REPUBLIC OF THE PHILIPPINES
DEPARTMENT OF FINANCE
BUREAU OF INTERNAL REVENUE

National Office Building
Quezon City

Secs. 24 (C); 98; 175 of the Tax Code of 1997, as amended; RR No. 13-2004
BIR Ruling No. 779-18; BIR Ruling No. 1114-18; BIR Ruling No. OT-338-2021; BIR Ruling No. OT-421-2021; BIR Ruling No. OT-467-2021
OT-038-2023
MAY 05 2023

BANIQUED LAYUG & BELLO
8/F Jollibee Center
San Miguel Avenue
Pasig City

Attention: **Atty. Laura Victoria A.S. Yuson-Layug**
and
Atty. Casiano V. Flores III

Gentlemen:

This refer to your letters dated August 10, 2018 and November 23, 2018, requesting confirmation of your opinion that the transfer of a proprietary share beneficially owned by your client, Republic Cement Services, Inc. ("RCSI"), from one trustee to another trustee is not subject to income tax, donor's tax, and documentary stamp tax.

It is represented that RCSI is a domestic corporation organized and existing under and by virtue of the laws of the Philippines, with office address at Menarco Tower, 32nd Street, Bonifacio Global City, Taguig City; and that it is principally engaged in business as a service provider, adviser and consultant to governments and their agencies, businesses, industries and other persons or entities.

It is likewise represented that RCSI is the beneficial owner of one (1) proprietary share in Manila Polo Club, Inc. ("MPC") covered by Proprietary Membership Certificate No. currently in the name of RCSI's trustee, Dong Hoon Lee, who executed a Declaration of Trust recognizing RCSI [formerly Lafarge Cement Services (Philippines), Inc.] as the real owner of the MPC proprietary share.

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It is further represented that on June 20, 2018, RCSI approved and authorized the transfer of the MPC proprietary share from Dong Hoon Lee to RCSI's new trustee and assignee, Nabil Paul Francis. Thus, Nabil Paul Francis executed a Declaration of Trust in favor of RCSI acknowledging that registration of the proprietary share in MPC in his name is only as a representative of RCSI which is the actual owner thereof.

Finally, it is represented that beneficial ownership of the proprietary share in MPC remains with RCSI and that the transfer of the proprietary share does not involve any consideration.

Based on the foregoing representations, you now request confirmation of your opinion that:

1. The transfer of legal ownership of RCSI's proprietary share in MPC without consideration from its former trustee to its new trustee is not subject to income tax, withholding tax, or capital gains tax.

2. The transfer of legal ownership of RCSI's proprietary share in MPC without consideration from its former trustee to its new trustee is not subject to donor's tax.

3. The transfer of legal ownership of RCSI's proprietary share in MPC without consideration from its former trustee to its new trustee is not subject to documentary stamp tax.

In reply thereto, please be informed that your opinion is hereby confirmed, as follows:

1. In *Brodett v. Commissioner of Internal Revenue, CTA Case No. 7049, January 9, 2009*, the CTA discussed the nature of a trust agreement, to wit:

> "On the other hand, trust is a fiduciary relationship with respect to property, subjecting the person by whom the property is held to equitable duties to deal with the property for the benefit of another person which arises as the result of a manifestation of an intention to create it. Trusts are either express or implied. An express trust is created by the intention of the trustor or of the parties. Implied trust come into being by operation of law. No particular words are required for the creation of an express trust, it being sufficient that a trust is clearly intended.
>
> The intention to create a trust, which must be manifest before an express trust can be found to have been created, may be determined from the employment by the trustor of express or explicit language, or it may be by construction or inference from what the trustor has said or done, the nature of a transaction and the surrounding circumstances."

The documents submitted clearly support the creation of a trust by RCSI in favor of the present trustee, Dong Hoon Lee, the revocation thereof, and the subsequent creation of a new trust in favor of the new trustee, Nabil Paul Francis.

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The transfer of the proprietary share in MPC, beneficially owned by RCSI from its present trustee to a new trustee is not subject to capital gains tax imposed under Sec. 27(D)(2) of the Tax Code of 1997, as amended.

In BIR Ruling No. 779-18 dated May 8, 2018, this Office has ruled that transfers from trustor to trustee, without consideration, is not subject to capital gains tax:

> "Accordingly, the transfer of titles over the subject condominium units from Trustor MLI to the individual trustees, without any monetary consideration and by virtue of the Deed of Trust each individual had executed separately, which effectively acknowledges the existence of a trust by and between them and MLI, is not subject to the CGT nor to the CWT prescribed under Revenue Regulations No. 2-98, as amended."

Likewise, in BIR Ruling No. 1114-18 dated July 27, 2018, this Office has ruled that transfers from trustee to trustor, without consideration, is not subject to capital gains tax:

> "The transfer/conveyance of titles over the Subject Properties by CCRC, as Trustee, in favor of UCMW, as Trustor, who is the beneficial owner thereof is not subject to capital gains tax imposed under Sec. 27 (D) (5) of the Tax Code of 1997, as amended, nor to the creditable withholding tax (CWT) prescribed in Revenue Regulations (RR) No. 2-98, as amended, considering that the conveyance merely acknowledges, confirms and consolidates the legal title and beneficial ownership over the properties in the name of UCMW, the Trustor."

In the instant case, the transfer from trustee to another trustee may be truncated into two separate transfers. First, transfer by current trustee to trustor-beneficial owner; and second, transfer by trustor-beneficial owner to new trustee. Thus, the transfer from one trustee to another trustee is not subject to capital gains tax.

