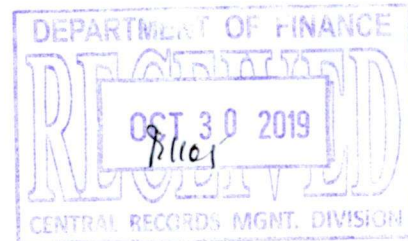
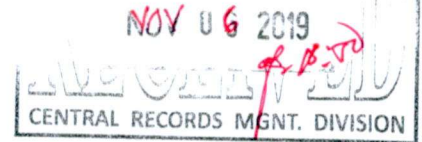




Republic of the Philippines
DEPARTMENT OF FINANCE

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ATTY. VICTORIA A. VILALLUZ
Principal-Partner, Tax Services
SyCip Gorres Velayo & Co.
6760 Ayala Avenue, Makati City,
1226 Metro Manila, Philippines

DOF Opinion No. 015.2019 OCT 30 2019

**SUBJECT: Request for Review of Bureau of Internal Revenue Ruling
No. ITAD 169-2013**

Dear **Atty. Villaluz**:

This refers to the subject letter dated 19 July 2013 ("Request for Review") which you filed with this Department on behalf of your client Hitachi-Omron Terminal Solutions Corporation ("Hitachi-Omron") to request for review of Bureau of Internal Revenue ("BIR") Ruling No. International Tax Affairs Division ("ITAD") 169-2013 dated 19 June 2013 ("BIR Ruling"), found that Hitachi-Omron has a permanent establishment in the Philippines and, hence, must be treated as a resident foreign corporation.

In particular, the Request for Review prays for the reversal of the BIR's finding that Hitachi Terminals Mechatronics Philippines Corporation ("Hitachi Terminals Philippines") constitutes a permanent establishment of Hitachi-Omron because of a Basic Purchase Agreement ("BPA") between the two companies, based on paragraph 5(c), Article 5, of the Philippines-Japan tax treaty.

On the other hand, as stated in your Request for Review, it is your position that paragraph 5(c), Article 5, of the Philippines-Japan tax treaty does not apply to the BPA because of the following:

- a. Hitachi Terminals Philippines owns the raw materials used in manufacturing the products because it purchases the same from its foreign and local suppliers;
- b. Hitachi Terminals Philippines owns the products (finished products/goods) until the sale of the products to Hitachi-Omron is consummated;
- c. The storage of the Products within the premises of Hitachi Terminals Philippines and the fact that in pricing the products, Hitachi Terminals Philippines will include the costs for packaging, hauling, storage and transportation of the same are evident manifestation of its exercise of the right of ownership over the said products; and
- d. The Commissioner of Internal Revenue extended the provisions of the Philippines-Japan tax treaty when she used the terms “delivering regularly” and “delivers” in the BIR Ruling to the prejudice of the company.

We find that the BIR made a reversible error and, hence, reverse the BIR Ruling as discussed below.

Paragraph 5(c), Article 5, of the Philippines-Japan tax treaty provides:

Where a person – other than an agent of an independent status to whom paragraph 7 applies – is acting in a Contracting State on behalf of an enterprise of the other Contracting State, that enterprise shall be deemed to have a permanent establishment in the first-mentioned Contracting State in respect of any activities which that person undertakes for the enterprise, if:

X X X

- c) that person maintains in the first-mentioned Contracting State a stock of goods or merchandise belonging to the enterprise from which he regularly fills orders on behalf of the enterprise.

A reading of said paragraph shows that in order to constitute a permanent establishment, it must be shown that Hitachi Terminal Philippines (1) is not an agent of an independent status under paragraph 7, Article 5 of the tax treaty;



(2) maintains in the Philippines a stock of goods or merchandise belonging to Hitachi Omron, and (3) regularly fills orders from that stock of goods or merchandise on behalf of Hitachi Omron. *However, after a review of the subject BPA, we find that Hitachi Terminals Philippines, and not Hitachi Omron, is the owner of the stock of goods or merchandise. Hence, paragraph 5(c), Article 5, of the Philippines-Japan tax treaty does not apply.*

The relevant portions of the subject BPA provide:

3. Price and Payment

- A. All prices in any Purchase Order shall be firm and fixed unless otherwise agreed, and based on **FOB Philippines according to Incoterms 2000**. Such prices shall include all charges incurred to the point of delivery, including without limitation, packaging, hauling, storage and transportation.

