REPUBLIC OF THE PHILIPPINES
DEPARTMENT OF FINANCE
BUREAU OF INTERNAL REVENUE

Quezon City

Secs. 24 (C); 98; 175 of the Tax Code of 1997, as amended; RR No. 13-2004
BIR Ruling No. OT-0653-2020
OT-[illegible]-2021
DEC 14 2021

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Attention: **Attys. Jose Lis C. Leagogo**
McDonald Abalos
and
Pola Lia Celina L. Lamarca

Gentlemen:

This refers to your request, on behalf of your client, **THE HONG KONG AND SHANGHAI BANKING CORPORATION LIMITED** (the "HSBC"), for confirmation that the change of trustee of the Manila Polo Club Inc. (MPCI) Membership share from one trustee to another trustee is not subject to capital gains tax (CGT), donor's tax and documentary stamp tax (DST).

Background:

HSBC is a corporation duly registered in Hong Kong and is authorized to do business in the Philippines through its Philippine Branch with address at HSBC Centre 3058 Fifth Avenue, West Bonifacio Global City, Taguig City.

HSBC purchased a proprietary share in Manila Polo Club Inc. ("Manila Polo Club" or the "Club") covered by Proprietary Membership Certificate No.

Under the Club's Articles of Incorporation, only natural persons shall be admitted as proprietary members, as reflected in Article 7(c) of its Articles of Incorporation, to wit

> "(c) Only natural persons shall be admitted as proprietary members. No person shall be entitled to own more than one proprietary membership certificate."

Though only natural persons are admitted as proprietary members, the Proprietary Membership Certificate itself may be owned by a corporate entity. As could be gleaned in Article 7(c) above, admission to be a member and enjoyment of the facilities of the Club is limited only to natural persons, but as regards ownership of the proprietary membership certificate, it may be owned by a corporation.

Since only natural persons can enjoy the facilities, HSBC assigns the proprietary Membership share in Manila Polo Club ("MPCI Share") to a senior executive ("trustee") for the sole purpose that he or she may enjoy the facilities and amenities of MPCI while he or she works at HSBC. Ownership remains with HSBC.

HSBC maintains the beneficial ownership over the MPCI Share, as the same remains in its books as an asset as of December 31, 2020.

The trustee executes a Declaration of Trust in favor of HSBC confirming that there is no transfer of beneficial ownership of the MPCI Share. In the Declaration of Trust, it is shown that:

a) The senior executive is constituted as a trustee of HSBC, the trustor, as regard the MPCI Share;
b) Only legal ownership over the MPCI Share is transferred to the senior executive while the beneficial ownership of the MPCI Share remains with HSBC;
c) The transfer is for the sole purpose of making the senior executive qualified to avail of the use of the facilities of Manila Polo Club, Inc; and
d) No consideration was paid for the transfer.

In order for the trustee to enjoy the facilities of Manila Polo Club, a Proprietary Membership Certificate is issued by Manila Polo Club in the name of the trustee, upon submitting a copy of the Declaration of Trust. The trustee is then issued a card, which is presented every time the trustee uses the facilities of Manila Polo Club.

The MPCI Share is currently in the name of Mr. John Alistair Nichols effected through a Declaration of Trust dated March 6, 2015 executed by Mr. Nichols in favor of HSBC.

On August 25, 2021, Ms. Melina C. Concha ("Ms. Concha"), HSBC's Senior Vice President and Head of Wholesale Banking Management, executed a Declaration of Trust of even date in favor of HSBC. Ms. Concha is now the current trustee for the MPCI Share. A replacement of Proprietary Membership Certificate No. ., however, has not yet been issued to Ms. Concha until a ruling from the Bureau of Internal Revenue is issued in her favor.

We reply, as follows:

The transfer of MPCI Share from Mr. Nichols to Ms. Concha is not subject to CGT and DST.

Upon execution of the Declaration of Trust, a trust relationship was created between HSBC and Ms. Concha

A trust is a legal relationship between one person having an equitable ownership of property and another person owning the legal title to such property, the equitable ownership of the former entitling him to the performance of certain duties and the exercise of certain powers by the latter. What distinguishes a trust from other relations is the separation of the legal title and equitable ownership of the property. In a trust relation, legal title is vested in the fiduciary while equitable ownership is vested in a *cestui que trust*[1].

