REPUBLIC OF THE PHILIPPINES
DEPARTMENT OF FINANCE
BUREAU OF INTERNAL REVENUE

Quezon City

Sec. 40(C)(2)&(6)(b); RR 18-01
BIR Ruling No. 214-12 BIR Ruling No. 100-17 BIR Ruling No. 075-18
S4DM-0635-2020
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BERNARDO PLACIDO & CHAN LAW OFFICES
Unit 701 Antel Corporate Centre
121 Valero Street, Salcedo Village, Makati City

Attention: **DAMIAN M. PLACIDO, JR.**
and
DENNIS ARVIN L. CHAN

Gentlemen:

This refers to your letter dated October 15, 2018 requesting on behalf of your client, Greenhills Properties, Inc. (GPI) for confirmation of your opinion that the merger between GPI and Lochinver Assets, Inc. (LAI) is a tax-free merger in accordance with Sections 40(C)(2) and 6(b) of the National Internal Revenue Code (Tax Code) of 1997, as amended.

Background

GPI, with Tax Identification No. (TIN) is a domestic corporation duly organized and existing, under and by virtue of Philippine laws, with office address at Unit 2002-A, East Tower, Philippine Stock Exchange Centre, Exchange Road, Ortigas Center, 1605 Pasig City, Metro Manila.

GPI has authorized capital stock of (P), divided into ( ) common shares with a par value of One Peso (P1.00) each with the total capital stock issued and outstanding which amounts to (P .

As of June 30, 2012, the carrying amounts and fair values of GPI shows total assets of total liabilities of and total stockholders' equity of

LAI, on the other hand, with TIN was a wholly-owned subsidiary of GPI and likewise a duly registered domestic corporation prior to the subject merger which had its principal office at Unit 2002-B, East Tower, Philippine Stock Exchange Centre, Exchange Road, Ortigas Center, 1605 Pasig City, Metro Manila.

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LAI had an authorized capital stock of (P) divided into shares with a par value of (P) per share. The total capital stock issued and outstanding amounts to (P) of which, (P) or 99% was owned by GPI.

As of June 30, 2012 the audited balance sheet of LAI shows total asset of (, total liabilities of (P) and total stockholders' equity of (P).

In order to allow the effective management of assets and to enhance economic and operational efficiency for the business involved, the constituent corporations decided to effect a merger, thus, GPI and LAI executed a Plan of Merger dated April 26, 2012. Under the said plan of merger, LAI will be the absorbed corporation and will be merged with GPI, the surviving corporation.

The Plan of Merger was approved by a majority vote of the Board of Directors and by the vote of the stockholders owning or representing at least 2/3 of its outstanding capital stock of GPI and LAI at a stockholders' meeting held on April 12, 2012.

The SEC approved the Articles and Plan of Merger on November 28, 2012, by virtue of which the SEC issued a Certificate of Filing of the Articles and Plan of Merger. Under the approved Articles and Plan of Merger, the merger shall become effective on the date when the Certificate of Merger shall have been issued and released by the SEC. Accordingly, the merger took effect on **November 28, 2012** ("Effective Date of Merger").

GPI issued a total of ( ) shares of stock to the stockholders of LAI, which shares are composed of ( ) unissued authorized capital stock of GPI.

Based on the foregoing representations, you now request confirmation of your opinion that -

1. The described merger of GPI into LAI is a tax-free merger under Section 40(C)(2) and (6)(b) of the NIRC, such that no gain or loss shall be recognized for income tax purposes;
2. The transfer of assets by LAI to GPI pursuant to the merger is not subject to value-added tax (VAT) and any unused input tax of LAI as of the effective date of the merger is absorbed by GPI, as the surviving corporation;
3. The transfer of assets of LAI to GPI is likewise not subject to donor's tax for lack of donative intent on the part of SAFI;
4. The transfer of real properties to GPI is not subject to documentary stamp tax (DST) under Section 199 (m) of the NIRC, as amended by Republic Act (RA) No. 9243; and
5. Any excess creditable withholding tax (CWT) of LAI, as the absorbed corporation in a statutory merger, is transferred to and vested in GPI, as the surviving corporation, and such excess CWT may be utilized by the latter;

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In reply thereto, please be informed, as follows:

1. The foregoing merger of GPI and LAI is a merger within the contemplation of Section 40 (C) (2) (a) in relation to 40 (C) (6) (b) of the Tax Code of 1997, as amended, because GPI shall acquire/assume all the assets and liabilities of LAI and the same will result in economies of scale and efficiency of operations of the merging corporations, and make possible the more productive use of the properties of the constituent corporations, albeit, to the best interest of their respective stockholders. Hence, the merger of GPI and LAI is being undertaken for a *bona fide* business purpose and not for the purpose of escaping the burden of taxation.

The merger of GPI and LAI qualifies for non-recognition of gain or loss for income tax purposes in accordance with Section 40(C)(2) of the Tax Code of 1997, as amended, that no gain or loss shall be recognized by LAI, as the transferor of all assets and liabilities, to GPI pursuant to the Plan of Merger.

