



Republic of the Philippines  
**DEPARTMENT OF FINANCE**

Roxas Boulevard Corner Pablo Ocampo, Sr. Street  
Manila 1004

12 September 2018

DOF Opinion No. 003.2018

**MR. LAWRENCE C. BISCOCHO**

Tax Partner, Isla Lipana & Co.  
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8767 Paseo de Roxas  
1226 Makati City, Philippines

**SUBJECT: Request for Review of Bureau of Internal Revenue ITAD Ruling No. 008-2018**

Dear **Mr. Bischocho**:

This refers to the subject letter dated 12 March 2018 ("Request for Review") which you filed with this Department on behalf of your client Samsung C&T Corporation ("New Samsung C&T") to request for review of Bureau of Internal Revenue ("BIR") International Tax Affairs Division ("ITAD") Ruling No. 008-2018 dated 30 January 2018, which ruled on the taxability of transfer of shares of stocks arising from the merger between Samsung C&T Corporation ("Old Samsung C&T") and Cheil Industries, Inc. ("Cheil").

In particular, the Request for Review prays for the reversal of the BIR's finding that the transfer of Old Samsung C&T's investment in shares of stocks in Starworld Corporation ("Starworld") to Cheil is subject to donor's tax pursuant to Section 100 of the National Internal Revenue Code of 1997 ("NIRC"), as amended, and Section 7(c.1.4) of Revenue Regulations ("RR") No. 6-2008, as amended because the merger was for less than adequate and full consideration. The pertinent portion of BIR ITAD Ruling No. 008-2018 provides:

"Based on [Old Samsung C&T's] AFS as of December 31, 2014, it has a net book value or fair market value (total assets minus total liabilities) amounting to [KRW] 13,224,347,000,000. In the Investments in Subsidiaries, Associates and Joint Ventures section of the AFS, the shares in Starworld held by [Old Samsung C&T] has a net value of [KRW] 6,239,000,000 which account for 0.0471781% of the assets of [Old Samsung C&T]. Multiplying this to the par value of shares issued by Cheil to [Old Samsung C&T] amounting to [KRW] 5,631,748,300, the consideration given by Cheil to [Old Samsung C&T] in exchange for the transferred Starworld shares has an amount of [KRW] 2,656,951.84 or P108,138.

Based on Starworld's AFS as of October 31, 2014, the ratio of real property over its total assets is 3.61%.

As of that date, the fair market value ("FMV") of the 2,119,998 shares in Starworld transferred by [Old Samsung C&T] to Cheil is 262,617,965, which is greater than the consideration for such shares."

On the other hand, as stated in your Request for Review, it is your position that said transaction must not be subject to donor's tax for the following reasons:

- a. A merger transaction does not give rise to a donation. The elements of a valid donation are absent in said transaction because there is neither reduction in the patrimony or property of the donor nor increase in the patrimony or property of donee, and there is no donative intent on the part of the donor to do an act of liberality or generosity;
- b. A donation cannot be concluded by comparing two (2) different sets of values (FMV of Starworld shares vis-à-vis par value of Cheil shares); and
- c. The transaction must be exempt from any gift or donor's tax pursuant to the principle of reciprocity under Section 104 of the NIRC, as amended.

*We find that the BIR made a reversible error when it declared that the transfer is subject to donor's tax pursuant to Section 100 of the NIRC, as amended, and Section 7(c.1.4) of RR No. 6-2008, as amended.*

In the case of *Delpher Trades Corporation v. IAC*,<sup>1</sup> a deed of exchange was executed between Delfin and Pelagia Pacheco (the "Pachecos") and Delpher Trades Corporation ("Delpher") whereby the former conveyed to the latter properties for shares of stock of Delpher. The Pachecos became stockholders of the corporation by subscription and it became a business conduit of the Pachecos. The Pachecos invested their properties and change the nature of their ownership from unincorporated to incorporated form by organizing Delpher to take control of their properties and at the same time save on inheritance tax. Under said transaction, the Supreme Court held that the Pachecos merely changed their ownership from one form to another; however, the ownership remained in the same hands. There was no transfer of actual ownership interest by the Pachecos to a third party. Thus:

"The records do not point to anything wrong or objectionable about this "estate planning" scheme resorted to by the Pachecos. "The legal right of a taxpayer to decrease the amount of what otherwise could be his taxes or altogether avoid them, by means which the law permits, cannot be doubted." (Liddell & Co., Inc. v. The collector of Internal Revenue, 2 SCRA 632 citing Gregory v. Helvering, 293 U.S. 465, 7 L. ed. 596).

The "Deed of Exchange" of property between the Pachecos and Delpher Trades Corporation cannot be considered a contract of sale. **There was no transfer of actual ownership interests by the Pachecos to a third party. The Pacheco family merely changed their ownership from one form to another. The ownership remained in the same hands.** Hence, the private respondent has no basis for its claim of a light of first refusal under the lease contract." (Emphasis added)

Moreover, Revenue Memorandum Ruling No. 01-02<sup>2</sup> was issued to consolidate, provide, clarify and harmonize the existing guidelines on the tax consequences of a de facto merger under Section 40(C)(2) and (6)(b) of the NIRC, as amended. Under III. Tax Consequences (2) therein, it provides that the transferor is not subject to donor's tax, regardless of whether the value of the property transferred exceeds the par/stated value of the transferee shares issued to the transferor, there being no intent to donate on the part of the transferor.

