¹ WESM Rules (Last amended per DOE Department Circular No. 2021-10-0034 dated 12 October 2021 regarding enhancements to the rules change process). <https://www.wesm.ph/library/downloads/view-download/documents/enhanced-wesm-design/market-rules-and-manuals> dated 29 December 2021 and accessed on 5 January 2022.



4. The remittance by IEMOP of a portion of the Market Fees it collects to PEMC to cover the latter's cost of governing the WESM is not subject to tax.

We deny the Request for Review of BIR Ruling No. OT-323-021.

1. *IEMOP is not an income-tax exempt business league under Section 30(F) of the Tax Code, as amended*

IEMOP failed to prove that is an income tax exempt business league under Section 30 (f) of the of the Tax Code, as amended. The provision states:

“Sec. 30. Exemption from Tax on Corporations. – The following organizations shall not be taxed under this Title in respect to income received by them as such:

“(F) Business league, chamber of commerce, or board of trade, not organized for profit and no part of the net income of which inures to the benefit of any private stakeholder or individual;”

In accordance with Revenue Memorandum Order No. 64-2019², in determining whether or not a corporation falls within the contemplation of the categories of income tax-exempt corporation under Section 30, reference shall be made to Section 31 or Revenue Regulations (RR) No. 02-40³ (Income Tax Regulations) dated February 10, 1940 which describes these corporations an their respective operations.

Section 31 of RR No. 02-40 defines business leagues exempt from income tax as follows:

“SECTION 31. Business leagues. — A business league is an association of persons having some common business interest, which limits its activities to work for such common interest and does not engage in a regular business of a kind ordinarily carried on for profit. Its work need not be similar to that of a chamber of commerce or board of trade. If it engages in a regular business of a kind ordinarily carried on for profit, the fact that

² Dated July 24, 2019

³ Dated February 10, 1940



the business is conducted on a cooperative basis or produces only sufficient income to be self-sustaining, is not ground for exemption. xxx”

RMO No. 34-2019 reiterates this and enumerates the following characteristics of a business league qualified for the income tax exemption under Section 30(f), to wit:

- a. Organized as a business league, chamber of commerce, or board of trade;
- b. Operated as an association of persons having some common business interest, which limits its activities to work for such common interest;**
- c. It does not engage in a regular business of a kind ordinarily carried on for profit;
- d. It is non-profit;
- e. No part of its net income or asset shall belong to or inure to the benefit of any member, organizer, officer or any specific person

As correctly pointed out by the BIR, from the definition of a “business league,” IEMOP cannot qualify as such considering the nature and purposes of its incorporation. Its primary purpose under its Articles of Incorporation state:

“PRIMARY PURPOSE

“Manage and operate the market for the wholesale purchase of electricity and ancillary services in the Philippines (the Wholesale Electricity Spot Market or the “WESM”) and engage in services related to the same, in accordance with Republic Act No. 9136 including its implementing rules and regulations, the rules promulgated to govern the operations of the WESM (the “WESM Rules”), including their respective amendments and such other laws, rules and regulations, which may be enacted hereafter that shall govern the WESM, and in an efficient, competitive, transparent and reliable manner, with the end view of improving the trading, delivery and provision of electricity and ancillary services to the Philippine Electric Industry Participants.”



Congruently, nothing in Rule 1.3.1 of the WESM Rules state that it is responsible for the operation of an association of the industry players or the promotion of the interest of the latter.

It is very clear that the various Market Participants such as trading participants, network service providers, ancillary service providers, metering service providers, and system operators, while all registered as WESM members, cannot be said to have a common business interest with IEMOP, or the other market players. The primordial reason for their registration for membership is for them to access (inject or withdraw) electricity in the WESM⁴.

Accordingly, we do not agree with the argument that the IEMOP is akin to what the Information Technology and Business Process Association of the Philippines Inc. (IBPAP) is to the IT-Business Processing Office Industry. The glaring difference between the operations of IEMOP (i.e. market operation) and IBPAP (i.e. national organization of members of the eServices industry) cannot support the former's argument.

Registration as non-stock and non-profit corporation does not automatically exempt a subject corporation from income tax under Section 30 of the Tax Code. A corporation has to also meet the specific conditions based on the corporate purpose and actual operations under each item of Section 30 to be exempt.

It is worth reiterating that laws allowing tax exemptions are construed *strictissimi juris* because tax exemptions restrict the collection of taxes necessary for the existence of the government.⁵

2. *The Market Fees collected by IEMOP from WESM participants are subject to income and withholding tax. However, the operations of IEMOP should result to no taxable income.*

Not falling within the purview of an income tax-exempt business league under Section 30(F) of the Tax Code, as amended, the Market Fees collected by IEMOP from WESM Members are subject to income and withholding tax. However, pursuant to under the EPIRA law, the WESM Rules, and the Operating

⁴ Rule 2.2.4.2 of the WESM Rules.

