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

| Secs. 27(D)(5), 98 & 196, NIRC |
|---|
| BIR Ruling No. 020-02 |
| #230-2017<br>5-15-2017 |

**OFFICE OF THE GOVERNMENT CORPORATE COUNSEL**
3rd Floor MWSS Administration Building
Katipunan Road, Balara
Quezon City

**Attention:** **Raoul C. Creencia**
Government Corporate Counsel

Gentlemen:

This refers to your letter dated 12 October 2011 requesting for tax exemption on the transfer of real properties between the Philippine Economic Zone Authority (PEZA) and the Authority of the Freeport Area of Bataan (AFAB) pursuant to Republic Act (RA) 9728, otherwise known as the "Freeport Area of Bataan (FAB) Act of 2009".

Background

1. In 1969, the Municipality of Mariveles was established as a principal port of entry and foreign trade zone, to be operated and administered by a Foreign Trade Zone Authority (FTZA) in Mariveles pursuant to RA 5490;

2. On November 20, 1972, Presidential Decree (PD) 66 was issued creating the Export Processing Zone Authority (EPZA) to take over FTZA's functions and to establish export processing in strategic locations in the country;

3. Subsequently on February24, 1995, RA7916 was passed into law which provides that the existing Export Processing Zone Authority (EPZA) created under PD 66 shall evolve into the PEZA in accordance with the guidelines and regulations set forth in an executive order issued for this purpose;

4. On October 30, 1995, President Fidel V. Ramos issued Executive Order No. 282 providing for these guidelines and regulations, Section 1 of which states:

> *"Section 1. Assumption of EPZA's Powers and Functions by PEZA. All powers, functions and responsibilities of EPZA as provided under its Charter, Presidential Decree No. 66, as amended, insofar as they are not inconsistent with the powers, functions and responsibilities of the PEZA, as mandated under Republic Act. No. 7916 shall hereafter be assumed and exercised by the PEZA. Henceforth, the EPZA shall be referred to as the PEZA."*

5. On October 23, 2009, RA 9728 was passed creating the AFAB and transferring all funds, rights, obligations and liabilities from PEZA to AFAB. Section 32 thereof states:

> *"All properties, assets, funds, rights, obligations, and liabilities are hereby transferred to the AFAB except for the liabilities that are not properly accounted for as per the reports coming from the Commission on Audit, which shall be retained by the PEZA.*
>
> *The AFAB shall be responsible for the operations, administration, management and development of the FAB. The AFAB shall effect the transfer herein provided in a manner that will ensure the least disruption of ongoing programs of the BEZ xxx."*

In reply, please be informed as follows:

**Capital Gains Tax**

Section 27(D)(5) of the 1997 Tax Code, as amended, provides for the taxability of gains presumed to have been derived by a domestic corporation from the sale, exchange or other disposition of lands and/or buildings, to wit:

> *"xxx xxx xxx*
>
> *(5) Capital Gains Realized from the Sale, Exchange or Disposition of Lands and/or Buildings.- A final tax of six percent (6%) is hereby imposed on the gain presumed to have been realized on the sale, exchange, or disposition of lands and/or buildings which are not actually used in the business of the corporation and are treated as capital assets, based on the gross selling price or current fair market value as determined in accordance with Section 6(E) of this Code, whichever is higher, of such lands and/or buildings."*

The above-cited provision, however, does not apply in the instant case. There is no sale, barter or exchange of the real properties from PEZA to AFAB as contemplated under the above provision since the transfer of the real properties from PEZA to AFAB was made by virtue of the passage of RA 9728. Thus, the transfer of the real properties from PEZA to AFAB, without any monetary consideration is not subject to capital gains tax.

**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*). While the first two (2) elements are present in this case, there is no intention to donate the subject real properties to AFAB on the part of PEZA as the transfer was made by operation of law upon the passage of RA 9728 transferring all the assets of PEZA to AFAB. Thus, the subject transfer of real properties from PEZA to AFAB shall likewise be exempt from donor's tax.

**Value-Added Tax (VAT)**

Considering that the transfer by PEZA of the real properties is made by operation of law and not in the ordinary course of trade or business, such transfer shall not be subject to VAT under Section 106 of the 1997 Tax Code, as amended.

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**Documentary Stamp Tax**

In *BIR Ruling No. 020-02* dated May 13, 2002, this Office held:

> "Section 196 of the Tax Code provides that DST "shall be imposed 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. The DST will be computed at the rate of P15.00 for every P1,000, based on the consideration contracted to be paid for such realty or its fair market value determined in accordance with Section 6 (E) of this Code, whichever is higher. When one of the contracting parties is the Government, the tax herein imposed shall be based on the actual consideration, . . .
>
> xxx xxx xxx
>
> As to whether or not the transfer of NPC assets to PSALM or TRANSCO, as the case may be, will fall squarely within the very concept of "sale," reference to the provision of Article 1458 of the Civil Code must be made. This law provides for the following essential requisites to a contract of sale, viz.:
>
> 1. Consent of the contracting parties by virtue of which the vendor obligates himself to transfer the ownership of and to deliver a determinate thing, and the vendee obligates himself to pay therefor a price certain in money or its equivalent.
> 2. Object certain which is the subject matter of the contract.
> 3. Cause of the obligation which is established. The cause as far as the vendor is concerned is the acquisition of the price certain in money or its equivalent, while the cause as far as the vendee is concerned is the acquisition of the thing which is the object of the contract.
>
> Thus, the contract of sale is characterized as consensual, bilateral and reciprocal, principal, onerous, commutative, and nominate.
>
> In this case, the transfer of NPC's generation assets and liabilities to PSALM, as well as of the transmission and subtransmission assets and systems to TRANSCO, all of which are government-owned and -controlled corporations is mandated by law. There is no positive offer to sell and buy the aforesaid NPC properties. Moreover, consideration, which should be the prime reason for the transfer of abovementioned assets, is not availing to the parties in the transfer of the aforementioned NPC assets. Although it has been stated earlier, it should bear stressing that this is a transaction between and among government-owned and -controlled corporations pursuant to a law calling for the reorganization of NPC's assets.
>
> xxx xxx xxx

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> Accordingly, the transfer of ownership over NPC properties to PSALM is not a transaction contemplated within Section 196 of the Tax Code, and therefore neither NPC, PSALM nor TRANSCO is subject to DST under the said section. The notarial certification, is however, subject to the DST of fifteen pesos (P15.00) imposed under Section 188 of the Tax Code of 1997."

The above case is on all fours with the instant case. The subject transfer of the real properties by PEZA in favor of AFAB has been made without any monetary consideration, pursuant to the mandate of RA 9728. Accordingly, the transfer of the real properties by PEZA to AFAB is not subject to DST under Section 196 of the 1997 Tax Code of 1997, as amended. The notarial certification, is however, subject to the DST of fifteen pesos (P15.00) imposed under Section 188 of the same Code.

This will, therefore, serve as authority for the concerned Revenue District Officer to issue the corresponding Certificate Authorizing Registration (CAR) so that the concerned Register of Deeds may now transfer the subject real properties in the name of AFAB.

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,

**CAESAR R. DULAY**
Commissioner of Internal Revenue

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