June 7, 2018

BIR RULING NO. 983-18

Republic Act (RA) No. 10752; Secs. 24 (D) (1) & 196 of the NIRC of 1997, as amended

Department of Public Works and Highways
Office of the Secretary
Manila

Attention: *Karen Olivia V. Jimeno*
Undersecretary for Legal Affairs and Priority Projects

Gentlemen :

This refers to your letter dated June 30, 2017, pertaining to the computation of capital gains tax (CGT) and documentary stamps tax (DST) in connection with the negotiated sale of property to be used as right-of-way (ROW) for infrastructure projects under Republic Act (RA) No. 10752 and its approved Implementing Rules and Regulations (IRR).

Background:

On November 14, 2016, this Office issued BIR Ruling No. 389-2016, wherein it contains the following formula for calculating the CGT and DST in connection with the negotiated contracts entered into by the Department of Public Works and Highways (DPWH) under RA No. 10752:

AC = NAC + CGT + DST

AC = NAC + 6% AC + 1.5% AC

AC = NAC + 7.5% AC

92.5% AC = NAC

Therefore: AC = NAC/92.5%

Such formula was created by grossing up the Net Actual Consideration (NAC) from 92.5% to arrive at the Actual Consideration (AC). You now questioned such formula based on the following grounds:

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1. The formula would, in effect, include the DST in the AC to be paid as compensation to the Seller/Owner. You believe that this is not consistent with the provisions of RA No. 10752, which added CGT only, and not also the DST, to the compensation or consideration to be paid by the Implementing Agency (IA) for the account of the Seller/Owner.

2. The inclusion of only the CGT to the amount to be paid by the IA to the Owner was also the intent of the legislator when they deliberated on this bill as shown in the minutes of the meeting of the House of Committee on Public Works and Highways on February 19, 2014, pertinent excerpts of which are quoted below:

    a. Rep. Jesusito A. Manalo, principal sponsor of the bill: *". . . there is, likewise, Mr. Chairman, the resistance of property owners in paying capital gains tax, especially for negotiated sale, since the right-of-way acquisition is involuntary and tax must be paid upfront."*

    b. Rep. Manalo: *". . . The implementing agency shall assume the capital gains tax as part of compensation . . . "*

    Nowhere in the bill or in the minutes of discussions or in RA No. 10752 is the DST provided or proposed as part of the compensation due the property owner.

3. Payment of the DST was under the old law, and is still under RA No. 10752, the responsibility of the Buyer/IA in both negotiated sale and expropriation cases.

    a. For expropriation under RA No. 10752, Section 6 (g) provides that the IA shall pay the DST while the owner shall pay the CGT, to wit:

        "(g) With regard to the taxes and fees relative to the transfer of title of the property to the Republic of the Philippines through expropriation proceedings, ***the implementing agency shall pay the documentary stamp tax****, transfer tax and registration fees, while* ***the owner shall pay the capital gains tax*** *and any unpaid real property tax."*

    b. On the other hand, for negotiated sale under RA No. 10752, Section 5 (c) transferred the responsibility for paying the CGT from the Owner to the IA for the account of the Owner to wit:

        "(c) With regard to the taxes and fees relative to the transfer of

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title of the property to the Republic of the Philippines through negotiated sale, ***the implementing agency shall pay, for the account of the seller, the capital gains tax****, as well as the documentary stamp tax, transfer tax and registration fees, while the owner shall pay any unpaid real property tax."*

The qualifier "for the account of the seller" refers only to the CGT, which was the intent of the legislators, since the CGT shall be embedded as part of the compensation or consideration to the Owner, while payment of the DST, transfer tax and registration fees remains the duty of the IA.

4. The DST should not be part of the AC or the compensation to the Seller/Owner, since, as mentioned in all cases, the DST is the responsibility of the Buyer/IA. In accordance with Section 196 of the National Internal Revenue Code of 1997, though, the DST is a function of the IA, and shall be computed as follows:

   DST = 1.5% AC

5. To include the DST as part of the AC would incorrectly mean that payment of the DST is the Seller/Owner's duty and would unduly increase the value of the AC. Thus:

   AC = NAC + CGT + DST

   = NAC + 6% AC + 1.5% AC'

   92.5% AC = NAC

   AC = NAC/92.5% = 1.0811 NAC

   This would unwarrantedly expand the tax base from 1.0638 NAC to 1.0811 NAC which would consequently raise the amounts of CGT and DST. This would then needlessly increase the budget requirement of the IA for ROW.

In view of the foregoing, you reiterate the applicability of the formula for computing the compensation and CGT, as provided in Section 6.9 of the approved IRR consistent with RA No. 10752 as well as with the National Internal Revenue Code of 1997, as amended. You also maintain that the approved IRR of RA No. 10752 is valid and effective. If there is indeed a justification to revise the formula stated in Section 6.9 of the IRR, then the IRR Committee created under RA No. 10752 will have to consider the same and approve any appropriate amendments to the IRR.

