Republic of the Philippines
DEPARTMENT OF FINANCE
Roxas Boulevard Corner Pablo Ocampo, Sr. Street
Manila 1004

Registered Post Para 1/7/19 3:00 P.M

DOF Opinion No. 001.2019

MR. DAISUKE YAMAWAKI
President, Nitto Denko Philippines Corporation
Lot 5 Block 7 American Avenue Greenfield Automotive Park
Brgy. Don Jose, Sta. Rosa City
Laguna 4026, Philippines

SUBJECT: Request for Review of Bureau of Internal Revenue ITAD Ruling No. ITAD 070-2018

Dear **Mr. Yamawaki**:

This refers to the subject letter dated 8 June 2018 ("Request for Review") which you filed with this Department on behalf of Nitto Denko Philippines Corporation ("Nitto Philippines") to request for review of Bureau of Internal Revenue ("BIR") International Tax Affairs Division ("ITAD") Ruling No. 070-2018 dated 27 April 2018, which ruled on the taxability of transfer of Nitto Denko Corporation ("Nitto Japan") of its Nitto Philippines shares of stocks to Nitto Denko Singapore Pte. Ltd. ("Nitto Singapore").

In particular, the Request for Review prays for the reversal of the BIR's findings that the said transfer subject of this review was for less than adequate and full consideration and, hence, subject to donor's tax pursuant to Section 100 of the National Internal Revenue Code of 1997 ("NIRC"), as amended, and Section 7(c.1.4) of Revenue Regulations ("RR") No. 6-2008, as amended, and that the transaction is subject to documentary stamp tax under Section 175 of the NIRC, as amended. The pertinent portion of BIR ITAD Ruling No. 070-2018 provides:

> "As mentioned, the FMV of the transferred Nitto Philippines shares [Php443,945,757] is greater than the consideration received for those shares [Php87,340,371.00]. The excess between the higher FMV and the lower consideration is a deemed gift subject to donor's tax under Section 100 of the Tax Code as implemented by Section 7(c.1.4) of Revenue Regulations No. 6-2008, xxx.
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> xxx xxx xxx xxx
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> Finally, under Section 175 of the Tax Code, the transfer of the said Nitto Philippines shares is subject to documentary stamp tax as follows: xxx"

On the other hand, as stated in your Request for Review, it is your position that said transaction must not be subject to donor's tax and documentary stamp tax for the following reasons:

a. The transaction between Nitto Japan and Nitto Singapore lacks donative intent. The share transfer was a bona fide transaction, conducted at arm's length, and made pursuant to a global restructuring program implemented by Nitto Group in 2014.

b. The transfer of shares did not result in a transfer of ownership of Nitto Philippines since Nitto Japan maintained its interest in Nitto Philippines through its being the 100% owner of Nitto Singapore.

c. The transfer of Nitto Philippines shares to Nitto Singapore is made pursuant to a tax-exempt transaction and thus, not liable for documentary stamp tax.

After reviewing the facts and the laws presented, we *agree* with Nitto Philippines that the subject transfer of Nitto Philippines shares from Nitto Japan to Nitto Singapore is not subject to donor's tax for the reasons stated below.

In order that a donation of an immovable property be valid, the following elements must be present: (a) the essential reduction of the patrimony of the donor; (b) the increase in the patrimony of the donee; (c) the intent to do an act of liberality or *animus donandi*; (d) the donation must be contained in a public document; and e) that the acceptance thereof be made in the same deed or in a separate public instrument; if acceptance is made in a separate instrument, the donor must be notified thereof in an authentic form, to be noted in both instruments. *(Missionary Sisters of Our Lady of Fatima v. Alzona, G.R. No. 224307, [August 6, 2018])*

In the case at bar, animus donandi or the intent to do an act of liberality is wanting in the transfer of Nitto Philippines' shares of stock from Nitto Japan to Nitto Singapore. The transfer was done for a bona fide business purpose, which is for a capital structure change in the South Asia Region in order to align it with the projected business growth in the region.

Likewise, there is essentially no reduction of the patrimony of the donor since the parent company (Nitto Japan) transferred its ownership interest in a subsidiary (Nitto Philippines) to another wholly-owned subsidiary (Nitto Singapore). In effect, Nitto Japan maintained its interest in Nitto Philippines, being the 100% owner of Nitto Singapore.

