March 10, 2021

BIR RULING NO. OT-065-21

39 (A) (1), RR No. 7-2003

AAA

_____

_____

Dear AAA:

This refers to your letter dated December 28, 2020 requesting for confirmation that the real properties which you sold to Bacolod Golden Rock Construction and Development Corporation (BGRCDC) is subject to the 6% capital gains tax under Section 27 (D) (5) and documentary stamp tax under Section 196, both of the Tax Code of 1997, as amended, but is not subject to value-added tax (VAT).

It is represented that AAA (AAA for brevity), with Taxpayer Identification Number (TIN) _____, is the registered owner of sixteen (16) real properties (hereinafter referred to as "subject properties"), particularly described as follows:

	Title No.	Tax Declaration No.	Lot No.	Area
1	_____	_____	7B	1,756
2	_____	_____	7D	1,755
3	_____	_____	7F	1,755
4	_____	_____	7H	1,755
5	_____	_____	7A	1,755
6	_____	_____	7C	1,755
7	_____	_____	7E	1,755
8	_____	_____	7G	1,755
9	_____	_____	8A	1,437
10	_____	_____	8B	1,437
11	_____	_____	8C	1,437
12	_____	_____	8D	1,437
13	_____	_____	8E	1,437

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14	_____	_____	8F	1,437
15	_____	_____	3	5,570
16	_____	_____	20-B	4,971

The subject properties were acquired as professional fee for legal services rendered to Bacolod Real Estate Development Company.

Due to his old age and poor medical condition, AAA decided to sell the subject properties to fund his hospitalization. In a Certification dated November 19, 2020 issued by his attending physician, [1] AAA is ____ years of age and is being confined in Bacolod Adventist Medical Center since March 30, 2015.

On January 10, 2017, AAA entered into a Memorandum of Agreement (MOA) with BGRCDC for the sale of the subject properties. Based on said MOA, the full consummation and transfer of ownership of each and every property is dependent on the payments made by the buyer, and a Deed of Absolute Sale corresponding to the property covered by the amount paid shall be executed and delivered to the buyer. On the basis of the amounts paid by the buyer, the transaction was completed in four (4) closing dates. On the following dates, the corresponding DOAs were issued over the subject properties:

	Date of DOAs	**TCT Number**	**Tax Declaration Number**
1	February 7, 2017	_____	_____
2	May 25, 2017	_____	_____
		_____	_____
		_____	_____
3	June 20, 2017	_____	_____
		_____	_____
		_____	_____
		_____	_____
		_____	_____
		_____	_____
		_____	_____
		_____	_____
		_____	_____
4	July 13, 2017	_____	_____
		_____	_____

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Hence, this request for confirmation that the subject properties are considered capital assets subject to capital gains tax and documentary stamp tax and shall be exempt from VAT.

In reply, Section 39 (A) of the National Internal Revenue Code (NIRC) of 1997, as amended, provides for the definition of a capital asset, to wit:

"Section 39. Capital Gains and Losses. —

(A) Definitions. — As used in this Title —

*(1) Capital Assets. — The term **'capital assets'** means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property used in the trade or business, of a character which is subject to the allowance for depreciation provided in Subsection (F) of Section 34; or real property used in trade or business of the taxpayer."*

The foregoing provision is being implemented by Revenue Regulations (RR) No. 7-2003, issued on February 11, 2003, providing for the guidelines in the determination of whether a particular real property is a capital asset or an ordinary asset. Section 2 (a) of RR No. 7-2003 defines capital assets as referring to 'all real properties held by a taxpayer, whether or not connected with his trade or business, and which are not included among the real properties considered as ordinary assets under Sec. 39 (A) (1) of the Code. On the other hand, Section 2 (b) of the same Regulations laid down what constitutes ordinary assets as follows:

b. Ordinary assets shall refer to all real properties specifically excluded from the definition of capital assets under Sec. 39(A)(1) of the Code, namely:

1. *Stock in trade of a taxpayer or other real property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year; or*

2. *Real property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business; or*

3. *Real property used in trade or business (i.e., buildings and/or improvements) of a character which is subject to the allowance for depreciation provided for under Sec. 34(F) of the Code; or*

4. *Real property used in trade or business of the taxpayer.*

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c. Real property shall have the same meaning attributed to that term under Article 415 of Republic Act No. 386, otherwise known as the "Civil Code of the Philippines."

d. Real estate dealer shall refer to any person engaged in the business of buying and selling or exchanging real properties on his own account as a principal and holding himself out as a full or part-time dealer in real estate.

e. Real estate developer shall refer to any person engaged in the business of developing real properties into subdivisions, or building houses on subdivided lots, or constructing residential or commercial units, townhouses and other similar units for his own account and offering them for sale or lease.

f. Real estate lessor shall refer to any person engaged in the business of leasing or renting real properties on his own account as a principal and holding himself out as lessor of real properties being rented out or offered for rent.

g. Taxpayers engaged in the real estate business shall refer collectively to real estate dealers, real estate developers, and/or real estate lessors. Conversely, the term "taxpayers not engaged in the real estate business" shall refer to persons other than real estate dealers, real estate developers and/or real estate lessors. A taxpayer whose primary purpose of engaging in business, or whose Articles of Incorporation states that its primary purpose is to engage in the real estate business shall be deemed to be engaged in the real estate business for purposes of these Regulations.

