REPUBLIC OF THE PHILIPPINES
DEPARTMENT OF FINANCE
BUREAU OF INTERNAL REVENUE
Quezon City

Bureau of Internal Revenue Ruling

	Secs. 6(F), 27, 106(A)(2)(a)(5) & 196 of the Tax Code of 1997; Sec. 2.57.2(J) of RR No. 2-98, RMC 74-99, Sec. 4.106, RR 4-2007	BIR Ruling No. #198-2016

Person to Contact: Chief, Law Division
Tel. Nos. 926-55-36 / 927-09-63

Date: May 17, 2016

NATIONAL DEVELOPMENT COMPANY
NDC Building, 116 Tordesillas St.,
Salcedo Village, Makati City

Attention : Ma. Lourdes F. Rebuano
General Manager

Gentlemen:

This refers to your letter dated 14 October 2011 requesting for confirmation of your opinion that:

1) For purposes of computing the documentary stamp tax (DST) and creditable withholding tax (CWT) due on the court-ordered sale by the National Development Company (NDC) to Philippine Phosphate Fertilizer Corporation (PHILPHOS) of a parcel of land owned by NDC, the tax base shall be the actual consideration appearing on the deed of sale regardless of the zonal value of the subject property; and--

2) The sale of the subject property by NDC to PHILPHOS, a PEZA-registered Ecozone Export Enterprise, is subject to zero percent (0%) value-added tax.

Documents submitted disclose the following:

1. NDC, with TIN , is a government-owned and -controlled corporation (GOCC) with original charter (P.D. No. 1648, as amended). NDC was established to pursue commercial, industrial, agricultural, mining and other enterprises which may be necessary or contributory to the economic development of the country;

2. NDC was issued Certificate of Registration No. ated 02 August 1982 as a "Zone Service Enterprise" located at LIDE, Isabel, Leyte by then Export Processing Zone Authority (now, Philippine Economic Zone Authority or PEZA) pursuant to P.D. No. 66, as amended and Executive Order (EO) No. 567, subject to the terms and conditions of the Registration Agreement;

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3. PHILPHOS, with TIN is a domestic corporation duly registered with the Securities and Exchange Commission (SEC) under SEC Registration No. PHILPHOS is engaged in the manufacture and production of fertilizers for domestic and international distribution;

4. PHILPHOS was certified by the Philippine Economic Zone Authority (PEZA) as an Ecozone Export Enterprise at the Leyte Industrial Development Estate-Special Economic Zone under Certificate of Registration No. dated 18 April 2006;

5. Since 06 August 1981, PHILPHOS has been occupying a One Million One Hundred Sixty Two Thousand Eight Hundred Seventy Four and 87/100 square meters (1,162,874.87 sq.m.) portion of NDC's property covered by Transfer Certificate of Title No. ("subject property") and is located in the Leyte Industrial and Development Estate (LIDE), a special economic zone established in 1978 pursuant to Letter of Instruction (LOI) No.

6. On 04 March 1994, NDC and PHILPHOS entered into a contract of lease whereby NDC leased the subject property to the latter for a period of twenty five (25) years from 06 August 1981. Under Section 23 of the lease contract, PHILPHOS has an option to purchase the subject property at a purchase price of per square meter, which was NDC's acquisition cost of the said property, plus cost of money at non-cumulative eighteen percent (18%) per annum reckoned from 06 August 1981;

7. On 21 December 2000, PHILPHOS notified NDC that it would exercise its option to purchase the subject property at the aforesaid stipulated purchase price computed as follows:

P	Value of the property at 1,162,874.87 sq.m.
+	Cost of money (value of the property x 18% per annum from 06 August 1981 to 31 December 2000
P	Purchase price

8. The zonal value of the subject property, however, amounts to P650.00 per sq.m. or a total of The fair market value of the subject property, on the other hand, is estimated at

9. Due to the disparity of the stipulated purchase price and the fair market/zonal values of the subject property, NDC refused to sell to PHILPHOS at the stipulated price and insisted on the sale thereof at its fair market value;

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10. On 18 March 2002, PHILPHOS filed a complaint for damages for breach of option against NDC before the Regional Trial Court (RTC) of Makati (Branch 133) praying that NDC be ordered to comply with its obligation to sell the subject property to PHILPHOS at the stipulated price;

11. On 18 August 2006, the RTC rendered a decision finding NDC liable for damages for breach of option, and directed it to execute the appropriate deed of sale of the subject property in favor of PHILPHOS upon payment by the latter of (stipulated price) less rentals at a rate of per month paid from 21 December 2000;

12. The Court of Appeals and Supreme Court upheld and affirmed the RTC's decision and denied with finality the motions for reconsideration of NDC. ON 27 January 2009, the Supreme Court decision in favor of PHILPHOS became final and executory. Hence, NDC was directed to execute the deed of sale;

13. The total amount of consideration, after deducting the rentals of PHILPHOS, shall be as follows:

P	Stipulated Purchase Price	
-	Rentals at	x 91
	months from January 2001 to August 2008	
	Total amount receivable	

