REPUBLIC OF THE PHILIPPINES
DEPARTMENT OF FINANCE
BUREAU OF INTERNAL REVENUE
Quezon City

Section 40 (C) (2) and 6 (c) of the National Internal Revenue Code of 1997, as amended
BIR Ruling No. 0377-2019
[illegible]
[illegible]

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Attention: **ATTY. MARIA KATRINA C. FRANCO**
For the Firm

Gentlemen:

This refers to your letter dated February 21, 2017, requesting on behalf of your client, Global Medical Solutions, Inc. ("GMSI"), for a ruling on whether or not due to the merger of Syncor Overseas Ltd. ("SOL") and Global Medical Solutions, Ltd. ("GMSL"), both British Virgin Islands registered corporations, the transfer of shares of SOL in GMSI to GMSL as the surviving corporation, is subject to tax in the Philippines.

Background:

GMSI was registered as Syncor Philippines, Inc. ("Syncor Philippines") with the Securities and Exchange Commission ("SEC") on June 15, 1994, as a domestic corporation with address at 3/F No. 14 Economia Street, Pasig, Metro Manila, which is ninety-nine percent (99%) owned by Syncor International Corporation ("Syncor International"), an American Corporation duly organized and existing by virtue of the laws of the state of Delaware, USA, with address at 6464 Canoga Avenue, Woodland Hills, California, USA. At the time of Syncor Philippines' incorporation, Syncor International owned 132,745 (the "Subject Shares") out of 132,750 shares of common stock. Syncor Philippines also applied for and was authorized to do business in the Philippines under the Foreign Investments Act of 1991.

On January 2, 2013, Syncor International amended its corporate name to Cardinal Health 414, Inc. ("Cardinal Health").

In 2003, Cardinal Health assigned the 132,745 shares of common stock that it owned in the Corporation to SOL, an international business company under the laws of the British Virgin Islands, whose registered office is at Citco B.V.I. Limited, Citco Building, Wickams Cay, P.O. Box 662, Tortola, British Virgin Islands, through a Deed of Assignment of Shares of Stock dated June 19, 2003. The documentary stamp tax (DST) on the transaction was duly paid, and a Certification dated October 16, 2003 from the Bureau of Internal Revenue (BIR) was secured stating that the transaction is not subject to capital gains tax (CGT) pursuant to Article 14 of the RP-US Tax Treaty. Thereafter, a new Stock Certificate No. 007 was issued in the name of SOL.

On May 27, 2004, Syncor Philippines amended its corporate name to Global Medical Solutions, Inc. ("GMSI").

On November 30, 2007, SOL merged with GMSL, a Business Company established and existing under laws of the British Virgins Islands with address at Citco Building, Wickams Cay, P.O. Box 662, Tortola, British Virgin Islands, pursuant to a Written Plan of Merger, and

Articles of Merger also dated November 30, 2007, as a matter of strategic management to consolidate ownership in the companies' assets and liabilities. Under the Terms and Conditions of Merger enumerated in both the Written Plan of Merger and the Articles of Merger, the parties agree on the following:

1. GMSL is the sole shareholder of SOL, and will be the surviving company on the registration of the merger. All 2,393,413 issued and outstanding shares in SOL will, with the consent of the sole shareholder, be cancelled on the merger.

2. The 100 issued shares of GMSL shall, with the consent of the sole shareholder, remain outstanding on the merger.

3. The director and officer in the office of GMSL upon the effective date of the merger, shall remain in office and shall hold such office until the election, qualification of the respective successors or until their tenure is otherwise terminated in accordance with the law or the Memorandum of Articles of Association.

4. Upon the effective date of the merger, all property, assets, rights and interests owned by SOL shall, in accordance with the laws of the British Virgin Islands, immediately vest in GMSL subject to any liabilities, charges, debts and provisos attached thereto.

5. The merger of SOL into GMSL shall at all times be subject to and authorized in the manner as prescribed by the laws of the British Virgin Islands.

To date, the Subject Shares registered in the name of SOL have not yet been transferred to the name of GMSL, the surviving company.

