REPUBLIC OF THE PHILIPPINES
DEPARTMENT OF FINANCE
BUREAU OF INTERNAL REVENUE

Quezon City

Sec. 28(B)(5)(c), 40 (C) & (6)(c), Tax Code of 1997, as amended	
BIR Ruling No. 377-19 BIR Ruling No. DA-150-00	
OT- 338-2022	
JUN 30 2022	

QUISUMBING TORRES
12th Floor, Net One Center
26th Street corner 3rd Avenue
Crescent Park West, Bonifacio Global City
1634Taguig City

Attention: **Atty. Dennis G. Dimagiba**
Atty. Jose Jaime V. Cruz

Gentlemen:

This refers to your letter dated March 19, 2020 requesting on behalf of your client, **Infinera International Corporation** ("**Infinera**") for confirmation that the transfer of the shares of capital stock of Coriant Philippines, Inc. [formerly Tellabs Philippines, Inc.] ("**Coriant Ph**") from Coriant International Inc. [formerly Tellabs International, Inc.] ("**Coriant US**") to Infinera, pursuant to an offshore merger between Coriant US and Infinera, is not subject to the capital gains tax (CGT) imposed under Section 28(B)(5)(c) of the National Internal Revenue Code of 1997 (Tax Code), as amended.

Background

Infinera is a corporation duly organized and registered under the laws of the State of Delaware, United States of America (USA), with principal office at 160 Greentree Drive, Suite 101 Dover Delaware 19904, United States.

Coriant US was a corporation duly organized and registered under the laws of the State of Illinois, United States of America. Coriant US was the legal and beneficial owner of 106,955 shares and beneficial owner of five (5) shares in Coriant Ph, which represent 100% of the total subscribed capital stock of Coriant Ph.

Effective December 31, 2019, Infinera and Coriant US merged, with Infinera as the surviving corporation. As a consequence of the merger, the shares of the capital stock of Coriant Ph were transferred from Coriant US to Infinera by operation of law.

In reply thereto, ple se be informed as follows:

Income Tax / CGT

Section 40 (C)(2 a d 6 (b) of the Tax Code, as amended, does not make any qualification or distinction as to its a pl cation to a corporation. Thus, its application to non-resident foreign corporation is well-settl d.[1] It provides:

"*SEC. 40. Dete ni ation of Amount and Recognition of Gain or Loss. —*

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(C) Exchange of Pr perty. —

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(2) Exception. — N gain or loss shall be recognized if in pursuance of a plan of merger or co s lidation —

(a) A corpo at on, which is a party to a merger or consolidation, exchanges propert so ely for stock in a corporation, which is a party to the merger or cons lic ation; or

(b) A share ol ler exchanges stock in a corporation, which is a party to the merger r onsolidation, solely for the stock of another corporation also a party t e merger or consolidation; or

(c) A secur y holder of a corporation, which is a party to the merger or consolic ati n, exchanges his securities in such corporation, solely for stock o securities in such corporation, a party to the merger or consolic ati n.

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(6) Definitions. —

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(b) The ter 'merger' or 'consolidation', when used in this Section, shall be underst o to mean: (i) the ordinary merger or consolidation; or (ii) the acquisit n by one corporation of all or substantially all the properties of another co poration solely for stock: Provided, That for a transaction to

[1] BIR Ruling No. 377-2019 da ed uly 5, 2019

> *be rega d d as a merger or consolidation within the purview of this Section, it must be undertaken for a bona fide business purpose and not solely f r the purpose of escaping the burden of taxation: Provided, further, Th t in determ ning whether a bona fide business purpose exists, each an e ery step of the transaction shall be considered and the whole transac o or series of transactions shall be treated as a single unit: Provide nally, That in determining whether the property transferred constitu s a substantial portion of the property of the transferor, the term 'propert hall be taken to include the cash assets of the transferor."*

The application c f ection 40 (C)(2) of the Tax Code, as amended, to nonresident foreign corporation is well-settl d. Section 40 (C)(2) of the Tax Code, as amended, does not make any qualification or distincti n s to its application to a corporation. It provides that:

> *"No gain o loss shall also be recognized if property is transferred to a corporation by p rson, alone or together with others, not exceeding four (4) persons, in exch n e for stock or unit of participation in such a corporation of which as a resul of uch exchange the transferor or transferors, collectively, gains or maintains con ro of said corporation: Provided, That stocks issued for services shall not be cons d ed as issued in return for property."*

In a merger, the s r ving/absorbing corporation succeeds to the rights and liabilities of the absorbed corporation an merely carries on the identity of the latter.[2] The underlying assumption of tax-free exchange pr sions generally is that the new property received is substantially a continuation of the old stment still unliquidated.[3] Hence, a merger does not involve a sale, exchange or dispositio shares. Therefore, the transfer of the shares of capital stock of Coriant Ph from Corian U S (absorbed corporation) to Infinera (surviving corporation) pursuant to a merger effected in a c rdance with the laws of the State of Delaware, USA is not subject to the CGT imposed under Se tion 28 (B)(5)(c) of the Tax Code, as amended.

