June 20, 2019

BIR RULING NO. 357-19

Section 29 (B) of the National Internal Revenue Code of 1997, as amended; Revenue Regulations No. 2-2001; BIR Ruling No. 094-2013

5-S Properties, Inc.
103 North Science Avenue, Laguna Technopark,
Special Export Processing Zone, Biñan, Laguna

Attention: *AAA*

Gentlemen:

This refers to your letter dated September 21, 2017, requesting for confirmation of your opinion that 5-S Properties, Inc. is a publicly held corporation defined under Revenue Regulations (RR) No. 2-2001, thus, exempt from the Improperly Accumulated Earnings Tax (IAET) imposed under Section 29 of the National Internal Revenue Code of 1997, as amended.

Background:

5-S Properties, Inc. is a corporation duly organized and existing under Philippine laws with office address at 103 North Science Ave., Laguna Technopark, Biñan, Laguna. It is engaged in the business of real estate and is an affiliate of Laguna Dai-ichi, Inc. ("LDI" for brevity), a corporation duly organized and existing under Philippine laws with office address also located at 103 North Science Ave., Laguna Technopark, Biñan, Laguna. LDI is primarily engaged in the manufacture, fabricate, process assemble, pack, store, export market, sell at wholesale and otherwise trade or deal in and with all kinds of molding dies and various kinds of industrial plastic products and stamping metal pressed parts and other related products.

On July 08, 2002, a trust agreement was made and entered into by and between LDI and Equitable PCI Bank, whereby LDI has adopted an employee benefit retirement plan

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(herein referred to as "the Plan") for the exclusive benefit of members and their nominated beneficiaries. The Plan contemplates the creation of a trust fund to which contributions shall be made and from which disbursements shall be paid.

As shown in the submitted General Information Sheet of 5-S Properties, Inc., its equity structure is as follows:

Stockholder	No. of Shares	% of Ownership
Singapore Dai-ichi Pte. Ltd.	1,998	40%
LDI Retirement Plan	2,997	60%
BBB	1	
CCC	1	
DDD	1	
EEE	1	
FFF	1	
	5,000	100%

In reply, please be informed that Section 29 (A) and (B) of the National Internal Revenue Code of 1997, as amended, and as implemented by RR No. 2-2001, provides that in addition to other taxes imposed by Title II of the National Internal Revenue Code of 1997, as amended, there shall be imposed for each taxable year a tax equal to 10% of the improperly accumulated taxable income of corporations formed or availed of for the purpose of avoiding the income tax with respect to its shareholders or the shareholders of any other corporation, by permitting the earnings and profits of the corporation to accumulate instead of dividing them among or distributing them to the shareholders.

Thus, IAET is being imposed in the nature of a penalty to the corporation for the improper accumulation of its earnings, and as a form of deterrent to the avoidance of tax upon shareholders who are supposed to pay dividends tax on the earnings distributed to them by the corporation. However, the IAET shall not apply to, among others, publicly-held corporations.

Section 29 (B) of the National Internal Revenue Code of 1997, as amended, provides that:

"*SEC. 29. Imposition of Improperly Accumulated Earnings Tax. —*

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(B) Tax on Corporations Subject to Improperly Accumulated Earnings Tax. —

(1) In General. — The improperly accumulated earnings tax imposed in the preceding section shall apply to every corporation formed or availed for the purpose of avoiding the income tax with respect to its shareholders or the shareholders of any other corporation, by permitting earnings and profits to accumulate instead of being divided or distributed.

(2) Exceptions. — The improperly accumulated earnings tax as provided for under this Section shall not apply to:

(a) Publicly-held corporations;

(b) Banks and other non-bank financial intermediaries; and

(c) Insurance companies.

xxx xxx xxx"

Furthermorc, second paragraph of Section 4 of RR No. 2-2001 entitled "Implementing the Provision on Improperly Accumulated Earnings Tax under Section 29 of the Tax Code of 1997" states that:

> *"For purposes of these Regulations, closely-held corporations are those corporations at least fifty percent (50%) in value of the outstanding capital stock or at least fifty percent (50%) of the total combined voting power of all classes of stock entitled to vote is owned directly or indirectly by or for not more than twenty (20) individuals. Domestic corporations not falling under the aforesaid definition are, therefore, publicly-held corporations."*

The same section further provides that "for purposes of determining whether the corporation is closely held corporation, insofar as such determination is based on stock ownership, stock owned directly or indirectly by or for a corporation, partnership, estate or trust shall be considered as being owned proportionately by its shareholders, partners or beneficiaries."

Based on the foregoing, for purposes of determining whether or not a domestic corporation is a closely-held corporation or a publicly-held corporation, the ownership is ultimately traced to the individual shareholders. Where at least 50% in value of the outstanding capital stock or of the total combined voting power of all classes of stock entitled to vote in a corporation is owned directly or indirectly by not more than 20 individuals, the corporation is considered a closely-held corporation.

Thus, 5-S Properties, Inc. is considered a closely-held corporation since the 60% of its

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shareholdings is owned by LDI Retirement Plan which is considered as only one (1) stockholder. The member-beneficiaries of LDI Retirement Plan are not considered as stockholders who own directly or indirectly the shares of 5-S Properties, Inc., since their entitlement to the benefits contemplated in the Plan depends upon compliance with certain conditions stated in the Plan. Hence, 5-S Properties, Inc. is not a publicly held corporation exempt from IAET as contemplated under Section 29 (B) of the National Internal Revenue Code of 1997, as amended, in relation to RR No. 2-2001.

Please be guided accordingly.

Very truly yours,

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

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