

Act 52: Amendments to the Puerto Rico Internal Revenue Code (Alert #2)

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An McV Tax Alert

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This is the second of two Tax Alerts summarizing some of the most important amendments to the Puerto Rico Internal Revenue Code of 2011, as amended (“PR Code”) approved by the recently enacted Act 52-2022 (“Act 52”).

This summary specifically addresses provisions under the PR Code related to (i) Remote Work, (ii) Sales and Use Taxes, and (iii) Administrative Matters.

Remote Work

PR Code Section 1010.01(a)(40) defines the term ‘engaged in trade or business in Puerto Rico’ (“ETB-PR”) to include the performance of services in Puerto Rico at any time during the taxable year. Effective for taxable years commencing after December 31, 2021, businesses with employees working remotely from Puerto Rico will not be deemed ETB-PR under this general rule (“Remote Employee Rule”) provided the following conditions are met:

- The taxpayer does not have an office or a fixed place of business in Puerto Rico at any time during the taxable year;
- The taxpayer does not have an ‘economic nexus’ with Puerto Rico at any time during the taxable year;
- The taxpayer is not considered a merchant under the sales and use tax provisions of the PR Code;
- The employee working remotely is not an officer, director or controlling shareholder of the taxpayer;
- The services performed by the employee working remotely are rendered for the benefit of clients or businesses of the taxpayer that have no nexus with Puerto Rico; and
- The taxpayer reports the income paid to the employee working remotely in an IRS W-2 Form or counterpart W-2 form in Puerto Rico.

For purposes of applying the Remote Employee Rule, the taxpayer will not be considered to have an ‘economic nexus’ with Puerto Rico even if:

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- The office at the remote employee's home is necessary or otherwise an employment condition;
- There is a business purpose for allowing the use of a home as an office;
- The remote employee must render some of the work-related duties from an employer's location; and
- The employer reimburses the employee working remotely for some of the home office expenses.

For purposes of applying the Remote Employee Rule, a 'remote employee' is an individual who performs 'services' as an employee for the benefit of a 'nonresident person'.

- A 'nonresident person' includes:
 - A nonresident individual;
 - A trust whose beneficiaries, settlor and trustees are not Puerto Rico residents.
 - An estate with respect to which the deceased, nor any heir, legatee, or executor is not or, in the case of the deceased, has not been a resident of Puerto Rico; or
 - A foreign entity.
- For purposes of the above, the term 'services' only includes services that have no economic nexus with Puerto Rico and that are rendered to an employer who complies with the requirements mentioned above.

Effective for taxable years beginning after December 31, 2021, employers complying with the Remote Worker Rule do not have to withhold income taxes under the PR Code on salary payments made to employees working remotely. The employee, however, must make estimated tax payments on a quarterly basis.

Sales and Use Taxes

Definition of Digital Product

Act 52 includes as a taxable item under the PR Code "digital products."

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“Digital Products” are defined as items acquired through streaming, either by purchase or subscription; video, pictures, applications for electronic equipment, games, music, computer programs or any other similar item delivered to the purchaser through electronic means or by digital transferring. Digital Products also include Specified Digital Products and Other Digital Products.

Act 52 includes in the statute definitions of Specified Digital Products and Other Digital Products that were already included in proposed regulations issued by the Puerto Rico Treasury Department, as follows:

- Specified Digital Products include any electronically transferred digital audio-visual work, digital audio work, or other similar products, to the extent a digital code is provided to the purchaser with the right to obtain the product, including non-fungible tokens (“NFT”).
- Other Digital Products, include greeting cards, images, games, video or electronic entertainment, memberships to electronic groups to download exclusive electronic content or audio-visual work, including theater products, musical products, such as concerts or videos, audio-visual adult materials, news and information products, digital storage devices, software applications for computers, and any other product that can be deemed as a digital product, whether digitally or electronically transferred, delivered or downloaded, or accessed.

Sourcing Rules on the Sale of Digital Products

The source on the sale of Digital Products will be:

- a. The physical address of the purchaser.
- b. If the seller does not have the physical address of the purchaser, then the source will be the postal address of the purchaser.
- c. If the purchaser does not provide a physical or postal address to the seller, then the source of the sale will be determined by reference to the information of the purchaser’s bank account or credit card, or the location of the financial institution holding the bank account (branch of the bank) used by the purchaser to acquire the digital products. If the payment cannot be allocated to a branch or financial business location, then the source of the sale will be the headquarters of the financial institution.

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These sourcing rules were also incorporated into the statute from proposed regulations issued by the Puerto Rico Treasury Department.

New Filing Deadline for Informative Return of Endorsement - Public Shows

The promoter of an event can start selling admission tickets after filing the “Informative Return of Endorsement-Public Shows” through the digital platform SURI. Act 52 eliminates the requirement of filing such return 48 hours prior commencing the sale of tickets.

Any concert promoter who fails to timely file the informative return will be subject to a fine of 25% of the total sales tax due according to the endorsement issued by the Puerto Rico Secretary of the Treasury. The fine will be applied to the promoter even if it has contracted a company to handle ticketing.

Any company or promoter who is not licensed as a ticket agent, or any representative of a promoter who sells tickets through a company that is not registered with the Office of Concert Promoter Services (“OSPEP” by its Spanish acronym), will be subject to an administrative fine of \$20,000 and the cancellation of the event.

Change to the definition of Marketplace Facilitator and Marketplace Seller

Act 52 modifies the definition of “Marketplace Facilitator” to include a person that facilitates the sale of admission rights.

The definition of “Marketplace Seller” is modified to include a seller that makes retail sales of tangible personal property, specified digital products, admission rights, or taxable services.

Elimination of Bi-monthly Installments

The requirement imposed to certain merchants to pay the sales tax in bi-monthly installments will be effective until June 2022.

Administrative Matters

Protection of Informants

Under the PR Code as amended by Act 52, no employer or taxpayer can dismiss, demote, suspend, threaten, nor in any other way discriminate against an employee or independent contractor for

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(A) providing information in an investigation of violations to the PR Code, or

(B) testifying or in any other way participating in any administrative or judicial proceedings related to violations to the PR Code.

An employee or contractor who prevails in a claim under this new provision will be eligible to receive 200% of lost wages and 100% of benefits not received, plus interest. In addition, they will have the right to attorney's costs and fees. These protections and rights cannot be waived nor can be part of an employment contract. Any clauses that are brought up for arbitration or mediation, will be considered as non-existent.

Large Taxpayers Unit

Act 52 also establishes a "Large Taxpayers Unit." The PR Treasury Secretary has the authority to monitor and oversee the taxpayers who meet the criteria to be considered Large Taxpayers under the Code. These functions include:

- the development and maintenance of a registry of Large Taxpayers and profiles of such
- offering support service to Large Taxpayers in tax proceedings before Puerto Rico Treasury Department;
- issue and coordinate communications to Large Taxpayers;
- establish an audit plan to validate compliance of Large Taxpayers' tax obligations;
- hire external specialized tax consultants or experts when necessary;
- assist Large Taxpayers in the expedited resolution of any administrative matter (including, but not limited to, the processing of exemption certificates, certifications required to obtain an exemption established in the Code, and the clarification or resolution of tax debts).

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