

Harmonization of the Data Privacy Act and the Power of the Commissioner to Obtain Information: Effect of the Ruling in Philippine Stock Exchange, Inc., et al. vs. Secretary of Finance, et al.*

I. Introduction

Section 5(B) of the National Internal Revenue Code (NIRC) of 1997,¹ as amended, has vested with the Commissioner of Internal Revenue (CIR) a multitude of powers, among which is the power to obtain information, on a regular basis, from any person other than the taxpayer subject of the audit or investigation.

With the enactment of Republic Act (RA) No. 10173,² the act of collecting, processing, and storing personal data and information has been subject to rigorous regulation. The Data Privacy Act (DPA) applies to the processing of all types of personal information and natural and juridical person involved in personal information processing, except to government agencies with respect to the processing of information or personal data necessary in performing their statutorily mandated functions, among others.

Notwithstanding this exception, the Supreme Court in G.R. No. 213860,³ struck down as unconstitutional certain issuances of the Bureau of Internal Revenue (BIR) for violation of the privacy rights and the provisions of the DPA. The Supreme Court discussed extensively the extent of the power of the CIR to obtain information vis-à-vis the constitutional right to privacy and the relevant provisions of the DPA.

In view of these statutory and jurisprudential developments, this paper aims to harmonize the interplay of the provisions of the NIRC of 1997, as amended, and the DPA vis-à-vis the mandate of the CIR to obtain information from taxpayers, in light of the pronouncement of the

** Prepared by Nicole Bernadette F. Occeño, Legal Assistant II. Reviewed and approved by Atty. Jocet Consisa P. Dita, Attorney V, Legal Research and Communication Division.*

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¹ Entitled, “National Internal Revenue Code of 1997, as amended by Republic Act (RA) No. 10963 (TRAIN), RA 11256, RA 11346, RA 11467, and RA 11534 (CREATE)”, 26 March 2021.

² Entitled, “Data Privacy Act of 2012”, 15 August 2012.

³ Philippine Stock Exchange, Inc., Bankers Association of the Philippines, Philippine Association of Securities Brokers, Inc., Fund Managers Association of the Philippines, Trust Officers Association of the Philippines, and Marmon Holdings, Inc, Petitioners v. Secretary of Finance, Commissioner of Internal Revenue, and Chairperson of the Securities and Exchange Commission, Respondents., 05 July 2022.

Supreme Court in the Philippine Stock Exchange Inc. (PSEI) case. Specifically, the study delves into whether the CIR can validly require the submission of the Taxpayer's Information Number (TIN) of all the active members of a cooperative for purposes of securing a certificate of tax exemption (CTE), applying the principles established in the PSEI case. Additionally, the paper explores the potential impact, if any, of the provisions of the DPA on the power of the CIR to obtain taxpayers' information under the NIRC of 1997, as amended.

II. Background Information

Under Sections 60 and 61 of RA 9520,⁴ otherwise known as the "Philippine Cooperative Code of 2008", cooperatives are entitled to certain tax exemptions depending on their classification and transaction. Accordingly, duly registered cooperatives dealing or transacting exclusively with members are exempt from any taxes and fees imposed under the internal revenue laws and other tax laws. Moreover, duly registered cooperatives that transact business with both members and non-members shall be subject to applicable taxes for transactions with non-members, if the accumulated reserves and undivided net savings of such cooperatives are more than P10 million. If, however, the accumulated reserves and undivided net savings are P10 million and below, such cooperative shall continue to be exempt from all national, city, provincial, municipal, or barangay taxes of whatever nature.

Notwithstanding the foregoing, the Joint Rules and Regulations of RA 9520⁵ provide that all income of cooperatives not related to the main or principal business/es under its Articles of Cooperation shall be subject to all the appropriate taxes under the NIRC of 1997, as amended. This applies to all types of cooperatives, whether dealing purely with members or both members and non-members.

