REPUBLIC OF THE PHILIPPINES
DEPARTMENT OF FINANCE
BUREAU OF INTERNAL REVENUE

Quezon City

Sec. 40(C)(2)&(6)(b) of the Tax Code of 1997, as amended; RR No. 18-01
BIR Ruling No. 214-12 BIR Ruling No. 100-17 BIR Ruling No. 075-18
S-ITC M - 426 - 2021
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Attention: **Carlos G. Baniqued**
and
Ana Margaret T. Dahilig

Gentlemen:

This refers to your letter request for confirmation of your opinion that the merger between **San Miguel Yamamura Packaging Corporation ("SMYPC")**, herein referred to as the "Surviving Corporation", and **San Miguel Yamamura Asia Corporation ("SMYAC")**, hereinafter referred to as the "Absorbed Corporation", is a tax-free merger in accordance with Section 40(C)(2) and 6(b) of the National Internal Revenue Code (Tax Code) of 1997, as amended.

Background

1. **SMYPC** is a corporation duly organized and existing under Philippine laws with principal office at 10th Floor, San Miguel Properties Centre, No. 7 St. Francis Street, Mandaluyong City and Taxpayer Identification Number ("TIN") As of June 30, 2019, SMYPC has an authorized capital stock of Eleven Billion Pesos (P11,000,000,000.00) divided into Eleven Million (11,000,000) common shares with a par value of One Thousand Pesos (Php 1,000.00) per share, of which, Ten Million Seven Hundred Eighty-Nine Thousand Thirty-One (10,789,031) shares have been issued and outstanding shares.

2. **SMYAC**, on the other hand, is also a corporation duly organized and existing under Philippine laws with principal office at Km. 27, Aguinaldo Highway, Anabu II, Imus, Cavite and TIN It has a total authorized capital stock of One Billion Seven Hundred Million Pesos (P1,700,000,000.00) containing Seventeen Million (17,000,000) shares, divided into Seven Million (7,000,000) common shares and Ten Million (10,000,000) preferred shares, both with a par value of One Hundred Pesos (Php 100.00) per share, all of which have been issued and outstanding.

3. On October 23, 2019, SMYPC and SMYAC entered into a Plan of Merger, with SMYPC as the Surviving Corporation, wherein at least a majority of the respective Board of Directors and stockholders holding at least two-

thirds (2/3) of the outstanding capital stock of SMYPC and SMYAC approved on September 19, 2019. Under such merger, the effective date shall be on the first day of the month following the SEC issuance of the Certificate of Merger. On February 24, 2020, SEC approved the Articles and Plan of Merger of the constituent corporations and issued the Certificate of Filing of the Articles and Plan of Merger on the same date.

4. The stockholders of the said corporations approved such merger in order to simplify the operations, improve administrative efficiency, increase financial strength, eliminate duplication of functions and maintenance costs, and attain greater efficiency and economy in the management of the businesses for the mutual advantage of SMYPC and SMYAC.

5. Under the said approved Plan of Merger, SMYPC and SMYAC will be merged in accordance with the Revised Corporation Code, and SMYAC exchange all its assets, net of liabilities and obligations for such number of common shares of the Surviving Corporation (SMYPC), based on the balance sheet of SMYAC as of June 30, 2019.

6. As of June 30, 2019, the total value of net assets of SMYAC is Php7,001,555,038.00. However, after a Php1,000,000,000.00 dividend declaration by SMYAC, the remaining total value of net assets of SMYAC shall be Php6,001,555,038.00. As such, SMYPC, as the surviving corporation, shall issue 6,001,555 common shares in exchange for the net assets of SMYAC with a total value of Php6,001,555,038.00 in favor of the following stockholders of SMYAC, the absorbed corporation, which ceases to have any legal personality and is deemed dissolved by operation of law and as a necessary consequence of the merger:

   San Miguel Corporation ("SMC") - 3,901,011 common shares (65%)

   Nihon Yamamura Glass Co., Ltd. ("NYG") - 2,100,544 common shares (35%)

   The excess value of Php38.00 shall be treated as additional paid in capital of SMYPC.

7. In order to implement the merger, on February 19, 2020, SMYPC applied for the increase in capital stock of SMYPC from Eleven Billion Pesos (Php11,000,000,000.00), divided into Eleven Million (11,000,000) common shares with a par value of One Thousand Pesos (Php1,000.00) per share, to Twenty Billion Pesos (Php20,000,000,000.00) divided into Twenty Million (20,000,000) common shares with a par value of One Thousand Pesos (P1,000.00) per share.