⁵ Commissioner of Internal Revenue v. Court of Tax Appeals and Young Men's Christian Association of the Philippines, Inc.



Agreement between the PEMC and the IEMOP⁶, its operations should not result to any taxable income.

Rule 4 of the EPIRA Law IRR defines "Market Fees" as "charges imposed on all market members by the Market Operator to cover the cost of administering and operating the WESM." Section 2.10.4 of the WESM Rules provide that the components of the market fee shall be:

- a. Registration fees, comprising an annual fee payable by each WESM member for the category or categories in which they are registered;
- b. Metering fees to recover the Market Operator's budgeted revenue requirements for the collection, storage and processing of metering data; (c) Billing and settlement fees, to recover the Market Operator's budgeted revenue requirements for providing the billing and settlements service, as described in chapter 3;
- c. Administration fees, to recover the remainder of the Market Operator's budgeted revenue requirements not covered by (a), (b), (c) and (d); and
- d. Costs reasonably incurred by the PEM Board and the committees and working groups that the PEM Board appoints under the WESM Rules.

Additionally, the Guiding Principles under the Operating Agreement between PEMC and IEMOP provide that the "Market Operator shall operate the WESM on a non-profit basis."

The Rules also provide how the remaining settlement surplus shall be treated, to wit:

"3.13.12. Treatment of Remaining Settlement Surplus

"3.13.16.1. If the transactions required by Clauses 3.13.14.2 (a), (b) and (d), in aggregate, result in a surplus or deficit remaining, this will be known as the net settlement surplus or settlement deficit.

"3.13.12.2 The net settlement surplus or net settlement deficit:

⁶ Dated September 19, 2018



- (a) May be flowed back to the WESM Participants in accordance with the procedures to be developed under 3.13.12.3, or may be used by the Market Operator to establish and support the market for financial transmission rights subject to the approval of the PEM Board; and
- (b) Shall be clearly accounted for and taken into account when setting the allowable charges under any regulatory instruments applying to the Market Operator.”

From the above, no net taxable income should be incurred by IEMOP as the Market Fees collected by it shall be expensed out anyway to answer for operating and administration costs.

3. The net settlement surplus (NSS) form part of the gross income of IEMOP as the Market Operator of the WESM

As to the NSS, the BIR ruled that like the market fees collected, “these monies flow into IEMOP as part of its operations, benefitting the corporation, and having the discretion on how to apply the net settlement surplus, they shall form part of the corporation’s gross income subject to income tax.”

IEMOP stressed that the BIR hinged their ruling on Section 3.13.16 of the WESM Rules, as amended by Department of Energy Circular No. 2004-07-008, which provides that the NSS may be retained by the Market Operator to fund deficit as a result of transactions; flowed back to the Market Participants; or used by the Market Operator to establish and support the market for Financial Transmission Rights subject to the approval of the PEM Board. To IEMOP, the WESM Rules having been amended further by DOE DC 2021-03-0007⁷ and the phrase “May be retained by the Market Operator, to fund deficit as a result of transactions required in clauses 3.13.14” in Section 3.13.12.2 having been deleted, the discretionary use of the NSS has already been eliminated.

We find no cogent reason to reverse the BIR’s ruling on this matter. The argument raised is of no moment as there is still discretion on the use of the NSS. The Market Fees, from where the NSS comes from, is income in the hands of IEMOP. Being such, any excess shall remain to be part of the gross income of IEMOP as these benefit the corporation and IEMOP remains to have discretion as to how to apply the same.

⁷ Amended on March 16, 2021.

In the instance that these are “flowed-back” to Market Participants, the same must be expensed out by IEMOP and taxed in the hands of the recipient Market Participant.

Necessarily, we have to uphold the BIR’s ruling on the matter that the same shall form part of the IEMOP’s gross income and shall be subject to income tax on the part of IEMOP.

On the issue on the taxation of the remittance of IEMOP to PEMC of the latter’s share in the Market Fees collected from WESM participants, the matter should have been raised in the first instance with, and ruled upon by the BIR before it can be raised to the Department on review. We regret to inform you that we cannot rule on the matter.

In view of the foregoing, this Office denies the Request for Review of BIR Ruling No. OT-232-021. Kindly note that this ruling is being issued based on 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



MAY 11 2022

CC Hon. Caesar R. Dulay
Commissioner
Bureau of Internal Revenue
BIR National Office Building
BIR Road, Diliman, Quezon City