To avail of the tax exemption provided by law, a registered cooperative must secure a CTE from the BIR. A CTE is a ruling issued by the BIR granting exemption to a cooperative, which shall be valid for five years from the date of issue. It is a mandatory requirement before a qualified cooperative can avail of tax exemptions provided under the Cooperative Code.

Revenue Memorandum Order (RMO) No. 76-2010⁶ provides simplified procedures for processing and confirmation of tax exemptions of cooperatives. Under the said RMO, a cooperative shall submit a duly accomplished application for CTE for cooperatives or BIR Form No. 1945, together with the complete documentary requirements, including Articles of Cooperation and By-laws, certificate of Cooperative Development Authority (CDA) registration, certificate of good standing issued by the CDA, and certificate of BIR registration. In addition to the aforementioned requirements, the cooperative shall submit a certification under oath of the list of cooperative members with their respective TINs and their capital

⁴ Entitled, "Philippine Cooperative Act of 2008", 17 February 2009.

⁵ Entitled, "Joint Rules and Regulations Implementing Articles 60, 61 and 144 of Republic Act No. 9520, Otherwise Known as the Philippine Cooperative Code of 2008 in Relation to RA No. 8424 or the National Internal Revenue Code, as Amended", 05 February 2010.

⁶ Entitled, "Prescribing the Policies and Guidelines in the Issuance of Certificate of Tax Exemption of Cooperatives and the Monitoring Thereof", 27 September 2010.

contributions. For the renewal of the CTE, the cooperative must also complete and submit their active members' TINs.

In 2022, or 12 years following the issuance of RMO 76-2010, the Supreme Court promulgated the PSEI case, which nullified three issuances of the BIR and the Securities and Exchange Commission (SEC) requiring the submission of TIN, among others, for being violative of the right to privacy. The Supreme Court ruled that TINs of investors are, without a doubt, sensitive personal information, and processing thereof requires that the regulatory enactments must guarantee the protection of the sensitive personal information, and that consent is not required by law or regulation pursuant to Section 13 of the DPA.

Following this pronouncement by the Supreme Court, this study will evaluate whether the BIR may continue requiring the submission of cooperative members' TIN for purposes of securing CTE under RMO 76-2010.

III. Comments and Observations

A. "Philippine Stock Exchange, Inc. (PSEI), et. al. v. Secretary of Finance, et. al."

This case arose when the petitioners assailed the constitutionality of Revenue Regulation (RR) No. 1-2014,⁷ Revenue Memorandum Circular (RMC) No. 5-2014,⁸ and SEC Memorandum Circular (MC) No. 10-2014⁹ (collectively, the "questioned regulations") for allegedly violating the petitioner's right to privacy.

The questioned regulations in this case are as follows:

- a. BIR RR 1-2014 and RMC 5-2014, which required all withholding agents to submit to the BIR an alphabetical list (alphalist) of employees and payees with their respective TINs, among others.
- b. SEC MC 10-2014 directs the Philippine Depository and Trust Corporation and broker-dealers to provide the listed companies or their transfer agents an alphalist of all depository account holders with their TINs, among others.

Petitioners questioned the above issuances on the grounds that their right to privacy over their personal information, protected by the DPA, is violated. They argued that by requiring broker-dealers to divulge their clients' personal information, such as TIN, the questioned regulations would expose them to criminal penalties under the

⁷ Entitled, "Amending the Provisions of Revenue Regulations (RR) No. 2-98, as Further Amended by RR No. 10-2008, Specifically on the Submission of Alphabetical List of Employees/Payees of Income Payments", 17 December 2013.

⁸ Entitled, "Clarifying Provisions of Revenue Regulations No. 1-2014 Pertaining to the Submission of Alphabetical List of Employees/Payees of Income Payments", 29 January 2014.

⁹ Entitled, "Guidelines and Directives to Assist Issuers of Securities Listed and Traded in the Philippine Stock Exchange in Complying with the Requirements of BIR Revenue Regulation No. 1-2014", 22 May 2014.

