



Republic of the Philippines  
**DEPARTMENT OF FINANCE**  
Roxas Boulevard Corner Pablo Ocampo, Sr. Street  
Manila 1004

DOF OPINION NO. 006.2021

**ATTY. LAWRENCE C. BISCOCHO**

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**SUBJECT: Request for Review of Bureau of Internal Revenue  
International Tax Affairs Division Ruling No. 028-20**

Dear Atty. Biscocho:

This refers to the subject letter dated November 28, 2020 ("Request for Review"), which you filed with this Department requesting the review of Bureau of Internal Revenue ("BIR") International Tax Affairs Division Ruling No. 028-20 dated October 6, 2020, which ruled on the taxability of the transfer of the Laguna International Industrial Park, Inc. ("LIIP") 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 LIIP to Cheil is subject to capital gains tax (CGT) under paragraph 4, Article 13 of the Republic of the Philippines – Korea Tax Treaty ("RP-Korea Tax Treaty"). The pertinent portion of BIR ITAD Ruling No. 028-20 provides:

Since Laguna Park's real property interest is 55.14%, its assets consist principally of real property under Section 2(b) of RR No. 04-86. This being the case, *any gains* [sic] derived by Samsung C&T from the transfer of its shares in Laguna Park to Cheil pursuant to the said merger are taxable in the Philippines under paragraph 3, Article 13 of the

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Philippine-Korea tax treaty, and particularly, under Section 28(B)(5)(c) of the Tax Code.

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. The real property test provided in the Republic of the Philippines-Korea tax treaty was satisfied at the time of transfer of the LIIP shares to Cheil (now New Samsung C&T), therefore the transfer is exempt from Philippine income tax pursuant to the tax treaty.
- b. Assuming *arguendo* that the BIR correctly used the 31 October 2014 Audited Financial Statements, the resulting capital gains tax would have been nil at any rate, considering that the merger is a non-recognition transaction as already held by the DOF in an earlier ruling.

***We remand the case to the BIR.***

***BIR correctly used LIIP's AFS for the year ending 31 October 2014***

Paragraph 4, Section 13 of the Republic of the Philippines – Korea Tax Treaty (“RP-Korea Tax Treaty”) provides:

4. Gains from the alienation of shares of a company, the property of which consists principally of immovable property situated in a Contracting State, may be taxed in that State. Gains from the alienation of interest in a partnership or a trust, the property of which consists principally of immovable property situated in a Contracting State, may be taxed in that State.

RR No. 04-86 is the prevailing issuance that provides guidance on how to determine whether the assets of a corporation consist principally of real property interest under Philippine tax treaties. Section 2 of the said RR provides the definition of “principally” in tax treaties as more than fifty percent of the



entire assets in terms of value. Section 4 of the RR also provides the basis for the computation of the ratio of real property interest of the corporation, as follows:

**SECTION 4. Basis** – The value of all the assets of the subject corporation both real and personal as appearing in its financial statement [sic] on the date of the sale of the share or interest in such corporation, as verified by the BIR, shall be used as the basis for determining the composition of its assets.

In case the financial statement [sic] as of the date of the sale is not available, the most recent financial statement [sic] may be used, after the necessary adjustments are made to reflect transactions made during the period from the date of such financial statement [sic] to the date of the sale.

Based on the abovementioned RR, the BIR shall verify the real property appearing in the financial statements submitted by the corporation as of the date of the sale of the shares to compute whether a corporation's assets consist principally of real property. Should the financial statements as of the date of sale be unavailable, the most recent audited financial statements may be used by the BIR for the said purpose.

In this case, Article 13 of the Agreement between Old Samsung C&T and New Samsung C&T states that New Samsung C&T shall assume any and all assets, liabilities, right and obligations of Old Samsung C&T as of the merger date, which was on 01 September 2015. As such, New Samsung C&T submitted to the BIR its unaudited Interim FS as of 31 August 2015 and its 31 October 2014 audited financial statements. This Department further required the company to submit its 31 October 2015 audited financial statements.

Comparing the real property interest ratios of LIIP's unaudited Interim FS as of 31 August 2015 and its AFS as of 31 October 2015 and 2014 show the following:



Financial Statements Submitted by New Samsung C&T	Ratio of Real Property Interest (Total Amount of Real Properties divided by Total Assets)
Audited Financial Statements as of 31 October 2014	$\frac{644,800^1}{1,223,790} = 52.89\%$
Unaudited Interim Financial Statements as of 31 August 2015	$\frac{644,800}{1,624,415.14} = 39.69\%$
Audited Financial Statements as of 31 October 2015	$\frac{644,800^2}{1,270,946.00} = 50.73\%$

We also note the following in our comparison of the 31 October 2015 AFS with the unaudited 31 August 2015 Interim FS:

- c. First, LIIP's "Cash" decreased from PHP655,707.04 in the unaudited Interim FS to PHP133,970 in the 31 October 2015 AFS;
- d. Second, LIIP has a "Trade and Other Receivables" account in 2014 and 2015 representing Digital Telecommunications Philippines, Inc. (DTP) and Eastern Telecommunication Philippines, Inc. (ETP) long-term lease of LIIP's property amounting to PHP492,176.00 in its AFS for the year ending 31 October 2015. This was not included in the unaudited Interim FS;
- e. Third, there is an "Accrued Rental Income" amounting to PHP323,907.00 recorded in the unaudited Interim FS. The amount was not present in the AFS as of 31 October 2015; and

<sup>1</sup> Refundable Deposits in the amount of PHP 30,000.00 was not included for the purposes of our analysis.