X X X

9. Title and Risk of Loss

- A. **Unless otherwise agreed in writing, title to Product shall pass from [Hitachi Terminals Philippines] to [Hitachi-Omron] at the same time risk of loss to Product is passed to [Hitachi-Omron] in accordance with the trade terms described in this Agreement.**

X X X

15. Insurance

- A. According to the FOB Philippines in Incoterms 2000.

X X X

30. Others

- F. Trade terms including FOR, FAS, FOB, CFR, CIF, etc., used in this Agreement and/or any Purchase Order, shall have the meanings stipulated in the Incoterms 2000 published by the International



Chamber of Commerce, unless the provisions thereof of this Agreement otherwise require. (emphasis ours)

X X X

Further, the relevant provisions of Incoterms 2000 provide:

X X X

FOB

Free on board (... named port of shipment)

“Free on Board” means that the seller delivers when the goods pass the ship’s rail at the named port of shipment. This means that the buyer has to bear all costs and risks of loss of or damage to the goods from that point. The FOB term requires the seller to clear the goods for export. This term can be used only for sea or inland waterway transport. If the parties do not intend to deliver the goods across the ship’s rail, the FCA term should be used.

A The seller’s obligations

X X X

A5 Transfer of risks

The seller must, subject to the provisions of B5, bear all risks of loss of or damage to the goods until such time as they have passed the ship’s rail at the named port of shipment.

X X X

B The buyer’s obligations

B5 Transfer of risks

The buyer must bear all risks of loss of or damage to the goods:

- from the time they have passed the ship’s rail at the named port of shipment; and



- from the agreed date or the expiry date of the agreed period for delivery which arise because he fails to give notice in accordance with B7, or because the vessel nominated by him fails to arrive on time, or is unable to take the goods, or closes for cargo earlier than the time notified in accordance with B7, provided, however, that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.

X X X

The BPA provides that title shall pass from Hitachi Terminals Philippines to Hitachi-Omron based on FOB Philippines, following the meanings provided under Incoterms 2000. Under Incoterms 2000, FOB means that the seller must bear all risks of loss or damage to the goods until they passed the ship's rail at the port of shipment (in this case, in the Philippine port), and that the buyer will only bear all costs and risks of loss or damage to the goods from that point. Applying FOB Philippines to the BPA using Incoterms 2000, title and consequently the risk of loss and damage to the goods shall only pass from Hitachi Terminals Philippines to Hitachi Omron at the port of shipment. Before that, Hitachi Terminal Philippines holds the title to the goods and the corollary risk of loss and damage to the goods.

Since Hitachi Terminals Philippines owns the goods, it means that it does not maintain a stock of goods or merchandise belonging to Hitachi Omron from which it (Hitachi Terminals Philippines) regularly fills orders on behalf of the Hitachi-Omron, as provided under paragraph 5(c), Article 5, of the Philippines-Japan tax treaty. Hence, Hitachi Omron cannot be considered to have a permanent establishment within the Philippines through Hitachi Terminals Philippines.

Consequently, the profits derived by Hitachi-Omron from the sale to its customers worldwide of electrical and electronic products manufactured and delivered by Hitachi Terminals Philippines for or on behalf of Hitachi-Omron is not subject to income tax in the Philippines.



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.

Sincerely yours,



CARLOS G. DOMINGUEZ

Secretary

OCT 25 2019



DEPARTMENT OF FINANCE
Republic of the Philippines



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CC Commissioner Caesar R. Dulay
Bureau of Internal Revenue