Applying the ab e-quoted provisions in this case, the merger of Infinera and Coriant US is a merger within the c nt mplation of Section 40 (C)(2), in relation to 40 (C)(6)(b) of the Tax Code, as amended, beca se upon the effective date of the merger, all property, assets, rights and interests owned by Cori nt US shall, in accordance with the Delaware General Corporation Law, immediately vest in Infi er subject to any liabilities, charges, debts and provisos attached thereto. Such merger is being nc ertaken for a *bona fide* business purpose as a matter of strategic management to consoli at ownership in the companies' assets and liabilities and not for the purpose of escaping the u den 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 Tax Code, as amended, and that no gain or loss sh l e recognized by Coriant US, as he transferor of all its assets and liabilities, to Infinera pu s ant to the merger. Likewise, no gain or loss shall be recognized by Infinera, on its receipt o th Coriant US shares pursuant to and as a consequence of the merger.

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[2] BIR Ruling No. UN-397-95 d te October 14, 1995 citing Cashman vs. Brownlee, 27 N.E. 560

[3] BIR Ruling No. 024-05 date D cember 23, 2005

Cost Basis

Section 40 (C)(5 a and (b) of the Tax Code, as amended, states:

"SEC. 40. Deter ir ation of Amount and Recognition of Gain or Loss. -

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(C) Exchange of r perty. –

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(5) Basis. –

(a) The basi of the stock or securities received by the transferor upon the exchang s ecified in the above exception shall be the same as the basis of the pr p rty, stock or securities exchanged, decreased by (1) the money receivec a d (2) the fair market value of the other property received, and increase l y (a) the amount treated as dividend of the shareholder and (b) h amount of any gain that was recognized on the exchange: Provide hat the property received as 'boot' shall have as basis its fair market v il e: Provided, further, That if as part of the consideration to the transfer r, he transferee of property assumes a liability of the transferor or acqui e: from the latter property subject to a liability, such assumption or acqu i on (in the amount of the liability) shall, for purposes of this paragra h be treated as money received by the transferor on the exchang : Provided, finally, That if the transferor receives several kinds of stock r ecurities, the Commissioner is hereby authorized to allocate the basi a ong the several classes of stocks or securities.

(b) The bas f the property transferred in the hands of the transferee shall be the s m as it would be in the hands of the transferor increased by the amount f he gain recognized to the transferor on the transfer."

Indubitably, the t as s of the Coriant Ph shares in the hands of the transferee (Infinera) shall be the same as it would e n the hands of the transferor (Cor ant US) increased by the amount of the gain, if any, recogniz d o the transferor on the transfer.

Value-Added Tax (VAT

Section 105 of th ax Code, as amended, reads:

"SEC. 105. Pers n Liable. – Any person who, in the course of trade or business, sells, barters, ex h nges, leases goods or properties, renders services, and any

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person who imp or s 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 t e course of trade or business' means the regular conduct or pursuit of a commercia or an economic activity, including transactions incidental thereto, by any person reg irdless of whether or not the person engaged therein is a non-stock, non-proj t private organization (irrespective of the disposition of its net income and wl etl er or not it sells exclusively to members or their guests), or government ent ty."

In view thereof, the transfer of the Coriant Ph shares as a consequence of the merger is not subject to VAT pursua it to Section 105 of the Tax Code, as amended. The transfer of the Coriant Ph 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 ou jurisprudence is the fact that the essential elements of a valid donation are: (1) the reduction o the patrimony of the donor; (2) the increase in the patrimony of the donee; and, (3) the intent to do ar act of liberality (animus donandi).

Clearly, there is no intention on the part of any of the parties to the merger – Coriant US to donate to Infinera its Coriant Ph 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 *bo ia fide* merger effected solely for business reasons.

Documentary Stamp T ax

Section 199 (m) of the Tax Code, as amended by Republic Act (RA) No. 9243 and as implemented by Reven ie Regulations (RR) No. 13-2004, states as follows:

"SEC. 1 9. Documents and Papers Not Subject to Stamp Tax. — The provisions of Se tion 173 to the contrary notwithstanding, the following instruments, do uments and papers shall be exempt from documentary stamp tax:

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(m) Tra ister of property pursuant to Section 40(c)(2) of the National Internal Reven e Code of 1997, as amended."

Thus, no DST is due on the surrender by Coriant US shareholders of their Coriant Ph shares for cancellation pursua t to the merger.

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Also, while Section 9 of RR No. 13-2004 states that the shares of stocks issued in exchange of property is subject to DST due under Section 174 of the Tax Code, as amended, if they are original issues, still, the shares of stock issued by Infinera is not subject to DST on original issuance of shares under Section 174 of the Tax Code, as amended, because Infinera is a corporation organized and existing under the laws of Delaware, USA, therefore, not within the Philippine taxing jurisdiction. Section 173 of the Tax Code, 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) and (6)(c) of the Tax Code

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 Tax Code, as amended, they should comply with the requirements hereunder mentioned.

The parties shall cause the Corporate Secretary of Coriant Ph 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 277 of the Tax Code, 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 ascertained 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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