In reply, please be informed that Section 5 (c) and Section 6 (g) of RA No. 10752,

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state that:

"SECTION 5. Rules on Negotiated Sale. — . . .

(c) With regard to the taxes and fees relative to the transfer of title of the property to the Republic of the Philippines through negotiated sale, the implementing agency shall pay, for the account of the seller, the capital gains tax, as well as the documentary stamp tax, transfer tax and registration fees, while the owner shall pay any unpaid real property tax."

"SECTION 6. Guidelines for Expropriation Proceedings. — . . .

(g) With regard to the taxes and fees relative to the transfer of title of the property to the Republic of the Philippines through expropriation proceedings, the implementing agency shall pay the documentary stamp tax, transfer tax and registration fees, while the owner shall pay the capital gains tax and any unpaid real property tax."

In relation thereto, Section 6.9 of the IRR of RA No. 10752, provides that:

"6.9. Taxes and Fees. —

As provided in Section 5(c) of the Act, the IA shall pay for account of the seller/owner, the Capital Gains Tax (CGT), as well as the Documentary Stamp Tax (DST), transfer tax and registration fees, while the owner shall pay any unpaid real property tax.

The IA shall pay the CGT to the Bureau of Internal Revenue (BIR) based on the actual consideration stated in the Deed of Sale, as expressed below:

AC = NAC + CGT

Where:

AC = Actual Consideration indicated in the Deed of Sale to be appropriated and paid out by the IA for the negotiated sale,

NAC = Compensation Price as offered by the IA to the property owner in accordance with Section 6.1 of this IRR, net of CGT, and

CGT = Capital Gains Tax to be paid by the IA to the BIR, for the account of the owner.

Since CGT = x% of AC,

Then NAC = AC – CGT = 100% AC – x% AC = (100% – x%) AC,

and, therefore, AC = NAC (100% – x%)

Annex B shows an illustrative example in computing the AC, NAC, and CGT for a hypothetical property affected by a ROW to be acquired through negotiated

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sale.

The above provisions pertaining to CGT does not apply to the sale of property classified as ordinary assets. The latter is subject to the existing BIR rules and regulations.

In addition, the DST, transfer tax and registration fees for the negotiated sale shall be paid by the IA in accordance with pertinent laws and regulations. Upon the request of the property owner, the IA shall remit to the LGU concerned the amount corresponding to any unpaid real property tax, subject to the deduction of this amount from the total negotiated price, provided that the said amount is not more than the negotiated price."

Moreover, Sections 24 (D) (1) and 196 of the National Internal Revenue Code of 1997, as amended, provide that:

"Section 24. Income Tax Rates. —

xxx xxx xxx

(D) Capital Gains from Sale of Real Property. —

(1) In General. — The provisions of Section 39 (B) notwithstanding, a final tax of six percent (6%) ***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, is hereby imposed upon capital gains presumed to have been realized from the sale, exchange, or other disposition of real property located in the Philippines, classified as capital assets, including pacto de retro sales and other forms of conditional sales, by individuals, including estates and trusts: . . ."* (Emphasis and underscoring supplied)

"Section 196. Stamp tax on Deeds of Sale, Conveyances and Donation of Real Property. — On all conveyances, donations, 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****."* (Emphasis and underscoring supplied)

Hence, the tax base of CGT, in case of negotiated transfer of ROW site or location for National Government Infrastructure Projects shall be gross selling price or zonal value of the real property as determined in accordance with Section 6 (E) of the National Internal Revenue Code of 1997, as amended, whichever is higher.

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Thus, for purposes of computing the CGT, the following formula shall be observed:

AC = NAC + CGT

Where:

NAC = gross selling price or the fair market value (FMV) as determined by the BIR Commissioner or the FMV as shown in the schedule of values of the Provincial and City Assessors, whichever is highest.

With regard to the computation of DST, Section 5 (c) of RA No. 10752 provides that in a negotiated sale, the IA shall pay the CGT for the account of the seller. It does not include the payment of DST because payment of the same together with the transfer tax and registration fees is the sole liability of the IA. Thus, the AC allocated to the seller must only be gross of CGT, but the CGT shall be deducted from the amount to be received by the seller (NAC) and shall be directly remitted by the IA to the BIR.

In relation thereto, Section 196 of the National Internal Revenue Code of 1997, as amended, provides that when one of the contracting parties is the Government, the DST shall be based on the actual consideration thereof. Therefore, the proper formula for the computation of DST is as follows:

AC = NAC + 6% AC

AC – 6% AC = NAC

94% AC = NAC

AC = NAC/94%

DST = AC (1.5%)

Please be guided accordingly.

Very truly yours,

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

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