DPA. Respondents, however, insisted that there is no violation of the right to privacy and the DPA because the collection and forwarding of the information required under the questioned regulations are allowed. Respondents argued that Section 4 of the DPA clearly states that the information needed in the performance of regulatory agencies of their constitutionally and statutorily mandated functions is excluded from the scope of that law.

The Court ruled that the questioned regulations violated the right to privacy of the petitioners, for the following reasons:

- a. The questioned regulations failed the second requirement under the “strict scrutiny test”. There are two requirements under the strict scrutiny test, i.e., (a) the State must show that the regulation serves a compelling interest; and (b) is narrowly drawn to prevent abuses.

Citing *Ople v. Torres*,¹⁰ the Court ratiocinated that it is mandatory to apply the strict scrutiny test in approaching government actions that are alleged to be violative of a fundamental right, including the right to privacy. Government bears the burden to show and prove that its action serves a compelling state interest and is narrowly drawn to prevent abuses. The *Ople* case states that:

And we now hold that when the integrity of a fundamental right is at stake, this [C]ourt will give the challenged law, administrative order, rule or regulation a stricter scrutiny. It will not do for the authorities to invoke the presumption of regularity in the performance of official duties. Nor is it enough for the authorities to prove that their act is not irrational for a basic right can be diminished, if not defeated, even when the government does not act irrationally. They must satisfactorily show the presence of compelling state interests and that the law, rule, or regulation is narrowly drawn to preclude abuses. This approach is demanded by the 1987

¹⁰ Blas F. Ople, Petitioner, vs. Ruben D. Torres, Alexander Aguirre, Hector Villanueva, Cielito Habito, Robert Barbers, Carmencita Reodica, Cesar Sarino, Renato Valencia, Tomas P. Africa, Head of the National Computer Center and Chairman of the Commission of Audit, Respondents., 23 July 1998.

Constitution whose entire matrix is designed to protect human rights and to prevent authoritarianism. In case of doubt, the least we can do is to lean towards the stance that will not put in danger the rights protected by the Constitution.

It can be argued that the questioned regulations serve a compelling state interest: the effective and proper collection of taxes. RR 1-2014's stated purpose of ensuring information on all income payments made by payors are monitored and captured in the taxpayer database for "establishing simulation model, formulating analytical framework for policy analysis, and institutionalizing appropriate enforcement activities" may well be considered to be within the BIR's mandate of assessment and collection of national taxes.

However, the Court found that the second requirement was not met. Accordingly, the questioned regulations were not narrowly drawn to prevent abuses. Respondents failed to present any evidence to show and prove that the challenged regulations were narrowly drawn as the "least restrictive means for effecting the invoked interest." There may be abuses, as a result of the enforcement of the questioned regulations: there is no assurance that the information gathered and submitted to the listed companies pursuant to the questioned regulations will be protected and will not be used for any other purpose outside its stated purpose. The investors provided their information to the brokers, presumably without the intention of sharing such with any other entity, including the investee companies and the BIR.

- b. The questioned regulations also failed to sufficiently meet the requirement of "necessity" under the DPA to describe the information to be used for the performance of functions of public authority for the processing to be outside the purview of the law.

Section 4 of the DPA exempts from its coverage any information necessary to carry out public functions. However, the same Section explicitly uses the word "necessary" to describe the information to be used for the performance of functions of public authority for the processing to be outside the purview of the law.

The Court holds that collecting information pursuant to the questioned regulations is unnecessary for the BIR to carry out its functions. There was no showing that there was a problem or inefficacy with the system prior to the issuance of the questioned regulations. Respondents failed to show the aspects of operations under the prior rule that will be improved by collecting the information. As it stands, the prior rule is effective and does not require additional information to collect the taxes properly. Accordingly, the state

cannot just use the exception of the performance of mandated functions under the DPA to carry out actions that abridge the right to privacy, there must be a showing of necessity.