Furthermore, under Section 100 of the NIRC, as amended, insufficiency of consideration in the transaction triggers the applicability of the donor's tax. However, transfer for insufficient consideration presupposes a transfer of actual ownership interest to a third party.

In the case of Delpher Trades Corporation v. IAC,[1] a deed of exchange was executed between Delfin and Pelagia Pacheco (the "Pachecos") and Delpher Trades Corporation ("Delpher") whereby the former conveyed to the latter properties for shares of stock of Delpher. Delpher became a business conduit of the Pachecos by virtue of their stock subscription. The Pachecos invested their properties and changed the nature of their ownership from unincorporated to incorporated form by organizing Delpher to take control of their properties and at the same time save on inheritance tax. Under said transaction, the Supreme Court held that the Pachecos merely changed their ownership from one form to another; **however, the ownership remained in the same hands**. There was no transfer of actual ownership interest by the Pachecos to a third party. Thus:

> "The records do not point to anything wrong or objectionable about this 'estate planning" scheme resorted to by the Pachecos. "The legal right of a taxpayer to decrease the amount of what otherwise could be his taxes or altogether avoid them, by means which the law permits, cannot be doubted." (Liddell & Co., Inc. v. The collector of Internal Revenue, 2 SCRA 632 citing Gregory v. Helvering, 293 U.S. 465, 7 L. ed. 596).

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[1] G.R. No. L-69259, 26 January 1988.

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The "Deed of Exchange" of property between the Pachecos and Delpher Trades Corporation cannot be considered a contract of sale. **There was no transfer of actual ownership interests by the Pachecos to a third party. The Pacheco family merely changed their ownership from one form to another. The ownership remained in the same hands.** Hence, the private respondent has no basis for its claim of a light of first refusal under the lease contract."[2]

Similar to *Delpher Trades*, the exchange of shares between Nitto Japan and Nitto Singapore resulted in Nitto Singapore's acquisition of 99.99% ownership in Nitto Philippines. Nevertheless, ownership interest in Nitto Philippines remained in the hands of Nitto Japan, as the ultimate parent of Nitto Singapore. As provided above, there was no transfer of actual ownership interests by Nitto Japan, who ultimately remains to be the owner of the Nitto Philippines, being the 100% owner of Nitto Singapore.

Hence, the BIR erred when it declared that the transaction under review is subject to donor's tax pursuant to Section 100 of the NIRC, as amended, as it was made purportedly for less than adequate and full consideration.

As to the issue on the imposition of documentary stamp tax, we *agree* with the BIR that the subject transfer of shares is subject to documentary stamp tax under Section 175 of the NIRC, as amended.

It bears emphasis that Article 13 of the Philippine-Japan Tax Treaty only provides for an exemption on the gains derived from the alienation of properties that satisfies the conditions provided therein. It does not, however, include the exemption from other taxes, such as documentary stamp tax.

Note that a documentary stamp tax is levied independently of the legal status of the transactions giving rise thereto.[3] The Supreme Court has previously pronounced that the documentary stamp tax is an exaction on the facility privilege to make and the facilities used in exchanges, such as a subscription of shares of stock, thus:

> "A documentary stamp tax is in the nature of an excise tax. It is not imposed upon the business transacted but is an excise upon the privilege, opportunity or facility offered at exchanges for the transaction of the business. It is an excise upon the facilities used in the transaction of the business separate and apart from the business itself. Documentary stamp taxes are levied on the exercise by persons of certain privileges conferred by law for the creation, revision, or termination of specific legal relationships through the execution of specific instruments."

Given the above, regardless of the taxability or non-taxability of the transaction subject of this review, the documentary stamp tax attaches by mere transfer of the shares of stock.

Hence, the BIR was correct in ruling that the transfer of Nitto Japan's 999,9995 shares in Nitto Philippines to Nitto Singapore is subject documentary stamp tax pursuant to Section 175 of the NIRC, as amended.

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[2] Emphasis supplied.
[3] JAKA Investments Corporation v. Commissioner of Internal Revenue, G.R. No. 147629, 28 July 2010.

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 as null and void.

Thank you.

Sincerely yours,

CARLOS G. DOMINGUEZ
Secretary of Finance

JAN 03 2019

CC **Commissioner Caesar R. Dulay**
Bureau of Internal Revenue

1/8/19

JAN 07 2019 10:26

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