REPUBLIC OF THE PHILIPPINES
DEPARTMENT OF FINANCE
BUREAU OF INTERNAL REVENUE
QUEZON CITY

Sec. 28(B)(5)(c) & Sec. 98 of the 1997 Tax Code, as amended
CTA Case No. 9106; CTA Case No. 1707; BIR Ruling No. DA 088-06; BIR Ruling No. DA-406-07; BIR Ruling No. OT-467-21; BIR Ruling No. 058-13; BIR Ruling No. 247-12
OT-101-2022
MAR 25 2022

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Attention: **Atty. Al C. Bonghanoy**
Counsel

Gentlemen:

This refers to your request filed on behalf of your client, Okada Manila International, Inc. (OMI), for confirmation that the transfer of Tiger Resorts Leisure and Entertainment, Inc. ("TRLEI") shares to OMI from Tiger Resorts Asia Limited ("TRA"), all under the Tiger Resorts Group, in exchange for additional paid-in capital (APIC) to form a new corporate structure is not subject to capital gains tax (CGT) and donor's tax.

Background

1. OMI, a wholly-owned subsidiary of TRA, is a corporation organized and existing under Philippine laws with registered address at New Seaside Drive, Entertainment City, Parañaque City. It was registered with the Securities and Exchange Commission (SEC) on March 10, 2021 with SEC Registration No. and with the Bureau of Internal Revenue (BIR), with Taxpayer Identification No. (TIN) . Its primary purpose is to invest in, purchase, or otherwise acquire and own, hold, use, sell, assign, lease, transfer, mortgage, pledge, exchange or otherwise dispose of personal property of every kind and description.

2. TRLEI, also a wholly-owned subsidiary of TRA, was incorporated and registered with the Philippine SEC on June 13, 2008 with SEC Registration No. and TIN . Its registered address is at Okada Manila, New Seaside Drive, Entertainment City, Barangay. Tambo, Parañaque City. TRLEI's primary purpose of registration is to acquire, own, maintain, operate and/or manage hotels (city and resort), inns, apartments, private clubs, pension houses, convention halls, lodging houses, restaurants, cocktail bars

(provided that such cocktail bars are inside the hotels or inns and will only cater to clients or customers of such hotels or inns), casinos, and other similar recreational or amusement places, gaming pools, and any and all services and facilities necessary, suitable, convenient, related or incident to the accomplishment of the above purposes (excluding ownership of land).

3. TRA is a corporation incorporated and registered in Hong Kong Special Administrative Region of the People's Republic of China. Its registered address is Suite 509 Charter House, No. 8 Connaught Road, Central Hong Kong. It is the parent company of OMI and TRLEI owning 99.99% shares in both companies.

4. Pursuant to a global restructuring plan of the Tiger Resorts Group, a Transfer Agreement was entered into by and between TRA and OMI wherein TRA transferred its shares in TRLEI in the form of additional capital contribution to OMI. As a consequence of this transfer, OMI will now own 99.99% of TRLEI's shares.

In view of the foregoing, you now request confirmation of your opinion that:

1. TRA's transfer of its TRLEI shares to OMI in the form of additional paid-in capital in OMI, without the issuance of additional shares of stock, is deemed a capital investment; hence, not subject to capital gains tax;

2. TRA's transfer of its TRLEI shares to OMI, without the issuance of additional shares of stock, is deemed a capital investment, which is not included within the purview of the term "taxable income" under the National Internal Revenue Code of 1997, as amended. Accordingly, it is not subject to Philippine income tax; and

3. TRA's transfer of its TRLEI shares to OMI pursuant to a legitimate worldwide reorganization and by way of additional capital contribution is not subject to donor's tax under Section 99 [sic] of the Tax Code, as amended.

In reply, please be informed as follows:

1. **The transfer of TRLEI shares from TRA to OMI pursuant to a legitimate worldwide corporate reorganization is not subject to income tax/capital gains tax.**

Section 28(B)(5)(c) of the 1997 Tax Code, as amended, provides for the taxability of gains derived by a nonresident foreign corporation from the sale, exchange or other disposition of shares of stock not traded in the stock exchange, to wit:

xxx *xxx* *xxx*

"(c) Capital Gains from Sale of Shares of Stock not Traded in the Stock Exchange.

