REPUBLIC OF THE PHILIPPINES
DEPARTMENT OF FINANCE
BUREAU OF INTERNAL REVENUE

Sec. 60(B), Tax Code, as amended
BIR Ruling No. 1301-18
OT- 393 - 2022
SEP 23 2022

Gatmaytan Yap Patacsil Gutierrez & Protacio
30/F 88 Corporate Center
Sedeño cor. Valero Streets
Salcedo Village, Makati City

Attention: **Atty. Anthony Mark A. Gutierrez**
Atty. Roxanne B. Tadique
Atty. Kyle D. Irasusta

Gentlemen:

This refers to your request on behalf of your client, **HOLCIM PHILIPPINES MANUFACTURING CORPORATION RETIREMENT FUND**[1] ("HPMC Retirement Fund"), for a ruling confirming that the income it earned from the sale of its shares (referred to as the "transaction") in Clinco Corporation ("Clinco") to Holderfin B.V. ("Holderfin"), is exempt from income tax including capital gains tax (CGT) pursuant to Section 60 (B) of the National Internal Revenue Code of 1997 (Tax Code), as amended.

Background

1. HPMC is a domestic corporation engaged in the business of manufacturing all kinds of cement products.

2. The HPMC Retirement Fund was formed to pay retirement, resignation, and separation benefits to HPMC employees. The vesting of benefits from the retirement fund is governed by the Retirement Plan Rules and Regulations, as amended by the 2000 and 2009 Amendments ("Plan Rules").

3. On the other hand, AB Capital & Investment Corporation ("AB Capital") is a corporation which, through its Trust and Investment Division, currently manages the HPMC Retirement Fund as trustee, in favor of HPMC, the trustor.

[1] Formerly, Alsons Cement Corporation Retirement Fund.

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4. The HPMC Retirement Fund, as well as the original Plan Rules, were established during the time that HPMC was still known as Alsons Cement Corporation.

5. The Plan Rules were amended on September 1, 2000 and January 1, 2009. Under BIR Ruling No. ERP-124-2003 dated June 17, 2003, the BIR confirmed that the amendments to the Plan Rules, together with the original Plan Rules, continue to qualify as a "reasonable retirement plan", and qualify for tax exemptions under Section 32 (B)(6)(a) of the Tax Code, as amended. It further stated that HPMC Retirement Fund is exempt from 20% final tax on interest income. The 2009 Amendments essentially changed the name of the Plan Rules from "Alsons Cement Corporation Retirement Plan" to "Holcim Philippines Manufacturing Corporation Retirement Plan" and closed it to new members.

The Transaction

1. A trust agreement was executed on December 19, 2018 between HPMC, as trustor, and AB Capital, as trustee, which authorized AB Capital to administer and manage the HPMC Retirement Fund in accordance with the terms and conditions of the trust agreement.

2. The assets held in trust by AB Capital include the HPMC Retirement Fund's shares in Clinco with a par value of ₱ per share or aggregate par value of ₱) (the "shares"), acquisition cost of ₱ as of March 2019, and book value of ₱) as of December 31, 2018.

3. The shares of HPMC Retirement Fund in Clinco were sold to Holderfin for a selling price of ₱ on March 18, 2019. The transaction resulted in a capital gain on the part of the HPMC Retirement Fund.

4. The documentary stamp tax (DST) on the transaction was paid on April 5, 2019. The CGT return, wherein the HPMC Retirement Fund indicated that it intended to avail of the exemption granted under Section 60 (B) of the Tax Code, as amended, was filed on April 4, 2019.

In reply thereto, please be informed that a careful review of the Plan Rules disclose that it remains to be:

1. a definite written program;

2. more or less permanent in character;

3. covers all regular employees of the company;

4. non-discriminatory;

5. duly funded and trusteed;

6. provides for non-forfeitable rights;

7. expressly provides that forfeitures must not be applied to increase the benefits any employee would receive, but must be used to reduce the employer's contribution under the plan; and

8. finally, provides that no part of the corpus or income of the Trust Fund shall be used for or diverted to purposes other than for the exclusive benefit of the member-employees and their beneficiaries.

Hence, the Plan Rules continue to be a "reasonable retirement plan" within the contemplation of Section 32 (B)(6)(a) of the Tax Code, as amended.

In relation thereto, Section 60 (B) of the Tax Code, as amended, provides:

> *"**SEC. 60. Imposition of Tax.** –*
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> *x x x x x x x x x*
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> ***(B) Exception.** - The tax imposed by Title II shall not apply to employees' trust which forms part of a pension, stock bonus, or profit-sharing plan of an employer for the benefit of some or all of his employees (1) if contributions are made to the trust by such employer, or employees, or both for the purpose of distributing to such employees the earnings and principal of the fund accumulated by the trust in accordance with such plan, and (2) if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees. . ."*

Sec. 60 (B), supra specifically exempted employees' trust from income tax. Since the final tax and withholding tax thereof are embraced within the title on "Income Tax," it follows that said trust is exempt from the coverage of the withholding tax regulations. Otherwise, the exception becomes meaningless.