Accordingly, no gain or loss shall be recognized by GPI, as the transferee, on its receipt of the assets and liabilities of LAI pursuant to and as a consequence of the merger.

The basis of the properties transferred in the hands of the transferee (GPI), listed in Annex "A" hereof, shall be the same as it would be in the hands of the transferor (LAI) increased by the amount of the gain, if any, recognized to the transferor (LAI) on the transfer. (*Sec. 40 (C) (5) (b)*)

The basis of the shares of stock received by the transferor (LAI) upon the exchange shall be the same as the basis of the properties, stocks or securities exchanged, decrease by (1) the money received, and (2) the fair market value of the other property received and increased by (a) the amount treated as dividend of the shareholders and (b) the amount of any gain that was recognized on the exchange. (Sec. 40 (C) (5) (a) of the Tax Code of 1997)

Finally, if the amount of the liabilities assumed plus the amount of the liabilities to which the property is subject exceed the total of the adjusted basis of the properties transferred pursuant to such exchange, then such excess shall be considered as a gain, on the part of the transferor, from the sale or exchange of a capital asset or of property which is not a capital asset, as the case may be. (Sec. 40 (C) (4) (b), *supra*)

The substituted basis of the properties transferred by LAI to GPI shall comply with the rule that cash and other cash items will be excluded from the computation of the adjusted basis of the properties transferred for purposes of determining whether liabilities assumed and to which the property is subject do not exceed the adjusted basis of the property transferred pursuant to No. IV(A)(2) of Revenue Memorandum Ruling (RMR) No. 2-2002 dated June 10, 2002.

Accordingly, the allocated shares and liabilities, and the substituted basis of the assets transferred by LAI to GPI, based on LAI's audited financial statements as of June 30, 2012 shall be as follows:

	Amount (in Php)	**Allocated Liabilities**	**Allocated Shares**	**Substituted Basis (in Php)**
Cash and Cash Equivalents				

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Prepayments				
Property, plant and equipment				
Investment in properties				
Deferred tax assets				
TOTAL				

Liabilities	**Amount (in Php)**
Accounts payable and accrued expenses	
Advances from Related Party	
TOTAL	

2. Section 105 of the Tax Code of 1997, as amended, identifies the persons liable for the Value-Added-Tax.

> "SECTION 105. Persons Liable. – Any person who, in the course of trade or business, sells, barters, exchanges, leases goods or properties, renders services, and any person who imports goods shall be subject to the value-added-tax (VAT) imposed in Sections 106 to 108 of this Code."

However, Section 4.106-8(b)(3) of Revenue Regulations (RR) No. 16-2005, as amended by RR No. 4-2007[1], specifically excludes mergers from being subject to output tax.

> "**SECTION 4.106-8**. Change or Cessation of Status as VAT-registered Person. –
>
> xxx xxx xxx
>
> (b) **Not subject to output tax.**
>
> The VAT shall not apply to goods or properties existing as of the occurrence of the following:
>
> xxx xxx xxx
>
> (3) Merger or consolidation of corporations. The unused input tax of the dissolved corporation, as of the date of merger or consolidation, shall be absorbed by the surviving or new corporation."

Thus, the above-mentioned transaction shall not be subject to VAT, and any unused input VAT of LAI as of the effective date of merger will be transferred to and absorbed by GPI pursuant to Section 4.106-8(b)(3) of RR No. 16-2005, as amended, the said transfer being considered a transaction "not subject to output tax" under the said Section.

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[1] now exempted from VAT under Section 34 of RA No. 10963, amending Section 109 of RA Nos. 8424 and 9337

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3. Well-settled in our jurisprudence is the fact that 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)*.

Clearly, there is no intention on the part of any of the parties to the merger – LAI to donate to GPI its assets since the transaction is purely for legitimate business purpose. Thus, the aforesaid merger will not be subject to gift tax since there is no intention to donate, and the transaction is a *bonafide* merger effected solely for business reasons.

4. No DST is due on the transfer of assets made pursuant to the Plan of Merger under Section 199 (m) of the Tax Code, as amended by Republic Act No. 9243, in relation to Section 40 (C) (2) of the Tax Code, as amended. *(BIR Ruling No. 100-2017 dated March 2, 2017)*

5. Any excess and unutilized creditable withholding taxes (CWT), which form part of the assets to be transferred by LAI as of the effective date of the merger, shall be transferred to and vested in GPI, as the surviving corporation, and such excess CWT may be utilized by the latter. *(BIR Ruling No. 100-2017 dated March 2, 2017)*

6. DST at the rate of P1.00 on each P200 par value, or fractional part thereof, shall be imposed on the original issuance of shares by GPI to the stockholders of LAI as a consequence of the merger as provided under Section 174 of the Tax Code, as amended.

7. It is to be emphasized, however, that the net operating loss carry-over (NOLCO) under Section 34(D) (3) of the Tax Code, as amended, and as implemented by Revenue Regulations No. 14-2001, of LAI, if any, is not one of their assets that can be transferred and absorbed by the surviving corporation, GPI, as this privilege or deduction can be availed of by LAI only. Accordingly, the tax-free merger between LAI and GPI does not cover the NOLCO of the former.