On October 20, 2016, GMSI, through counsel, wrote the Revenue District Officer of Revenue District Office No. 39, requesting for legal opinion on the tax treatment of the merger, and requesting for confirmation of its opinion that the transaction is one that is tax exempt under Section 40 (C)(2) of the National Internal Revenue Code of 1997, as amended. The Revenue District Officer denied the request for legal opinion on the ground, *inter alia*, that under Revenue Memorandum Order No. 9-2014, a request for a ruling on tax exemption must be filed with the Law and Legislative Division of this Bureau. Hence, this request for ruling on the following:

1. Whether or not, due to the merger of SOL and GMSL, there was a transfer of GMSI shares that subjects either or both foreign corporations to tax in the Philippines; and

2. If not, whether or not GMSI can now transfer the shares in the name of SOL to GMSL.

In reply, please be informed as follows:

<u>Income tax</u>

Section 40 (C) (2) and (6) (b) of the National Internal Revenue Code of 1997, as amended, does not make any qualification or distinction as to its application to a corporation. Thus, its application to non-resident foreign corporation is well settled.[1] It provides that:

[1] BIR Ruling No. 0377-2019 dated July 05, 2019.

"SEC. 40. Determination of Amount and Recognition of Gain or Loss. –

xxx xxx xxx

(C) Exchange of Property. -

xxx xxx 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; or

(b) A shareholder exchanges stock in a corporation, which is a party to the merger or consolidation, solely for the stock of another corporation also a party to the merger or consolidation; or

(c) A security holder of a corporation, which is a party to the merger or consolidation, exchanges his securities in such corporation, solely for stock or securities in such corporation, a party to the merger or consolidation.

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(6) Definitions. –

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(b) The term 'merger' or 'consolidation', when used in this Section, shall be understood to mean: (i) the ordinary merger or consolidation, or (ii) the acquisition by one corporation of all or substantially all the properties of another corporation solely for stock: Provided, That for a transaction to be regarded as a merger or consolidation within the purview of this Section, it must be undertaken for a bona fide business purpose and not solely for the purpose of escaping the burden of taxation: Provided, further, That in determining whether a bona fide business purpose exists, each and every step of the transaction shall be considered and the whole transaction or series of transaction shall be treated as a single unit: Provided, finally , That in determining whether the property transferred constitutes a substantial portion of the property of the transferor, the term 'property' shall be taken to include the cash assets of the transferor."

Applying the above-quoted provisions in this case, the merger of SOL and GMSL is a merger within the contemplation of Section 40(C)(2), in relation to Section 40(C)(6)(b) of the National Internal Revenue Code of 1997, as amended, because upon the effective date of the merger, all property, assets, rights and interests owned by SOL shall, in accordance with the laws of the British Virgin Islands, immediately vest in GMSL subject to any liabilities, charges, debts and provisos attached thereto. Such merger is being undertaken for a bona fide business purpose as a matter of strategic management to consolidate ownership in the companies' assets and liabilities and not for the purpose of escaping the burden of taxation. Thus it qualifies for non-recognition of gain or loss for income tax purposes in accordance with Section 40 (C) (2) of the National Internal Revenue Code of 1997, as amended, and that no gain or loss shall be recognized by SOL, as the transferor of all its assets and liabilities, to GMSL pursuant to the Written Plan and Articles of Merger.

Accordingly, no gain or loss shall be recognized by GMSL, as the transferee, on its receipt of the GMSI shares pursuant to and as a consequence of the merger.

Cost Basis

Section 40 (C) (5) (a) and (b) of the National Internal Revenue Code of 1997, as amended, states:

"SEC. 40. Determination of Amount and Recognition of Gain or Loss. –

xxx xxx xxx

(C) Exchange of Property. -

xxx xxx xxx

(5) Basis. –

(a) The basis of the stock or securities received by the transferor upon the exchange specified in the above exception shall be the same as the basis of the property, stock or securities exchanged, decreased 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 shareholder and (b) the amount of any gain that was recognized on the exchange: Provided, That the property received as 'boot' shall have as basis its fair market value: Provided, further, That if as part of the consideration to the transferor, the transferee of property assumes a liability of the transferor or acquires from the latter property subject to a liability, such assumption or acquisition (in the amount of the liability) shall, for purposes of this paragraph, be treated as money received by the transferor on the exchange: Provided, finally, That if the transferor receives several kinds of stock or securities, the Commissioner is hereby authorized to allocate the basis among the several classes of stocks or securities.