Moreover, a transfer from a former trustee to a new trustee is not a taxable transaction and, therefore, is not subject to income tax, withholding tax or capital gains tax. As beneficial ownership remains with the same person or entity and only a transfer of legal ownership is involved, the transfer of property from one trustee to another is not subject to tax.

2. The conveyance of the property to the new trustee without any monetary consideration is not subject to gift tax imposed under Sec. 98 of the Tax Code of 1997, as amended. While there is no consideration for the transfer of the proprietary share, the same is brought about by the beneficial owner's instruction and not due to any donative intent on the part of the former trustee. Since there is no donative intent on the part of the trustee, no donor's tax is imposable on the conveyance. (*BIR Ruling No. 779-18 dated May 8, 2018 and BIR Ruling No. 1114-18 dated July 27, 2018*)

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3. Likewise, the foregoing transfer is not subject to DST under Section 175 of the Tax Code of 1997, as amended. The rule is that the assignment of shares of stock of a domestic corporation is subject to DST upon execution of the deed transferring ownership or rights thereto, or upon delivery, assignment or indorsement of such shares in favor of another.

Revenue Regulations (RR) No. 13-2004 dated December 23, 2004, implementing the provisions of Republic Act (RA) No. 9243, otherwise known as *An Act Rationalizing Further the Structure and Administration of the Documentary Stamp Tax*[1] qualified this rule by stating that for a sale or exchange to be taxable, there must be *an actual or constructive transfer of beneficial ownership of the shares of stock from one person to another.* Section 4 of RR No. 13-2004 provides, to wit:

> "For a sale or exchange to be taxable, there must be an actual or constructive transfer of beneficial ownership of the shares of stock from one person to another. Such transfer may be manifested by the clear exercise of attributes of ownership over such stocks by the transferee, or by an actual entry of a change in the name appearing in the certificate of stock or in the Stock and Transfer Book of the issuing corporation or by any entry indicating transfer of beneficial ownership in any form of registry including those of a duly authorized scripless registry, such as those maintained for or by the Philippine Stock Exchange. However, if by the transfer of certificates of stock from a resigned trustee to a newly appointed trustee such certificate of stock remains in the name of the cestui que trust or the resigned trustee so that the new trustee is constituted as mere depository of the stock, **such transfer is not taxable.** Provided, however, that transfer of shares to "nominees" to qualify them to sit in the board or to qualify them to perform any act in relation to the corporation shall not be subject to the DST provided herein only upon proof of a duly executed Nominee Agreement showing the purpose of the transfer; that the transfer is without consideration other than the undertaking of the nominee to only represent the beneficial owner of the stock; and the transfer is in trust." (Emphasis and underscoring supplied)

The herein transfer complies with the afore-cited rules. First, there is no actual or constructive transfer of the beneficial ownership of the share. Only the legal title was transferred when RCSI changed its assignee from Mr. Dong Hoon Lee to Mr. Nabil Paul Francis. Second, the execution of and by the express provisions of the Declaration of Trust, the intention of the parties was clearly for Mr. Lee to hold the share in trust for RCSI.

Furthermore, in the case of *Commissioner of Internal Revenue v. First Express Pawnshop, Inc.*[2], the Supreme Court explained that Sections 175 and 176 of the Tax Code on DST contemplates the execution of a subscription agreement in order for a taxpayer to be liable to pay the DST. The Supreme Court ruled, thus:

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[1] RR 13-2004.
[2] G.R. Nos. 172045-46, 16 June 2009.

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"As pointed out by the CTA, Sections 175 and 176 of the Tax Code contemplate a subscription agreement in order for a taxpayer to be liable to pay the DST. A subscription contract is defined as any contract for the acquisition of unissued stocks in an existing corporation or a corporation still to be formed. A stock subscription is a contract by which the subscriber agrees to take a certain number of shares of the capital stock of a corporation, paying for the same or expressly or impliedly promising to pay for the same."

A mere transfer of a share from one trustee to another, without change in the beneficial ownership of the share is, therefore, not the taxable transaction being contemplated under the Tax Code provisions on DST. That the transfer from Mr. Lee to Mr. Francis is without a subscription agreement or any kind of consideration is indicative of the real intention of the parties that there would be no transfer of beneficial ownership of the MPC share. The same remains with RCSI.

In the case of *Brodett v. Commissioner of Internal Revenue*[3], the Court of Tax Appeals (CTA) ruled that a deficiency assessment of DST is invalid where there is no shift in the beneficial ownership of the subject shares of stock, and, effectively, no transfer of shares as contemplated under Section 175 of the Tax Code. In *Brodett* case, the transfer was merely a continuation and confirmation of title in favor of the ultimate and real beneficiary of the subject properties. There being no new conveyance to speak of, there was no new exercise of a privilege that may be taxed.

In view thereof, the herein transfer cannot be subject to DST as there is no transfer or conveyance to Mr. Francis of the beneficial ownership of or any right, claim or interest over the MPC Share or over the assets of MPC. There being no new conveyance to speak of in this case, there is no new exercise of a privilege upon which DST may be imposed. (*BIR Ruling No. OT-467-21 dated December 14, 2021*)

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 null and void.

Very truly yours,

ROMEO D. LUMAGUI, JR.
Commissioner of Internal Revenue
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[3] CTA Case No. 7049, January 9, 2009.