- c. Finally, respondents failed to consider Section 13(b) of the DPA in processing sensitive personal information, such as the TIN. In processing the TINs of investors, Section 13(b) should be observed, which requires that the regulatory enactments guarantee the protection of sensitive personal information and privileged information, and the law or regulation does not require the consent of the data subject. The questioned regulations also failed to provide safeguards for collecting sensitive information. Respondents cannot simply rely on other laws and regulations, such as the NIRC of 1997, as amended, the Securities Regulation Code, and other issuances regarding the said requirement. The DPA is clear that it must be the subject issuance itself—not the other laws or regulations—that should provide the safeguard.

B. Implications of the PSEI ruling on the requirement for the submission of TIN of members for purposes of securing a CTE

In view of the doctrine enunciated under the PSEI case, will a requirement for the submission of the cooperative members' TINs to BIR to secure a CTE infringe the members' right to privacy and violate the provisions of the DPA?

In a nutshell, the subject case provides for three parameters to determine whether there is a violation of privacy rights under RMO 76-2010, when it required the submission of the cooperative members' TINs to BIR, to wit:

- a. Will it pass the strict scrutiny test?
- b. Will it pass the necessity requirement under the DPA?
- c. Are there safeguards for the protection of sensitive personal information, i.e., members' TIN, in the regulatory enactment?

Let's discuss the parameters *in seriatim*.

Firstly, RMO 76-2010 has to pass the two-fold requirements under the strict scrutiny test, i.e., the BIR must show that the regulation not only serves a compelling interest, but is also narrowly drawn to prevent abuses. To pass the requirement of strict scrutiny, the BIR must show that the RMO 76-2010 serves compelling state interest, and that the issuance must be the least restrictive or intrusive means for effecting the invoked interest. If these requirements are successfully met, the risk of RMO 76-2010 being declared unconstitutional for violating privacy rights can be effectively avoided.

It can be argued that RMO 76-2010 serves a compelling state interest, i.e., judicious confirmation of the tax incentives granted to qualified cooperatives under RA 9520. It is incumbent upon the BIR to ensure that the tax exemptions and incentives extended to cooperatives are administered effectively through the

submission of relevant documentation and information by the cooperatives, such as the TIN of the cooperative as its members.

It is settled that tax exemption and preferential treatment are not favored and are never presumed, so that if granted, they must be construed against the taxpayer. This means that the BIR is obligated to thoroughly exercise due diligence before confirming a cooperative's entitlement to any tax exemptions, ensuring that such confirmation is substantiated with corroborative documents.

However, to hurdle the second requirement of the strict scrutiny test, the BIR has to present evidence to show and prove that RMO 76-2010 was narrowly drawn as the “least restrictive means for effecting the invoked interest”. Simply put, the BIR has to prove that the requirement of submission of TIN both at the cooperative and members’ level is the least intrusive means to judiciously perform its mandate of collecting the applicable taxes and/or implementing the fiscal provisions of the Cooperative Code, in relation to the provisions of the NIRC of 1997, as amended. The BIR has to prove and provide assurance that the TIN gathered and submitted pursuant to RMO 76-2010 will be protected and shall not be used for any other purpose outside its stated purpose.

Secondly, the BIR has to sufficiently establish that the submission of TIN is necessary to carry out its functions. If there is a showing of necessity, the processing of TIN under RMO 76-2010 will not be subject to the provisions of the DPA; hence, RMO 76-2010 may not contain a guarantee for the protection of sensitive personal information or provide safeguards for its collection.

The submission of an original copy of the “Certification under Oath of the List of Cooperative Members” with their respective TINs and capital contributions is necessary for the BIR to efficiently and effectively monitor the taxability of the transactions of the cooperative and/or their members. A perusal of RMO 76-2010 shows that the objectives of the issuance include: (a) to prescribe simplified procedures in the availment of tax exemption and incentives in the Cooperative Code; (b) sustain an efficient and effective administration of tax exemptions under RA 9520; and (c) increase coordination between revenue regions and national office for purposes of monitoring the revenue impact of the exemptions granted to cooperatives. RMO 76-2010’s stated purpose of providing uniform and simplified procedures in the processing and confirmation of cooperative tax exemption may be considered to be within the BIR’s mandate of assessment, collection of national taxes, and supervisory powers conferred to it by the NIRC of 1997, as amended, or other laws.