Similarly situated is the case of *Commissioner of Internal Revenue vs. Court of Appeals*[2], G.R. No. 95022 promulgated on March 23, 1992, where the Court upheld the judgement of the respondent Court of Appeals in affirming the decision of the Court of Tax Appeals, which ruled —

> *"x x x it is significant to note that the GCL Plan was qualified as exempt from income tax by the Commissioner of Internal Revenue in accordance with Rep. Act No. 4917 approved on 17 June 1967. This law*

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[2] G.R. No. 95022 promulgated on March 23, 1992.

specifically provided:

> *Sec. 1. Any provision of law to the contrary notwithstanding, the retirement benefits received by officials and employees of private firms, whether individual or corporate, in accordance with a reasonable private benefit plan maintained by the employer shall be exempt from all taxes and shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatsoever except to pay a debt of the official or employee concerned to the private benefit plan or that arising from liability imposed in a criminal action;*

x x x x x x x x x

And rightly so, by virtue of the raison de'etre behind the creation of employees' trusts. Employees' trusts or benefit plans normally provide economic assistance to employees upon the occurrence of certain contingencies, particularly, old age retirement, death, sickness, or disability. It provides security against certain hazards to which members of the Plan may be exposed. It is an independent and additional source of protection for the working group. What is more, it is established for their exclusive benefit and for no other purpose.

The tax advantage in RA No. 1983, Section 56(b), was conceived in order to encourage the formation and establishment of such private Plans for the benefit of laborers and employees outside of the Social Security Act. Enlightening is a portion of the explanatory note to H.B. No. 6503, now R.A. 1983, reading:

> *Considering that under Section 17 of the Social Security Act, all contributions collected and payments of sickness, unemployment, retirement, disability and death benefits made thereunder together with the income of the pension trust are exempt from any tax, assessment, fee, or charge, it is proposed that a similar system providing for retirement, etc. benefits for employees outside the Social Security Act be exempted from income taxes. (Congressional Record, House of Representatives, Vol. IV, Part. 2, No. 57, p. 1859, May 3, 1957; cited in Commissioner of Internal Revenue v. Visayan Electric Co., et al., G.R. No. L-22611, 27 May 1968, 23 SCRA 715).*

It is evident that tax-exemption is likewise to be enjoyed by the income of the pension trust. Otherwise, taxation of those earnings would result in a

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diminution of accumulated income and reduce whatever the trust beneficiaries would receive out of the trust fund. This would run afoul of the very intendment of the law.

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Notably, too, all the tax provisions herein treated of come under Title II of the Tax Code on "Income Tax." Section 21 (d), as amended by Rep. Act No. 1959, refers to the final tax on individuals and falls under Chapter II; Section 24 (cc) to the final tax on corporations under Chapter III; Section 53 on withholding of final tax to Returns and Payment of Tax under Chapter VI; and Section 56 (b) to tax on Estates and Trusts covered by Chapter VII, Section 56 (b), taken in conjunction with Section 56 (a), supra, explicitly exempts employees' trusts from "the taxes imposed by this Title." Since the final tax and the withholding thereof are embraced within the title on "Income Tax," it follows that said trust must be deemed exempt therefrom. Otherwise, the exception becomes meaningless.

There can be no denying either that the final withholding tax is collected from income in respect of which employees' trusts are declared exempt (Sec. 56 [b], now 53 [b], Tax Code). The application of the withholdings system to interest on bank deposits or yield from deposit substitutes is essentially to maximize and expedite the collection of income taxes by requiring its payment at the source. If an employees' trust like the GCL enjoys a tax-exempt status from income, we see no logic in withholding a certain percentage of that income which it is not supposed to pay in the first place.

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Considering that it is still a reasonable Retirement Benefit Plan at present time, this Office is of the opinion as it hereby holds that HPMC Retirement Fund's investments remain exempt from income tax and consequently from withholding tax pursuant to Section 60 (B) of the Tax Code, as amended. Thus, the income it earned from the sale of its shares in Clinco to Holderfin is exempt from CGT under Section 27 (D)(2) of the Tax Code, as amended, pursuant to Section 60 (B) of the same Code, and consequently from withholding tax prescribed in Revenue Regulations No. 2-98, as amended.

It is worthy to note, however, that the tax incentive granted to a pension trust under Section 60 (B) of the Tax Code, as amended, is limited only to Title II which refers to Income Tax. Please note that stock transaction tax under Section 127 (A) of the Tax Code, as amended, is not embraced within the title of "Income Tax." Thus, the stock transaction tax which is a percentage tax under Title V and DST under Section 175 both of the Tax Code, as amended, are not covered by Section 60 (B) of the same Code. Accordingly, the sale by

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HMPC Retirement Fund of its shares of stocks in Clinco to Holderfin shall be subject to stock transaction tax, in case said shares are listed in the local stock exchange, and DST.

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,

LILIA CATRIS GUILLERMO
Commissioner of Internal Revenue

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