[1] Soledad Caezo substituted by William Caezo and VictorianoCaezo v. Concepcion Rojas, G.R. No. 148788, 23 November 2007.

In relation thereto, a declaration of trust has been defined as an act by which a person acknowledges that the property, title to which he holds, is held by him for the use of another[2].

In the Declaration of Trust which Ms. Concha executed, she acknowledged that the transfer did not give her any kind of right, claim or interest whatsoever in the MPCI Share and that she is holding only the legal ownership of the same with the beneficial ownership pertaining to HSBC. Here, the trustor and the *cestui que trust* is HSBC while the fiduciary, also known as the trustee, is the assignee, Ms. Concha.

A trust arises in favor of one who pays the purchase money of property in the name of another, because of the presumption that he who pays for a thing intends a beneficial interest therein for himself.[3] The principle of a resulting trust is based on the equitable doctrine that valuable consideration, and not legal title, determines the equitable title or interest and are presumed always to have been contemplated by the parties. They arise from the nature or circumstances of the consideration involved in a transaction whereby one person thereby becomes invested with legal title but is obligated in equity to hold his legal title for the benefit of another.[4]

In the case of *Sime Darby Pilipinas, Inc. v. Mendoza*[5], Sime Darby acquired a Class "A" club share in Alabang Country Club ("ACC") in 1987, but being a corporation which was expressly disallowed by ACC's By-Laws to acquire and register the club share under its name, registered the share under the name of respondent Mendoza, Sime Darby's sales manager at the time. The Supreme Court held that a trust arrangement existed between Sime Darby and Mendoza and while the share was bought by Sime Darby and placed under the name of Mendoza, the latter's title was only limited to the use and enjoyment of the club's facilities and privileges while employed with the company.

In the instant case, HSBC purchased the MPCI Share and intends to give legal title thereto to its trustee-appointee, which title entitles the trustee-appointee only to the use and enjoyment of the club's facilities since, under the Articles of Incorporation and By-laws of MPC, only natural persons may become registered members.

The transfer of the legal title of the MPCI Share from Mr. Nichols (old trustee-appointee) to its new trustee-appointee, Ms. Concha, is not subject to CGT considering that the transfer involves neither monetary consideration nor change in beneficial ownership.

Section 24(C) of the National Internal Revenue Code (Tax Code) of 1997, as amended, provides that CGT is imposed upon the net capital gains realized during the taxable year from the sale, barter, exchange or other disposition of shares of stock in a domestic corporation, except shares sold, or disposed of through the Stock Exchange. In other words, CGT is imposed on the gain or profit from the sale of capital assets.[6]

In this case, the Membership Share will be transferred from Mr. Nichols's name, as the former trustee, to Ms. Concha, who will be HSBC's new trustee-appointee. Since Mr. Nichols only possessed legal title over the MPCI Share, the transfer of the subject share in favor of Ms. Concha will be limited only to the transfer of the legal title.

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[2] Resurreccion de Leon, et al. v. Emiliano Molo-Peckson, et al., G.R. No. L-17809, 29 December 1962.
[3] Marsh Thomson v. Court of Appeals and the American Chamber of Commerce of the Philippines, Inc., G.R. No. 116631, 28 October 1998.
[4] Spouses Trinidad v. Imson, G.R. No. 197728, 16 September 2015.
[5] G.R. No. 202247, 19 June 2013.
[6] Salud v. Commissioner of Internal Revenue, C.T.A. EB CASE NO. 412, 30 April 2009.

The intention of HSBC in giving legal title of the MPCI Share to Ms. Concha is to make her an extension of HSBC's ownership over the same. Practically speaking, being a juridical entity, HSBC cannot directly enjoy the privileges that come with owning the MPCI Share, hence, must assign someone to use the club facilities on its behalf.

Since the beneficial ownership over the MPCI Share remains with HSBC, there is no actual transfer of ownership of the said share as between HSBC and its trustees and/or from such trustees to the next trustees, and therefore, no gain or profit shall be recognized.