8. The excess and unexpired minimum corporate income tax (MCIT) of LAI, as of the effective date of the merger as of year 2012, if any, shall be carried forward and credited against the normal income tax due of GPI for the three (3) immediately succeeding taxable years pursuant to Section 27(E)(2) of the Tax Code, as amended; and

9. The retained earnings of the absorbed corporation amounting to [redacted] is subject to the ten percent (10%) final withholding tax on dividends constructively received by its individual shareholders pursuant to Section 24 (B) (2) of the Tax Code. *(BIR Ruling No. 1422-18 dated December 7, 2018)*

In order that the above-described reorganization can be considered as merger under Section 40 (C) (2) and (6) (b) of the Tax Code of 1997, as amended, the parties to the merger should comply with the following requirements set forth under Revenue Regulations No. 18-2001:

A. The plan of reorganization should be adopted by each of the corporations, parties thereto, the adoption being shown by the acts of its duly constituted responsible officers and appearing upon the official records of the corporation. Each corporation, which is a party to the reorganization, shall file, as part of its

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return for the taxable year within which the reorganization occurred a complete statement of all facts pertinent to the non-recognition of gain or loss in connection with the reorganization, including:

1. A copy of the plan of reorganization, together with a statement executed under the penalties of perjury, showing in full the purposes thereof and in detail all transactions incident to, or pursuant to the plan;

2. A complete statement of all cost or other basis of all property, including all stocks or securities, transferred incident to the plan;

3. A statement of the amount of stock or securities and other property or money received from the exchange, including a statement of all distribution of other disposition made thereof. The amount of each kind of stock or securities and other property received shall be stated on the basis of the fair market value thereof at the date of the exchange;

4. A statement of the amount and nature of any liabilities assumed upon the exchange, and the amount and nature of any liabilities to which any of the property acquired in the exchange is subject.

B. Every taxpayer, other than a corporation, party to the reorganization, who received stock or securities and other property or money upon a tax-free exchange in connection with a corporate reorganization shall incorporate in his income tax return for the taxable year in which the exchange takes place a complete statement of all facts pertinent to the non-recognition of gain or loss upon such exchange, including:

1. A statement of the cost or other basis of the stock or securities transferred in the exchange; and

2. A statement in full of the amount of stock or securities and other property or money received from the exchange, including any liabilities assumed upon the exchange, and any liabilities to which property received is subject. The amount of each kind of stock or securities and other property (other liabilities assumed upon the exchange) received shall be set forth upon the basis of the fair market value thereof at the date of the exchange.

C. Records in substantial form shall be kept by every taxpayer who participates in a tax-free exchange in connection with a corporate reorganization showing the cost or other basis of the transferred property or money received (including any liabilities assumed on the exchange, or any liabilities to which any of the properties received were subject), in order to facilitate the determination of gain or loss from subsequent disposition of such stock of securities and other property received from the exchange.

In addition to the foregoing requirements, the parties shall enclose with their respective income tax returns for the taxable year in which the merger occurred a copy of the request for ruling filed with, and the corresponding ruling issued by, the Bureau of Internal Revenue, both duly stamp-received by the appropriate office of the Bureau of Internal Revenue.

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Such parties shall include as a note to their respective audited financial statements for the taxable year in which the merger occurred a statement to the effect that they hold such assets/shares acquired in a merger and the year in which such merger occurred, and in the taxable years until the subject properties are subsequently transferred to another transferee.

Moreover, the shareholders of the absorbed/dissolving corporation and the surviving/transferee corporation shall record in their respective books of accounts the mandatory accounting entries stated in Annex "B" hereof, pursuant to Revenue Memorandum Order (RMO) No. 17-2016.

Furthermore, the parties shall cause to annotate at the back of the Transfer Certificates of Title (TCT) and Certificates of Stock, the date the merger was executed, the original or historical cost of acquisition of the properties or shares of stock involved, and the fact that no gain or loss was recognized as a result of such merger; provided however, that any violation by the Register of Deeds or by the Corporate Secretary of this condition shall be penalized under Section 269 or 275, as the case may be, of the Tax Code of 1997, as amended.

Finally, the parties are required to submit to the Legal and Legislative Division, Bureau of Internal Revenue, proof of annotation of the substituted basis of the shares of stock and/or real properties involved in the transfer within ninety (90) days from receipt of this ruling. Violation of this requirement is subject to the penalties provided in Section 275 of the Tax Code of 1997.

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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Annex "A"

LIST OF PROPERTY/IES TRANSFERRED

(Pursuant to Section 40(C)(2) and 6(c) of the Tax Code of 1997,
Revenue Regulations No. 18-2001 dated November 13, 2001,
and Revenue Memorandum Order No. 32-2001 dated November 28, 2001)

Name of Transferee: **LOCHINVER ASSETS, INC.**

No.	Transfer Certificates of Title No./Tax Declaration Nos.	Property Description and Classification	Acquisition Cost	Depreciation	Original/Adjusted Basis (in PhP)
1	[redacted]	Land/Commercial	[redacted]	-	[redacted]
	TOTAL			-	

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