(b) The basis of the property transferred in the hands of the transferee shall be the same as it would be in the hands of the transferor increased by the amount of the gain recognized to the transferor on the transfer."

Indubitably, the basis of the GMSI shares transferred in the hands of the transferee (GMSL) shall be the same as it would be in the hands of the transferor (SOL) increased by the amount of the gain, if any, recognized to the transferor on the transfer.

Value-Added Tax (VAT)

Section 105 of the National Internal Revenue Code of 1997, as amended, states that:

"SEC. 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.

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The phrase 'in the course of trade or business' means the regular conduct or pursuit of a commercial or an economic activity, including transactions incidental thereto, by any person regardless of whether or not the person engaged therein is a non-stock, nonprofit private organization *(irrespective of the disposition of its net income and whether or not it sells exclusively to members or their guests), or government entity."*

In view thereof, the transfer of the GMSI shares as a consequence of the merger is not subject to VAT pursuant to Section 105 of the National Internal Revenue Code of 1997, as amended. The transfer of the GMSI shares to effectuate a merger is not made in the course of business but by operation of law pursuant to the merger.

Donor's Tax

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 - SOL to donate to GMSL its GMSI shares since the transaction is purely for a legitimate business purpose. Thus, the merger will not be subject to donor's tax since there is no intention to donate and the transaction is a *bona fide* merger effected solely for business reasons.

Documentary Stamp Tax

Section 199 (m) of the National Internal Revenue Code of 1997, as amended by Republic Act (RA) No. 9243 and as implemented by RR No. 13-2004, states as follows:

"Sec. 199 Documents and Papers Not Subject to Stamp Tax. – The provision of Section 173 to the contrary notwithstanding, the following instruments, documents and papers shall be exempt from the documentary stamp tax:

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(m) Transfer of property pursuant to Section 40(c)(2) of the National Internal Revenue Code of 1997, as amended."

Thus, no DST is due on the surrender by SOL shareholders of their SOL shares for cancellation pursuant to the merger.

Also, while Section 9 of RR No. 13-2004 states that the shares of stocks issued in exchange for property is subject to DST due under Section 174 of the National Internal Revenue Code of 1997, as amended, if they are original issues, still, the shares of stock issued by GMSL is not subject to DST on original issuance of shares under Section 174 of the National Internal Revenue Code of 1997, as amended, because GMSL is a corporation organized and existing under the laws of the British Virgin Islands, therefore, not within the Philippine taxing jurisdiction. Section 173 of the National Internal Revenue Code of 1997, as amended, only imposes DST on obligations or rights arising from Philippine sources or property situated in the Philippines.

Strict compliance of requirements to avail non-recognition of gains provided for in Section 40(C)(2) of the National Internal Revenue Code of 1997, as amended.

In order that the parties to the exchange can avail of the non-recognition of gains provided for in Section 40 (C) (2) of the National Internal Revenue Code of 1997, as amended, they should comply with the requirements hereunder mentioned.

The parties shall cause the Corporate Secretary of GMSI to annotate at the back of the Certificates of Stock the date the merger was executed, the original or historical cost of acquisition of the 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 Corporate Secretary of this condition shall be penalized under Section 275 of the National Internal Revenue Code of 1997, as amended.

It is further required that the Certificate of Stock that bears the annotation of substituted bases of the shares of stock transferred/received in connection with this transaction, as duly certified by the Corporate Secretary, should be submitted to the Law and Legislative Division, Bureau of Internal Revenue, 7/F National Office Building, Diliman, Quezon City, within ninety (90) days from the date of the receipt of this Ruling, by any of the parties to the transaction. Otherwise, this ruling shall be void and without effect, and the Chief, Law and Legislative Division shall refer the docket of the case to the Prosecution Division for appropriate action.

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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