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

DOF Opinion No. 010.2018

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SUBJECT: Request for Review of Bureau of Internal Revenue ITAD Ruling No. 018-2018

Dear **Atty. Castillo**:

This refers to the subject letter dated 2 April 2018 ("Request for Review") which you filed with this Department on behalf of your client Rohm Apollo Company Ltd. ("Rohm Apollo") to request for review of Bureau of Internal Revenue ("BIR") International Tax Affairs Division ("ITAD") Ruling No. 018-2018 dated 21 February 2018, which ruled on the taxability of transfer of Rohm Electronics Philippines, Inc. ("Rohm Philippines") shares of stocks arising from the merger between Rohm Fukuoka Company Ltd. ("Rohm Fukuoka") and Rohm Apollo.

In particular, the Request for Review prays for the reversal of the BIR's finding that in the absence of compensation, the transfer of the said shares constitutes donation subject to donor's tax of thirty percent (30%) under Section 98 and 99 of the *National Internal Revenue Code (NIRC) of 1997, as amended*. The pertinent portion of BIR ITAD Ruling No. 018-2018 provides:

> *"In the absence of compensation, the transfer of those shares constitutes donation subject to donor's tax of 30% under Sections 98 and 99 of the Tax Code:*
>
> ***"SEC. 98. Imposition of Tax. –***
>
> *(A) There shall be levied, assessed, collected and paid upon the transfer by any person, resident or nonresident, of the property by gift, a tax, computed as provided in Section 99.*
>
> *(B) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible.*
>
> ***SEC. 99. Rates of Tax Payable by Donor. –***
>
> *xxx xxx xxx*
>
> ***(B) Tax Payable by Donor if Donee is a Stranger.** – When the donee or beneficiary is stranger, the tax payable by the donor shall be thirty percent (30%) of the net gifts..."*

The rate of 30% is clarified under Section 10(B) of Revenue Regulations No. 2-2003,[1] *to wit:*

> ***"SEC. 10. RATES OF DONOR'S TAX. –***
>
> *xxx xxx xxx*
>
> *(B) Tax payable by the donor if donee is a stranger. – When the donee or beneficiary is a stranger, the tax payable by the donor shall be thirty per cent (30%) of the net gifts.*
>
> *xxx xxx xxx*
>
> *Donation made between business organizations and those made between an individual and a business organization shall be considered as donation made to a stranger. (Emphasis ours)"*

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 for the following reasons:

> FIRST, the transfer of the Rohm Philippines common shares pursuant to the merger is done for a bona fide business purpose, which is to streamline the ownership of Rohm Philippines common shares by consolidating ownership thereof in one Japanese entity, and thus negates an intention to donate;
>
> SECOND, the latest rulings of the Commissioner on mergers under Section 40(C)(2) of the Tax Code also confirm that there can be no donative intent in a merger transaction entered into for legitimate business reasons; and
>
> THIRD, no reduction in the patrimony of the purported donor (Rohm) resulted from the transfer of the Rohm Philippines shares from Rohm Fukuoka to Rohm Apollo despite the non-issuance of additional shares to Rohm in exchange for the Rohm Philippines shares.

After reviewing the facts and the laws presented, we *agree* with Rohm Apollo that the subject transfer of 8,068,956 Rohm Philippines common shares of Rohm Fukuoka to Rohm Apollo pursuant to their merger is not subject to donor's tax since it lacks the essential requisites for a valid donation.

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 Rohm Philippines' common shares from Rohm Fukuoka to Rohm Apollo. The transfer was done for a bona fide business purpose, which is to streamline the ownership of

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[1] Consolidated Revenue Regulations on Estate Tax and Donor's Tax Incorporating the Amendments Introduced by Republic Act No. 8424, the Tax Reform Act of 1997.

Rohm Philippines common shares by consolidating ownership thereof in one Japanese entity.

Likewise, there is essentially no reduction of the patrimony of the donor since the merger was executed between two wholly-owned subsidiaries (Rohm Apollo and Rohm Fukuoka) having the same ultimate parent company (Rohm). Ultimately, there can be no transfer that can be attributed on the additional capital contribution to Rohm Apollo since there was no transfer of actual ownership interests by Rohm, who remains to be the owner of the subject shares.

Further, it is vital to highlight that merger is the combining of two (2) or more corporations into one constituent corporation (surviving corporation).[2] This means that the separate existence of the constituent corporations shall cease,[3] and the surviving corporation shall possess all rights, privileges, and franchises of each of the constituent corporations, including all property and receivables, including share subscriptions, and all other interest of each constituent corporation **by operation of law**.[4] (Emphasis supplied)

However, we hold that the transfer does not comply with the provision under Section 40(C)(2) of the NIRC, as amended.

The NIRC, as amended provides instances wherein any gain or loss resulting from a merger between two or more corporations is not recognized, the reorganization having been considered as a tax-free merger. Section 40(C)(2) of the NIRC, as amended, states:

> "SEC. 40. *Determination of Amount and Recognition of Gain or Loss.* —
>
> -xxx-
>
> (C) *Exchange of Property.* —
>
> -xxx-
>
> (2) *Exception.* — No gain or loss shall be recognized if in pursuance of a plan of merger or consolidation —
>
> (a) A corporation, which is a party to a merger or consolidation, exchanges property solely for stock in a corporation, which is a party to the merger or consolidation;
>
> -xxx xxx xxx-"

A reading of this provision will reveal that in order to avail of the exception from the recognition of any gain or loss pursuant to a merger, the same requires that the constituent corporation[5] exchanges its property solely for the stock of another constituent corporation.

To restate, Rohm Fukuoka's common shares in Rohm Philippines were transferred to Rohm Apollo without any payment of compensation from Rohm Apollo considering that both corporations have the same ultimate parent company. In this scenario, there was no

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[2] Section 76 of the Corporation Code of the Philippines.
[3] Section 80(1) of the Corporation Code of the Philippines.
[4] Section 80(4) of the Corporation Code of the Philippines.
[5] A constituent corporation pertains to a corporation who is a party to a proposed merger or consolidate. Section 76 of the Corporation Code of the Philippines.

exchange of property solely for stock in another corporation as contemplated under Section 40(C)(2) of the NIRC, as amended. Thus, the same is inapplicable in the present case.

Nevertheless, the subject merger is still considered exempt pursuant to Article 13 of the Philippine-Japan Tax Treaty.

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
NOV 12 2018

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

NOV 16 2018

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TERESITA SALAZAR