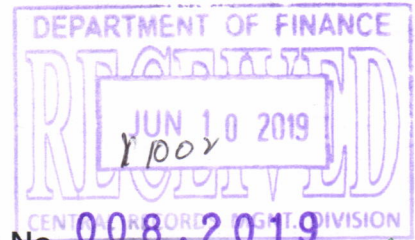




Republic of the Philippines  
**DEPARTMENT OF FINANCE**

Roxas Boulevard Corner Pablo Ocampo, Sr. Street  
Manila 1004



640  
10 JUN 2019

DOF Opinion No. 008-2019

JUN 10 2019

**MR. PATERNO M. OBSUNA**

President

Taishan Insurance Brokers Philippines, Inc.

Suite 1801, 88 Corporate Center, Sedeño corner Valero Streets,  
Salcedo Village, Makati City, Philippines 1227

**SUBJECT: Request for Review of Bureau of Internal Revenue Ruling  
No. ITAD 010-18**

Dear **Mr. Obsuna:**

This refers to the subject letter dated 16 March 2018 ("Request for Review") which you filed with this Department on behalf of JAB Capital Berhad ("JAB Capital") to request the review of Bureau of Internal Revenue ("BIR") Ruling No. ITAD 010-18 dated 2 February 2018, which ruled that donor's tax is due from JAB Capital on the sale of all its 480,001 common shares in Taishan Insurance Brokers Philippines, Inc. ("Taishan Philippines") to JCIP Holdings Philippines, Inc. ("JCIP Holdings"). In ruling that there was donor's tax, the AFS for the period ended 31 December 2014 was used in determining the FMV of the shares in Taishan Philippines (the "Taishan Shares").

JAB Capital is a foreign corporation organized and existing under the laws of Malaysia and a resident thereof based on its Memorandum and Articles of Association and Certificate of Residence issued by the Inland Revenue Board of Malaysia. The primary objective of JAB Capital is to insure all or any risks, and to carry on and undertake all kinds of insurance business and assurances of every and any kind, against every and any contingency. JAB Capital is not registered as a corporation or partnership in the Philippines based on a Certification of Non-Registration issued by the Securities and Exchange Commission.

JCIP Holdings is a domestic corporation which currently conducts business as an investment holding company. On the other hand, Taishan Philippines is a

domestic corporation which is presently engaged in the business of insurance brokering and other related services and activities incidental to the operations of an insurance broker.

Based on Taishan Philippines' General Information Sheet and Audited Financial Statements ("AFS") for the period ended 30 November 2015 and 31 December 2014, and Corporate Secretary's Certificate,<sup>1</sup> the company has 480,001 outstanding common shares with a par value of P100.00 each, or total value of P48,000,100.00, which account for all capital stock of Taishan Philippines. Those shares are held by JAB Capital (479,996) and five nominee individuals with one share each.

On 26 November 2015, JAB Capital and JCIP Holdings entered into a Deed of Assignment<sup>2</sup> where JAB Capital sold and transferred all its 480,001 common shares in Taishan Philippines (the "Taishan Shares") to JCIP Holdings for a consideration of P94,716,000.00.

On 18 October 2016, Taishan Philippines, on behalf of JAB Capital, filed its Application for Tax Treaty Relief ("TTRA") before the Bureau of Internal Revenue's International Tax Affairs Division ("BIR-ITAD"), requesting for confirmation that the gains realized from the sale of Taishan Shares in favor of JCIP Holdings is exempt from capital gains tax, pursuant to paragraph 3, Article 13 of the Philippines-Malaysia Tax Treaty.

In BIR Ruling ITAD No. 010-18 dated 2 February 2018 signed by Commissioner of Internal Revenue ("CIR") Caesar R. Dulay, it was held that the capital gains derived by JAB Capital from the sale of the Taishan Shares to JCIP Holdings are exempt from capital gains tax pursuant to paragraph 3, Article 13 of the Philippines-Malaysia tax treaty. It further held, however, that since the fair market value ("FMV") of the shares is greater than the consideration received, the excess between the higher FMV and the lower consideration is subject to donor's tax, pursuant to Section 100 of the Tax Code, as implemented by Section 7(c.1.4) of Revenue Regulations No. 6-2008. In ruling that there was donor's tax, the AFS for the period ended 31 December 2014 was used in determining the FMV of the Taishan Shares.

It is your position, as stated in your Request for Review, that donor's tax should not be imposed arguing that:

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<sup>1</sup> See attached docket.

<sup>2</sup> See attached docket.



"[I]t is indubitable that the date of the sale or disposition of the subject 480,001 shares of stocks was on November 26, 2015. Hence, it is clear that as between the AFS of Taishan as of the calendar year ended December 31, 2014, and the interim AFS as of November 30, 2015, the latter AFS is nearest to the date of the sale."