In reply, please be informed as follows:

CWT and DST due on the sale by NDC to PHILPHOS

As the object of the sale between NDC and PHILPHOS is an ordinary property of the former, the income received by NDC shall be subject to the applicable corporate income tax under Section 27 of the Tax Code of 1997, as amended, and such income payment shall be subject to creditable withholding tax (CWT) pursuant to Sec. 2.57.2(J) of Revenue Regulation No. 2-98, as amended. The pertinent provision states:

> "(J) Gross selling price or total amount of consideration or its equivalent paid to the seller/owner for the sale, exchange or transfer of real property classified as ordinary asset. - A [CWT] based on the gross selling price/total amount of consideration or the fair market value determined in accordance with Section 6(E) of the Code, whichever is higher, paid to the seller/owner for the sale, transfer or exchange of real property, other than capital asset, shall be imposed upon the withholding agent/buyer, in accordance with the following schedule:

i. Where the seller/transferor is exempt from [CWT] in accordance with Sec. 2.57.5 of these regulations.	Exempt
ii. Upon the following values of real property, where the seller/transferor is habitually engaged in the real estate business.	
With a selling price of Five Hundred Thousand Pesos (P500,000.00) or less.	1.5%
With a selling price of more than Five Hundred Thousand Pesos (P500,000.00) but not more than Two Million Pesos (P2,000,000.00).	3.0%
With a selling price of more than two Million Pesos (P2,000,000.00).	5.0%

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Gross selling price shall remain the consideration stated in the sales document or the fair market value determined in accordance with Section 6 (E) of the Code, as amended, whichever is higher. In an exchange, the fair market value of the property received in exchange shall be considered as the consideration.

The provision of the law is clear and unambiguous, the basis for computing the CWT shall be on the gross selling price or the consideration stated in the sales document OR the fair market value determined in accordance with Section 6(E) of the Tax Code of 1997, as amended. The term "fair market value" shall mean whichever is higher of: 1) the fair market value as determined by the Commissioner/zonal value, or 2) the fair market value as shown in schedule of values of the Provincial and City Assessors (real property tax declaration). However, in the absence of zonal value/fair market value as determined by the Commissioner, gross selling price refers to the market value shown in the latest real property tax declaration or the consideration, whichever is higher.

Hence, this Office cannot confirm NDC's opinion that the CWT shall be computed based on the remaining amount still due to NDC or [redacted], and not on the zonal value of the subject property regardless of its higher value. BIR Ruling No. DA-(C-038) 145-09 dated March 10, 2009, which NDC is invoking in support of its opinion, cannot serve as a precedent ruling in the case at hand since the facts upon which the ruling was issued are different. The facts in the aforementioned ruling involved an expropriation or negotiated sale resulting in the exercise by the government of its power of eminent domain.

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As to DST due on the sale of the subject property, Section 196 of the said Tax Code provides:

> "**SEC. 196.—*Stamp Tax on Deeds of Sale and Conveyances of Real Property*.** – On all conveyances, deeds, instruments, or writings, other than grants, patents or original certificates of adjudication issued by the Government, whereby any land, tenement or other realty sold, shall be granted, assigned, transferred or otherwise conveyed to the purchaser, or purchasers or to any other person or persons designated by such purchaser or purchasers, there shall be collected a documentary stamp tax, at the rates herein below prescribed, based on the consideration contracted to be paid for such realty or on its fair market value determined in accordance with Section 6(E) of this Code, whichever is higher: *Provided*, That when one of the contracting parties is the Government the tax herein imposed shall be based on the actual consideration;
>
> x x x" (Underscoring supplied)

While NDC is of the opinion that the DST due on the sale shall be computed based on the actual consideration since one of the contracting parties is the Government. This Office finds no legal basis to support this opinion.

Section 2 of Executive Order No. 292, otherwise known as the "Administrative Code of 1987" has defined the "Government of the Republic of the Philippines" as:

> *"Government of the Republic of the Philippines* refers to the corporate government entity through which the functions of the government are exercised throughout the Philippines, including, save as the contrary appears from the context, the various arms through which political authority is made effective in the Philippines, whether pertaining to the autonomous regions, the provincial, city, municipal or barangay subdivisions or other forms of local government."

The distinction being clearly made, the term "the Government" as used in the last sentence of Section 196 of the 1997 Tax Code, as amended, does not refer to GOCCs like NDC. Hence, the DST computation on NDC's sale of the subject property shall be based on the consideration contracted to be paid for such realty or on its fair market value determined in accordance with Section 6(E) of this Code.

Sale of the subject property by NDC to PHILPHOS, subject to 12% value-added tax.