Therefore, considering that there is no actual transfer of ownership and no monetary consideration, and consequently no gain or profit involved in the transfer which is merely by virtue of an assignment as evidenced by the Declaration of Trust, this Office confirms that the transfer is not subject to CGT.

The Transfer is not subject to DST

Likewise, the transfer is not subject to DST under Section 175 of the Tax Code of 1997, as amended. The rule is that the assignment of shares of stock of a domestic corporation is subject to DST upon execution of the deed transferring ownership or rights thereto, or upon deliver, assignment or indorsement of such shares in favor of another.

Revenue Regulations (RR) No. 13-2004 dated December 23, 2004, implementing the provisions of Republic Act (RA) No. 9243, otherwise known as *An Act Rationalizing Further the Structure and Administration of the Documentary Stamp Tax*[7] qualified this rule by stating that for a sale or exchange to be taxable, there must be *an actual or constructive transfer of beneficial ownership of the shares of stock from one person to another.* Section 4 of RR No. 13-2004 provides, to wit:

> "For a sale or exchange to be taxable, there must be an actual or constructive transfer of beneficial ownership of the shares of stock from one person to another. Such transfer may be manifested by the clear exercise of attributes of ownership over such stocks by the transferee, or by an actual entry of a change in the name appearing in the certificate of stock or in the Stock and Transfer Book of the issuing corporation or by any entry indicating transfer of beneficial ownership in any form of registry including those of a duly authorized scripless registry, such as those maintained for or by the Philippine Stock Exchange. <u>However, if by the transfer of certificates of stock from a resigned trustee to a newly appointed trustee such certificate of stock remains in the name of the cestui que trust or the resigned trustee so that the new trustee is constituted as mere depository of the stock, **such transfer is not taxable**.</u> Provided, however, that transfer of shares to "nominees" to qualify them to sit in the board or to qualify them to perform any act in relation to the corporation shall not be subject to the DST provided herein only upon proof of a duly executed Nominee Agreement showing the purpose of the transfer; that the transfer is without consideration other than the undertaking of the nominee to only represent the beneficial owner of the stock; and the transfer is in trust." (Emphasis and underscoring supplied)

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[7] RR 13-2004.

The herein transfer comply with the afore-cited rules. First, there is no actual or constructive transfer of the beneficial ownership of the shares. Only the legal title was transferred when HSBC changed its appointees from Mr. Nichols to Ms. Concha. Second, the execution of and by the express provisions of the Declaration of Trust, the intention of the parties was clearly for Mr. Nichols and now Ms. Concha to hold the share in trust for HSBC.

Furthermore, in the case of *Commissioner of Internal Revenue v. First Express Pawnshop, Inc.*[8], the Supreme Court explained that Section 175 and 176 of the Tax Code of 1997, as amended, on DST contemplates the execution of a subscription agreement in order for a taxpayer to be liable to pay the DST. The Supreme Court ruled, thus:

> "As pointed out by the CTA, Sections 175 and 176 of the Tax Code contemplate a subscription agreement in order for a taxpayer to be liable to pay the DST. A subscription contract is defined as any contract for the acquisition of unissued stocks in an existing corporation or a corporation still to be formed. A stock subscription is a contract by which the subscriber agrees to take a certain number of shares of the capital stock of a corporation, paying for the same or expressly or impliedly promising to pay for the same."

A mere transfer of a share from one trustee to another, without change in the beneficial ownership of the share is, therefore, not the taxable transaction being contemplated under the Tax Code provisions on DST. That the transfer from Mr. Nichols to Ms. Concha is without a subscription agreement or any kind of consideration is indicative of the real intention of the parties that there would be no transfer of beneficial ownership of the MPCI Share. The same remains with HSBC.

In view thereof, the herein transfer cannot be subject to DST as there are no transfer or conveyance to Ms. Concha of the beneficial ownership of or any right, claim or interest over the MPCI Share or over the assets of MPCI. There being no new conveyance to speak of in this case, there is no new exercise of a privilege upon which DST may be imposed. Consequently, since there will be no transfer or conveyance of the MPCI Share from Mr. Nichols to Ms. Concha, the same shall not be subject to donor's tax under Section 98 of the Tax Code of 1997, as amended.

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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gps(HSBC)

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[8] G.R. Nos. 172045-46, 16 June 2009.