However, to discuss the necessity, it is imperative to highlight that RMO 76-2010 deals with two types of TIN: (1) TIN of cooperatives; and (2) TIN of individual members of the cooperatives. Accordingly, the processing of this information is governed by distinct rules as outlined under the DPA.

There are no privacy issues in requiring the TIN of the cooperative whose entitlement to incentive is in question for the issuance of appropriate CTE. The

DPA does not apply when the data subject is a juridical entity, like a cooperative. The National Privacy Commission (NPC), through Privacy Policy Office Advisory Opinion No. 2023-002¹¹, reiterated that:

We note that while a tax declaration, in itself, is not automatically considered sensitive personal information, the Tax Identification Number (TIN) issued to an individual is classified as sensitive personal information. Thus, the processing of tax declaration of properties belonging to natural persons falls within the ambit of the DPA and may only be processed under the circumstances provided under Section 13 of the DPA. On the other hand, a TIN issued to a juridical entity such as the TRC or DOST is not considered sensitive personal information under the DPA. The scope of the DPA only extends to natural persons, considered as data subjects, whose personal data are sought to be protected.

However, privacy issues may ensue when it comes to requiring the submission, processing, and collection of cooperative members' TIN since, under the DPA, the sensitive personal information of an individual must be protected unless the requirement of necessity is established. Thus, the BIR has to provide the rationale for requiring the submission of TIN at a cooperative members' level and how it relates to the performance of its mandated function to efficiently and effectively administer the tax exemptions and incentives of its affiliate cooperative. If necessity is sufficiently established vis-à-vis processing of cooperative members' TIN, RMO 76-2010 may be exempt from the operation of the DPA. Otherwise, RMO 76-2010 has to comply with the provision of the DPA, particularly in guaranteeing the protection of sensitive personal information or providing safeguards for its collection.

Lastly, similar to the questioned regulations in the PSEI case, RMO 76-2010 has no guarantees for protecting the cooperative members' TINs, which is sensitive personal information under the DPA. Considering that RMO 76-2010 was issued

¹¹ Entitled, "Disclosure of Tax Declarations of Real Properties and Other Related Documents", 18 January 2023.

prior to the enactment of the DPA in the country, there is a need for its amendment to be compliant with the provisions of the DPA.

C. Harmonization of the DPA and its Implementing Rules and Regulations and Power of the CIR under the NIRC of 1997, as amended

The NPC has repeatedly reiterated in its Advisory Opinions (see Table 1) that the scope of the DPA is not all-encompassing. Section 5(d) of its Implementing Rules and Regulations (IRR) provides that the DPA does not apply to information necessary to fulfill the mandates of government agencies or institutions.

Table 1

NPC Advisory Opinions in Relation to the Processing of Personal/Sensitive Information

NPC advisory opinion no.	Date	Title
2018-083	26 November 2018	Re: Collection of health information by the Department of Health
2020-083	06 February 2020	Re: Publication of the full content of Bureau of Internal Revenue (BIR) rulings in the BIR website
2020-015	24 February 2020	Re: Collection of personal data by the Bureau of Internal Revenue for tax compliance purposes
2020-055	29 December 2020	Re: Applicability of the criteria for lawful processing of personal and sensitive personal information
2021-028	16 July 2021	Re: Disclosure of tenants' personal information by a condominium corporation to the Bureau of Internal Revenue
2023-002	18 January 2023	Re: Disclosure of tax declarations of real properties and other related documents

Note. Sections 12 and 13 of RA 10173; Sections 21 and 22 of Rule V of its IRR.

The DPA does not operate to hinder the BIR from adopting measures that it may deem necessary and crucial to promote transparency in its transactions; however, the collection and processing of personal and/or sensitive data, concomitantly impose on the BIR the responsibility of complying with the requirements of the DPA, its IRR, and other issuances of the NPC. It must be underscored that the DPA is a mechanism to uphold the fundamental human right to privacy while ensuring the free flow of information and growth. Therefore, the provisions of the NIRC of 1997, as amended, and the DPA must be harmonized and reconciled to give effect, if possible, to every clause and word of the statutes.