*We partially agree with Taishan Philippines, which represents JAB Capital.*

Any excess of the FMV of the shares of stock sold over the amount of money received as consideration shall be deemed a gift subject to the donor's tax under Sec. 100 of the Tax Code, as amended.<sup>3</sup> According to Revenue Regulations No. 06-08, for purposes of determining the FMV of shares of stock not listed and traded in the local stock exchanges, **the book value of the shares of stock as shown in the financial statements duly certified by an independent certified public accountant nearest to the date of sale shall be the FMV.**<sup>4</sup> This was further amended by Revenue Regulations No. 06-13.<sup>5</sup>

In a similar case, it was held that the financial statements to be utilized, for purposes of determining the fair market value of the shares of stocks not listed and traded in the local stock exchanges to be sold, bartered, or exchanged, are that which are **"duly certified by an independent public accountant"** and **"nearest to the date of sale."**<sup>6</sup> In this case decided by the Court of Tax Appeals, the date of sale of the subject shares of stocks is 4 April 2011. Instead of the AFS before the date of sale, the CTA ruled that it should be the AFS after the date of sale that should be used in determining the FMV of the shares subject

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<sup>3</sup> Rules on the Taxation of Sale, Barter, Exchange or Other Disposition of Shares of Stock Held as Capital Assets, Revenue Regulations No. 06-08, § 7(c.1.4) 22 April 2008.

<sup>4</sup> *Id.* § 7(c.2.2).

<sup>5</sup> (c.2.2) In the case of shares of stock not listed and traded in the local stock exchanges, the value of the shares of stock at the time of sale shall be the fair market value. In determining the value of the shares, the Adjusted Net Asset Method shall be used whereby all assets and liabilities are adjusted to fair market values. The net of adjusted asset minus the liability values is the indicated value of the equity. For purposes of this section, the appraised value of real property at the time of sale shall be the higher of —

- (1) The fair market value as determined by the Commissioner, or
- (2) The fair market value as shown in the schedule of valued fixed by the Provincial and City Assessors, or
- (3) The fair market value as determined by Independent Appraiser.

(Amending Certain Provision of Revenue Regulations No. 06-2008 Entitled Consolidated Regulations Prescribing the Rules on the Taxation of Sale, Barter, Exchange or Other Disposition of Shares of Stock Held as Capital Assets, Revenue Regulations No. 06-13, 13 April 2013)

<sup>6</sup> Commissioner of Internal Revenue v. Sara Lee Kiwi Holdings, LLC., C.T.A. EB Case No. 1396 (C.T.A. Case No. 8741), 13 February 2017.



of the sale as it is nearest to the said date of sale. The Supreme Court affirmed in toto this decision of the CTA En Banc.<sup>7</sup>

The unavailability of the annual AFS nearest the date of sale during its actual occurrence does not necessarily warrant reference to the preceding year's AFS to determine the FMV of the shares subject of the sale. In the case at bar, JAB Capital sold and transferred all its Taishan Shares to JCIP Holdings on 26 November 2015. Applying the two (2) requirements discussed above to determine which AFS should be used, namely, (1) duly certified by an independent public accountant and (2) nearest to the date of sale, it is evident that the AFS for the year ended 31 December 2015 should be used rather than the AFS for the period ended 31 December 2014.

After establishing that the AFS for the period ended 31 December 2015 should be the basis of the FMV of the Taishan Shares, we can now ascertain whether the FMV of the shares is higher than the selling price of P94,716,000.00 for all the Taishan Shares and, consequently, determine if the sale of the shares is subject to donor's tax. We are herein constrained to scrutinize the AFS for the year ended 31 December 2015 of Taishan Philippines. The total stockholder's equity in this AFS is valued at **P84,606,933**.

To determine if donor's tax is due on the sale of shares, we will provide the illustration below:

Total stockholder's equity per AFS as of 31 December 2015	<b>P84,606,933</b>
Divided by total shares issued and outstanding as of 30 November 2015	480,001
Equals Book Value per share	<b>P176.26</b>
Multiplied by the total number of shares sold per Deed of Assignment	480,001
Equals Book Value = Fair Market Value	<b>P84,606,933</b>
Less selling price per Deed of Assignment — 11/26/2015	94,716,000
Difference between Selling Price and FMV	<b>P10,109,067</b>

<sup>7</sup> Commissioner of Internal Revenue v. Sara Lee Kiwi Holdings, LLC, G.R. No. 232170 (Notice), 5 November 2018.

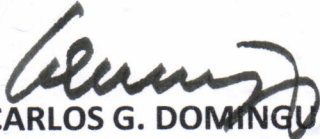


Applying Article 100 of the NIRC, it is apparent that said sale is not subject to donor's tax because the value of the consideration even exceeded such fair market value by P10,109,067.

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 of Finance

JUN 04 2019

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

**Atty. Fabian K. Delos Santos**  
Partner, Tax Services  
SyCip Gorres Velayo & Co.  
6760 Ayala Avenue  
1226 Makati City  
Philippines

*Handwritten initials in blue ink*

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