- A final tax at the rate of fifteen percent (15%) is hereby imposed upon the net capital gains realized during the taxable year from the sale, barter, exchange or other disposition of shares of stock in a domestic corporation, except shares sold, or disposed of through the stock exchange."

xxx xxx xxx

The above-cited provision does not apply in the instant case. The transfer by TRA of TRLEI shares to OMI in exchange for OMI's additional paid-in capital is not the sale, barter or exchange being contemplated under the foregoing provision since the transfer in this case is made pursuant to a global restructuring plan of the Tiger Resorts Group. In BIR Ruling No. DA 088-06 dated March 6, 2006, the BIR had the occasion to rule that:

> *". . . the proposed transfer of the TPC shares from TTC to THBV, pursuant to a worldwide reorganization of The Thomson Group of Companies, is not subject to capital gains tax as (1) there is no effective transfer of beneficial ownership of the TPC shares since both Transferor and Transferee belong to The Thomson Group of Companies and (2) the proposed transfer is a mere realignment of stockholdings effectively consolidating beneficial and legal ownership of the TPC shares. Since there is no transfer of beneficial ownership, no gain will be realized by TTC and THBV for income tax purposes."*

The foregoing opinion was reiterated in BIR Ruling No. DA-406-07 which involved Synovate, Inc. (Synovate), a corporation duly existing under Philippine laws and a wholly-owned subsidiary of Synovate (Asia-Pacific-BVI) Limited (BVI), a corporation existing under the laws of British Virgin Islands. BVI, on the other hand, is a wholly-owned company of Synovate Holdings BV ("Holdings"), a corporation existing under the laws of the Netherlands. Synovate, BVI and Holdings are all part of Synovate Far East Group and that in view of the corporate reorganization of the Synovate Far East Group, it is envisioned that the entire Synovate shares currently registered under the name of BVI will be transferred from BVI to Holdings. This Office ruled that the proposed transfer of Synovate shares from BVI to Holdings pursuant to a legitimate Asian corporate reorganization and without consideration is not subject to capital gains tax and donor's tax.

In the instant case, the transfer by TRA of TRLEI shares to OMI in exchange for OMI's additional paid-in capital is made pursuant to a global restructuring plan of the Tiger Resorts Group. It is considered a legitimate business practice which entails a realignment of stockholdings effectively consolidating beneficial and legal ownership of the TRLEI's shares, in which, no effective transfer of beneficial ownership of the TRLEI's shares is made since both Transferor and Transferee belong to the Tiger Resorts Group and TRA also owns 99.99% of the outstanding capital stock of OMI.

Since the beneficial ownership over the TRLEI share remains with TRA, being the owner of the 99.99% shares of OMI, there is no actual transfer of ownership of the said share, and therefore, no gain or profit shall be recognized.

In several rulings, we ruled that when the transfer is from the true and beneficial owner, made without monetary consideration and consequently no gain or profit involved in the transfer, the same is not subject to the income and capital gains taxes. (*BIR Ruling No. OT-467-21, December 14, 2021; BIR Ruling No. 058-13, February 1, 2013; BIR Ruling No. 247-12, April 13, 2012*)

Moreover, the additional funds received by a corporation from a shareholder in the form of APIC are not considered profits or earnings derived from the normal operations of the business of the corporation, hence, the same cannot be considered a taxable income subject to

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income tax or capital gains tax under Section 28(B)(1) and (5)(c) of the Tax Code of 1997, as amended. (*CTA Case No. 9106 dated September 27, 2018)*

In BIR Ruling DA-(C-252) 646-09 dated 04 November 2009 and BIR Ruling DA-(C-066) 228-09 dated 15 May 2009, this office ruled that a transfer of shares by way of an additional capital contribution in the form of additional paid-in capital (APIC) without the issuance of additional shares is not taxable income, to wit:

> *"xxx additional funds received by a corporation from shareholders in the form of APIC are not considered taxable income as defined under the 1997 Tax Code, as amended. This additional capital contribution without the issuance of additional shares of stock merely increases the basis of the stockholders' stock but not their proportionate equity in the corporation. As such, it is a transaction not subject to income or gift (i.e., donor's) taxes. (BIR Ruling Nos. DA-432-05 dated October 20, 2005; DA-046-04 dated February 5, 2004.*
>
> *Sec. 56 of Revenue Regulations No. 2 otherwise known as the Income Tax Regulations provides that voluntary payments by stockholders to the corporation, when credited to the corporation's surplus account or to its special capital account, is not considered income. Thus:*
>
> *Contributions by shareholders. — Where a corporation requires additional funds for conducting its business and obtains such needed money through voluntary pro rata payments by its shareholders, the amounts so received being credited to its surplus account or to a special capital account, will not be considered income, although there is no increase in the outstanding shares of stock of the corporation. The payments in such circumstances are in the nature of voluntary assessments upon, and represent an additional price paid for, in shares of stock held by the individual shareholders, and will be treated as an addition to and as part of the operating capital of the company."*

The transfer of TRLEI shares from TRA to OMI, however, is subject to DST imposed under Section 175 of the Tax Code of 1997, as amended. Moreover, Section 4 of Revenue Regulations (RR) No. 13-2004 provides that all transfers of shares of stocks of a domestic corporation are 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. No transfer of shares of stock shall be recorded unless DST thereon has been duly paid for in accordance with Section 201 of the 1997 Tax Code.

2. **The transfer of TRLEI shares from TRA to OMI pursuant to a legitimate worldwide corporate reorganization is not subject to donor's tax.**

Section 98 of the Tax Code of 1997 provides that a donor's tax is generally imposed on the transfer by any person, resident or non-resident, of property by gift. The donor's tax applies, whether such transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible.

The essential elements of a valid donation are: (1) the reduction of the patrimony of the donor, (2) the increase in the patrimony of the donee, and (3) the intent to do an act of liberality (animus donandi). In this case, there is no intention to donate on the part of TRA as the transfer

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was made in pursuance to a global restructuring plan of the Tiger Resorts Group. Moreover, the parties to the transaction are part of the Tiger Resorts Group of Companies, hence there is no transfer of beneficial ownership of the TRLEI shares. The BIR has previously ruled as follows:

> *"This Office has consistently ruled that the transfer of property, without consideration, and primarily made for business considerations is not subject to donor's tax under Section 98 of the Tax Code because under such circumstances, no donative intent can be attributed to the transferor." (BIR Ruling Nos. DA-174-98 dated April 30, 1998; DA-028-05 dated January 24, 2005; and DA-136-05 dated April 7, 2005).*

Also, in BIR Ruling No. DA 088-06 dated March 6, 2006, the BIR held that:

> *"Furthermore, both the Transferor and the Transferee are subsidiaries and part of The Thomson Group of Companies and there is no transfer of beneficial ownership of the TPC shares... there can be no donative intent on the part of the transferor in a transfer of properties to the member-beneficiaries, considering that a person or entity cannot donate properties the ownership of which belongs to themselves. (BIR Ruling No. DA318-99 dated May 21, 1999)"*

In the instant case, the transfer of the TRLEI shares was made pursuant to a global restructuring plan of the Tiger Resorts Group, hence, there is no showing of donative intent on the part of TRA to donate the subject shares to OMI. It has been consistently held that in a direct gift, the element of donative intent must be present in the transfer of property to be donated. Thus, the said transfer of shares, having been made pursuant to a valid corporate restructuring without donative intent, is not subject to donor's tax (*Perez vs. Commissioner of Internal Revenue, CTA Case No. 1707, February 10, 1969*).

This ruling is being issued on the basis of the foregoing facts as represented. However, if upon investigation, it will be ascertained that the facts are different, then this ruling shall be considered as null and void.

Very truly yours,

CAESAR R. DULAY
Commissioner of Internal Revenue

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