Under Section 3(j) of the DPA, processing is defined as any operation or any set of operations performed upon personal information, including but not limited to, the collection, recording, organization, storage, updating or modification, retrieval, consultation, use, consolidation, blocking, erasure, or destruction of data.

Thus, the yearly submission of cooperatives to their appropriate Revenue District Office of information, particularly the cooperative's List of Members and their respective TINs, as a pre-requisite for the issuance of CTE falls within the purview of the said definition.

Sections 12 and 13 of the DPA provide for the instances wherein the processing of personal and sensitive personal information, respectively, may be permitted, to wit:

Sec. 12. Criteria for Lawful Processing of Personal Information.

– the processing of personal information shall be permitted only if not otherwise prohibited by law, and when at least one of the following conditions exists:

X X X

(e) The processing is necessary in order to respond to national emergency, to comply with the requirements of public order and safety, or to fulfill functions of public authority which necessarily includes the processing of personal data for the fulfillment of its mandate;

X X X

The DPA also allows the processing of sensitive personal information, to wit:

Sec. 13. Sensitive Personal Information and Privileged Information. – the processing of sensitive personal information and privileged information shall be prohibited, except in the following cases:

X X X

(b) The processing of the same is provided for by existing laws and regulations: Provided, That such regulatory enactments

guarantee the protection of the sensitive personal information and the privileged information: Provided, further, That the consent of the data subjects are not required by law or regulation permitting the processing of the sensitive personal information or the privileged information;

X X X

The processing of the personal data of the BIR finds support in the DPA. Section 2 of the NIRC of 1997, as amended, provides that as a public authority performing supervisory functions, the BIR is permitted, to a certain extent, to process personal and sensitive data to perform its mandate. Notwithstanding the lawful basis, Section 11 of the DPA states that the exercise of this right is subject to the rights of a data subject and must adhere to the general data privacy principles, specifically the principle of proportionality. This principle dictates that information processing shall be adequate, relevant, suitable, necessary, and not excessive in relation to a declared and specified purpose. It must be emphasized that the qualifier “necessary” is the ultimate test to determine whether the processing is justified in relation to the declared purpose.

Further, the BIR should also observe the following NPC issuances with regard to the processing of personal information: (a) NPC Advisory No. 2017-03¹² on the Guidelines on Privacy Impact Assessment to ensure that the processing and collection of data is appropriate and in accordance with the organizational, physical, and technical safeguard for data protection; and (b) NPC Circular No. 16-01¹³ on the Security of Personal Data in Government Agencies.

Given the foregoing, there is no actual conflict between the DPA and the power of the Commissioner to collect and process the personal information of the members of the cooperatives in relation to the issuance of CTE. In fact, they complement each other.

IV. Conclusion and Recommendation

In view of the foregoing, we opine that the BIR may continue to require the submission of cooperative members’ TINs in the application for CTE provided that RMO 76-2010 will be amended to comply with the provisions of the DPA, its IRR, and other relative issuances of the NPC.

¹² Entitled, “Guidelines on Privacy Impact Assessments”, 31 July 2017.

¹³ Entitled, “Security of Personal Data in Government Agencies”, 10 October 2016.

Moreover, it is recommended that the BIR and the NPC release a joint issuance that will address the issues surrounding the application of the DPA and its IRR, in relation to the exercise of the CIR of its powers enumerated under the NIRC of 1997, as amended.

Also, Section 5 of the NIRC of 1997, as amended, recognizes the fundamental human right of privacy when it requires the CIR and revenue officers to comply with and observe the requirements of the law, with the BIR's own rules, and with regard to the taxpayer's constitutional rights in obtaining personal and sensitive information from any person. Thus, while the CIR is authorized by law to obtain information in evaluating any person's tax compliance, such authority should be exercised securely and with strict adherence to all existing laws, rules, and regulations.