<sup>2</sup> *Id.*

- f. Fourth, the total assets of the unaudited Interim FS is higher than the AFS as of 31 October 2015 despite the fact that there is only a two-month difference between the financial statements.

Based on the verification made on the real property assets of LIIP, its ratio of real property interest is more than 50% based on the AFS as of 31 October 2014 and AFS as of 31 October 2015. Thus, the BIR was correct in concluding that LIIP's assets consist principally of real properties.

***BIR has Jurisdiction to Determine Whether the Transfer of Shares from Old Samsung to Cheil (New Samsung C&T) is a Non-Recognition Transaction under 40(C)(2) of the Tax Code***

In its request for review, New Samsung C&T raised for the first time before this Department that "assuming arguendo that BIR correctly used the 31 October 2014 AFS, the resulting capital gains tax would have been nil considering that the merger between Old Samsung C&T and New Samsung C&T is a non-recognition transaction under Section 40(c)(2) of the Tax Code".

We note that under Section 40(C)(2) of the Tax Code, no gain or loss shall be recognized if pursuant to a plan of merger or consolidation, a corporation, which is a party to a merger or consolidation, exchanges property solely for stock in a corporation, which is a party to the merger or consolidation. In a merger, there is no transfer of ownership when property is exchanged for shares of stock. As such, the transaction may not also be subject to capital gains tax, provided that it must be undertaken for a *bona fide* purpose and not solely for the purpose of escaping the burden of taxation.<sup>3</sup>

In the case of *Sartorius Aketiengesellschaft v. Commissioner of Internal Revenue*<sup>4</sup>, the Court of Tax Appeals (CTA) discussed the transfer of shares

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<sup>3</sup> Section 40(C)(6).

<sup>4</sup> CTA Case No. 8951, 08 December 2017.



between two foreign companies affecting shares of stock in a domestic company in relation to Section 40(c)(2) of the Tax Code.

In the said case, Sartorius Aketiengesellschaft (SA) and Sartorius Weighing Technology GmbH (SWT GmbH) are both nonresident foreign corporations. SA, which owned 100% of SWT GmbH also had 10,083 shares of stock in Sartorius Mechatronics Philippines, Inc. (Sartorius Philippines). Pursuant to the Spin-Off and Take Over Agreements and an Addendum, SA exchanged its 10,083 shares of stocks in Sartorius Philippines for 1 share of stock of SWT GmbH. In ruling whether the exchange is a non-recognition transaction under Section 40(C)(2), the CTA outlined the following requisites, to wit:

From the above provision, the requisites for the non-recognition of gain or loss are as follows: (a) the transferee is a corporation; (b) the transferee exchanges its shares of stock for property/ies of the transferor; (c) the transfer is made by a person, acting alone or together with others, not exceeding four persons; and, (d) as a result of the exchange the transferor, alone or together with others, not exceeding four, gains control of the transferee.

We note that in the *Sartorius* case, the CTA recognized the application of Section 40(c)(2) on the exchange of shares between two nonresident foreign corporations involving shares of a domestic corporation.

Nevertheless, there is a need to determine the factual circumstances in the covered transaction and determine whether it complies with the requisites under 40(C)(2) of the Tax Code. Considering that New Samsung C&T raised this argument for the first time before this Department, it is prudent for the BIR Commissioner to resolve the issue at hand first.

Lastly, New Samsung C&T cannot rely on this Department's ruling in DOF Opinion No. 03-2018 to argue that Section 40(c)(2) rule applies to income, if any, that may be derived by it from the LIIP shares because the circumstances in the said ruling is not squarely applicable to the present case. In the aforementioned DOF Opinion, New Samsung C&T filed a request for the review of the BIR Commissioner's decision arguing that there is no donative intent on the part of Old Samsung C&T in transferring its shares of stock to New Samsung C&T as a



result of the merger. The main issue in DOF Opinion No. 03-2018 then is whether New Samsung C&T is liable for donor's tax and not capital gains tax which is the subject of this request for review.

In view of the foregoing, this Office **remands** the case to the BIR to rule on the issue at hand. Kindly further note that 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.

Very truly yours,

  
**CARLOS G. DOMINGUEZ**  
Secretary of Finance



OCT 28 2021

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