On the other hand, Section 3 of the same Regulations provides for the guidelines in determining whether a particular real property is a capital asset or ordinary asset, to wit:

"a. Taxpayers engaged in the real estate business. — Real property shall be classified with respect to taxpayers engaged in the real estate business as follows:

1. Real Estate Dealer. — All real properties acquired by the real estate dealer shall be considered as ordinary assets.

2. Real Estate Developer. — All real properties acquired by the real estate developer, whether developed or undeveloped as of the time of acquisition, and all real properties which are held by the real estate developer primarily for sale or for lease to customers in the ordinary course of his trade or business or which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year and all real properties used in the trade or business, whether in the form of land, building, or other improvements, shall be considered as

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ordinary assets.

3. *Real Estate Lessor. — All real properties of the real estate lessor, whether land and/or improvements, which are for lease/rent or being offered for lease/rent, or otherwise for use or being used in the trade or business shall likewise be considered as ordinary assets.*

4. *Taxpayers habitually engaged in the real estate business. All real properties acquired in the course of trade or business by a taxpayer habitually engaged in the sale of real estate shall be considered as ordinary assets. Registration with the HLURB or HUDCC as a real estate dealer or developer shall be sufficient for a taxpayer to be considered as habitually engaged in the sale of real estate. If the taxpayer is not registered with the HLURB or HUDCC as a real estate dealer or developer, he/it may nevertheless be deemed to be engaged in the real estate business through the establishment of substantial relevant evidence (such as consummation during the preceding year of at least six (6) taxable real estate sale transactions, regardless of amount; registration as habitually engaged in real estate business with the Local Government Unit or the Bureau of Internal Revenue, etc.)." (Emphasis supplied)*

Based on the above-quoted provisions, the classification, therefore, of a particular real property as being capital or ordinary asset does not depend upon its actual use or the purpose for its acquisition, but on the nature of the business of its registered owner.

In the instant case, it is shown that AAA is already ___ years of age and is being confined in the hospital since March 30, 2015; and due to old age and medical condition, he could not have been engaged in real estate business or any other kinds of business. This is supported by the Certification [2] issued by the Office of the City Mayor of Bacolod City that AAA has not applied nor been issued a business permit to operate any kind of business, and the Certification [3] issued by the Department of Trade and Industry that there is no business name registration filed by/as AAA. Moreover, the subject properties, being vacant idle lots, were never used in business nor leased out, as certified to by the Office of the Punong Barangay 2, Bacolod City.

The fact that AAA sold the subject properties pursuant to a Memorandum of Agreement, does not make him habitually engaged in the real estate business. To be considered as habitually engaged in the real estate business, the taxpayer must consummate during the preceding year at least six (6) taxable real estate sale transactions. It is noted that, the transaction between AAAand BGRCDC was consummated in 2017. As attested by AAA, due to his old age and medical condition, he was not able to engage in real estate business since his confinement in March 30, 2015. Hence, no real transaction was entered

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into in 2016, the preceding year when the transaction was consummated.

The transaction between AAA and BGRCDC is considered only as one transaction considering the fact that the subject properties were sold under one Memorandum of Agreement, and the execution of different DOAs was consistent with the terms of the MOA that the delivery and execution of DOAs shall be dependent on the amount paid by the buyer.

In view thereof and the pieces of evidence proffered, and further considering that AAA is a taxpayer not engaged in the real estate business, being not a real estate dealer, developer or lessor, it is the considered opinion of this Office that the subject real properties are classified as capital assets, the conveyance of which is subject to capital gains tax and documentary stamp tax but consequently not subject to VAT and creditable withholding tax.

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,

(SGD.) CAESAR R. DULAY
Commissioner of Internal Revenue

Footnotes

1. Certification of Confinement dated November 19, 2020 issued by BBB, Adventist Medical Center Bacolod.
2. Certification dated January 8, 2021 issued by the Permits and License Division, Office of the City Mayor of Bacolod City.
3. Certification dated January 19, 2021 issued by Mary Jean T. Pacheco, Assistant Secretary, Department of Trade and Industry.

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