In general, enterprises registered and operating under the said Act, otherwise known as ECOZONE or PEZA registered enterprises, shall only be imposed with a 5% special tax, based on "gross income earned" in lieu of all taxes, except real property tax. However, this tax incentive only applies in respect of the registered enterprise's operations within the ECOZONE. *(Revenue Memorandum Circular No. 74-99)*

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It appears that NDC applied for PEZA-registration and was approved as special zone service enterprise to establish a port complex facility[1] which shall be devoted exclusively for the establishment, operation and maintenance of such machinery, equipment and other improvements as may be necessary to carry on its business as a special zone service enterprise. Thus, the sale by NDC of the subject property located at LIDE in favor of PHILPHOS is not among its registered activities.

PHILPHOS on the other hand, is a PEZA-registered enterprise and is certified by such authority as a qualified enterprise for the purpose of VAT zero-rating of its transactions with its local suppliers of goods, properties and services in accordance with Section 4.106-6 of Revenue Regulations No. 16-05.

Section 106 of the Tax Code of 1997, as amended, provides:

"SEC. 106. Value-Added Tax on Sale of Goods or Properties. –
(A) Rate and Base of Tax. – . . .

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(2) The following sales by VAT-registered persons shall be subject to zero percent (0%) rate:

(a) Export Sales. The term 'export sales' means:

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(5) These considered export sales under Executive Order No. 226, otherwise known as the Omnibus Investment Code of 1987, and other special laws." *(Underscoring supplied)*

In relation to this, Article 23 of Executive Order (EO) 226 defined "export sales" as follows:

"Article 23. "Export sales" shall **mean the Philippine port F.O.B. value, determined from invoices, bills of lading, inward letters of credit, landing certificates, and other commercial documents, of exports products** exported directly by a registered export producer or the net selling price of **export product** sold by a registered export producer to another export producer, **or to an export trader that subsequently exports the same: *Provided, That sales of export products*** to another producer or to an export trader shall only be deemed export sales when actually exported by the latter, as evidenced by landing certificates or similar commercial documents; Provided, further, That without actual exportation the following shall be considered constructively exported for purposes of this provision: (1) sales to bonded manufacturing warehouses of export-oriented manufacturers; (2) sales to export processing zones; (3) sales to registered export traders operating bonded trading warehouses supplying raw materials used in the manufacture of export products under guidelines to be set by the Board in consultation with

[1] Article II, Registration Agreement of PEZA and NDC

the Bureau of Internal Revenue and the Bureau of Customs; (4) sales to foreign military bases, diplomatic missions and other agencies and/or instrumentalities granted tax immunities, of locally manufactured, assembled or repacked products whether paid for in foreign currency or not: Provided, further, That export sales of registered export trader may include commission income: and Provided, finally, That exportation of goods on consignment shall not be deemed export sales until the export products consigned are in fact sold by the consignee."

Moreover, Section 23, of Republic Act (RA) No. 7916 provides, to wit:

"SEC. 23. Fiscal Incentives. Business establishments operating within the ECOZONES shall be entitled to the fiscal incentives as provided for under Presidential Decree No. 66, the law creating the Export Processing Zone Authority, or those provided under Book VI of Executive Order No. 226, otherwise known as the Omnibus Investment Code of 1987." (Underscoring supplied)

Corollarily, Article 77 of EO 226 states:

"Article 77. Tax Treatment of Merchandise in the Zone.

(1) Except as otherwise provided in this Code, foreign and domestic merchandise, raw materials, supplies, articles, equipment, machineries, spare parts and wares of every description, except those prohibited by law, brought into the zone to be sold, stored, broken up, repacked, assembled, installed, sorted, cleaned, graded, or otherwise processed, manipulated, manufactured, mixed with foreign or domestic merchandise whether directly or indirectly related in such activity, shall not be subject to customs and internal revenue laws and regulations nor to local tax ordinances, the provisions of law to the contrary notwithstanding.

(2) Merchandise purchased by a registered zone enterprise from the customs territory and subsequently brought into the zone, shall be considered as export sales and the exporter thereof shall be entitled to the benefits allowed by law for such transaction. (Underscoring supplied)

xxx xxx xxx"

Based on the foregoing provisions of law, export sales to PEZA-registered enterprises subject to VAT at zero percent (0%) under Section Sec. 106(A)(2)(a)(5) of the Tax Code of 1997, as amended, only refer to export products or merchandise, excluding real properties.

In view of the foregoing, this OTCC is of the opinion and hereby holds that:

1) For purposes of computing the CWT and DST due on sale by the NDC in favor of PHILPHOS of the subject property, the tax base shall be the higher amount between the (a) gross selling price or the consideration stated in the sales document OR

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(b) the fair market value determined in accordance with Section 6(E) of the Tax Code of 1997, as amended; and

2) The sale of the subject property by NDC to PHILPHOS, a PEZA-registered Ecozone Export Enterprise, is not considered an "export sale" that is subject to zero percent (0%) VAT under Sec. 106(A)(2)(a)(5) of the Tax Code of 1997, as amended. It is therefore subject to the 12% VAT imposed under Section 106(A)(1)(a) of the same Tax Code.

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 as represented are different, then this ruling shall be considered null and void.

Very truly yours,

KIM S. JACINTO-HENARES
Commissioner of Internal Revenue

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