The discussion above applies to the case at bar. Pursuant to a Merger Agreement, the assets (including the Starworld shares) of Old Samsung C&T were transferred to New Samsung C&T in exchange for shares of stock of New Samsung C&T. In this instance, there

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<sup>1</sup> G.R. No. L-69259, 26 January 1988.

<sup>2</sup> Dated 25 April 2002.

was no transfer of actual ownership interests by stockholders of Old Samsung C&T to a third party. The ownership remained in the same hands of the stockholders of Old Samsung C&T through the shares issued by New Samsung C&T in its favor.

Concomitantly, the subject transaction is a non-recognition transaction consisting of a tax-free exchange of property for shares of stock under Section 40(C)(2) of the NIRC, as amended. Thus, it is not subject to donor's tax, there being no intent to donate on the part of the stockholders of Old Samsung C&T.

Assuming, *arguendo*, that the fair market value of the shares exceeds the value of the consideration given, the transaction is still not subject to donor's tax since a transfer for insufficient consideration presupposes a transfer of actual ownership interest to a third party.

The BIR ruled that the transfer of Starworld shares from Old Samsung C&T to Cheil (now New Samsung C&T) is subject to donor's tax by comparing the book value of Old Samsung C&T's holding in Starworld and the proportionate percentage par amount of Cheil (now New Samsung C&T) shares issued to the shareholders of Old Samsung C&T:

Based on Starworld's General Information Sheet ("GIS") and Secretary's Certificate, [Old Samsung C&T] owns 2,119,998 common shares of Starworld, each share with a par value of P100 or a total of P211,999,800. This accounts for 39.99% ownership in the company. Based on Starworld's GIS And AFS as of October 31, 2014, Starworld is engaged in real estate property development and marketing of the Calamba Premier International Park.

Based on [Old Samsung C&T's] AFS as of December 31, 2014, it has a net book value or fair market value (total assets minus total liabilities) amounting to [KRW]13,224,347,000,000. In the Investments in Subsidiaries, Associates and Joint Ventures section of the AFS, the shares in Starworld held by [Old Samsung C&T] has a net value of [KRW]6,239,000,000 which account for 0.0471781% of the assets of [Old Samsung C&T]. **Multiplying this to the par value of shares issued by Cheil to [Old Samsung C&T] amounting to [KRW]5,631,748,300, the consideration given by Cheil to [Old Samsung C&T] in exchange for the transferred Starworld shares has an amount of [KRW]2,656,951.84 or P108,138.** (Emphasis supplied)

In effect, the BIR found that the transfer was made for insufficient consideration, hence, subject to donor's tax pursuant to Section 100 of the NIRC, as amended.

*We do not agree.* The subject transaction is not subject to donor's tax since a transfer for insufficient consideration presupposes a transfer of actual ownership interest to a third party.

Black's Law Dictionary defines "transfer" as the passing of a thing or of property from one person to another; alienation; conveyance.

On the other hand, a merger is the combining of two (2) or more corporations into one constituent corporation (surviving corporation).<sup>3</sup> This means that the separate existence of the constituent corporations shall cease,<sup>4</sup> and the surviving corporation shall possess all rights, privileges, and franchises of each of the constituent corporations, including all

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<sup>3</sup> Section 76, Corporation Code of the Philippines

<sup>4</sup> Section 80(1), Corporation Code of the Philippines

property and receivables, including share subscriptions, and all other interest of each constituent corporation by operation of law.<sup>5</sup>


A merger effected under Section 40(C)(2) of the NIRC, as amended, does not give rise to a donation. In a merger, the constituent corporations shall become a single corporation, which shall be the surviving corporation designated in the plan of merger.<sup>6</sup> In essence, there is neither reduction nor increase in the property of the merging companies as the transaction merely consolidated the assets of the constituent corporations to the surviving corporation.

Hence, the BIR erred when it declared that the transfer is subject to donor's tax pursuant to Section 100 of the NIRC, as amended, as it was made purportedly for less than adequate and full consideration.

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.

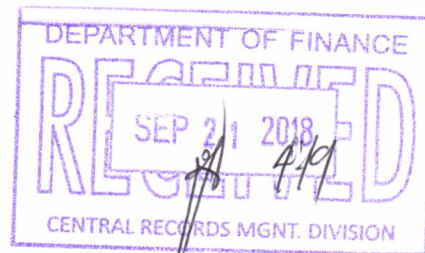
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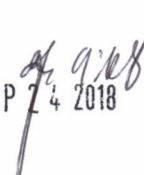
Sincerely yours,

  
**CARLOS G. DOMINGUEZ**  
Secretary of Finance  
SEP 14 2018

CC **Commissioner Caesar R. Dulay**  
Bureau of Internal Revenue





  
SEP 24 2018

<sup>5</sup> Section 80(4), Corporation Code of the Philippines

<sup>6</sup> Section 80, B.P. Blg. 68, otherwise known as "The Corporation Code of the Philippines."