8. On February 24, 2020, SEC approved the application for increase in capital stock and issued the Certificate of Approval of Increase of Capital Stock, Certificate of Filing of Amended Articles of Incorporation and Certificate of Filing of the Articles and Plan of Merger on the same date.

Based on the foregoing representations, you now request confirmation of your opinion that -

1. The merger of SMYPC and SMYAC is a tax-free merger under Section 40(C)(2) and (6)(b) of the Tax Code of 1997, as amended, such that no gain or loss shall be recognized for income tax purposes;
2. The transfer of assets by the SMYAC to SMYPC pursuant to the merger is not subject to value-added tax (VAT) and any unused input tax of the SMYAC as of the effective date of the merger is absorbed by SMYPC, as the Surviving Corporation;
3. The transfer of assets by the SMYAC to SMYPC is likewise not subject to donor's tax for lack of donative intent on the part of the SMYAC;
4. The transfer of assets to SMYPC is not subject to documentary stamp tax (DST) under Section 199 (m) of the Tax Code of 1997, as amended. However, the original issuance of SMYPC shares to the stockholders of SMYAC is subject to DST at the rate of Two Pesos (P2.00) on each Two Hundred Pesos (200.00), or fractional part thereof.
5. The aggregate amount of Net Operating Loss Carry Over (NOLCO) of SMYAC as of the effective date of merger shall be transferred to SMYPC, and the latter may claim the same as a deduction from gross income pursuant to Section 34(D)(3) of the Tax Code of 1997, as amended.
6. Any excess creditable withholding tax (CWT) of the SMYAC is transferred to and vested in SMYPC, as the Surviving Corporation, and such excess CWT may be utilized by the latter; and
7. Any excess and unexpired Minimum Corporate Income Tax (MCIT) of SMYAC as of the effective date of merger shall be transferred to SMYPC and carried forward and credited against the normal income tax due of SMYPC.

In reply thereto, please be informed, as follows:

1. The foregoing merger of SMYPC and SMYPC is a merger within the contemplation of Section 40 (C) (2) (a) in relation to 40 (C) (6) (b) of the Tax Code of 1997, as amended, because SMYPC shall acquire/assume all the assets and liabilities of SMYAC and the same will simplify the operations, improve administrative efficiency, increase financial strength, eliminate duplication of functions and maintenance costs, and attain greater efficiency and economy in the management of the businesses for the mutual advantage of SMYPC and SMYAC. Hence, the merger of SMYPC and SMYAC is being undertaken for a *bona fide* business purpose and not for the purpose of escaping the burden of taxation.

The merger of SMYPC and SMYAC qualifies for non-recognition of gain or loss for income tax purposes in accordance with Section 40(C)(2) of the Tax Code of 1997, as amended, such that no gain or loss shall be recognized by SMYAC, as the transferor of all assets and liabilities, to SMYPC pursuant to the Plan of Merger.

Accordingly, no gain or loss shall be recognized by SMYPC, as the transferee, on its receipt of the assets and liabilities of SMYAC pursuant to and as a consequence of the merger.

On the other hand, the bases of the shares of stocks to be received by the shareholders of SMYAC upon the exchange shall be the same as the bases of the properties, stocks or securities exchanged, decreased by (1) the money received, and (2) the fair market value of the other property/ies received and increased by (a) the amount treated as dividend of the shareholders and (b) the amount of any gain that was recognized in the exchange. (*Sec. 40 (C) (5) (a) of the Tax Code of 1997, as amended*)

The basis of the properties transferred in the hands of the transferee (SMYPC) shall be the same as it would be in the hands of the transferors increased by the amount of the gain, if any, recognized to the transferors on the transfer. (*Sec. 40 (C) (5) (b), supra*)

Finally, if the amount of the liabilities assumed plus the amount of the liabilities to which the property is subject exceed the total of the adjusted basis of the properties transferred pursuant to such exchange, then such excess shall be considered as a gain, on the part of the transferor, from the sale or exchange of a capital asset or of property which is not a capital asset, as the case may be. (Sec. 40 (C) (4) (b), *supra*)

The substituted basis of the properties transferred by SMYAC to SMYPC shall comply with the rule that cash and other cash items will be excluded from the computation of the adjusted basis of the properties transferred for purposes of determining whether liabilities assumed and to which the property is subject do not exceed the adjusted basis of the property transferred pursuant to No. IV(A)(2) of Revenue Memorandum Ruling (RMR) No. 2-2002 dated June 10, 2002.

Accordingly, the allocated shares and liabilities, and the substituted basis of the assets transferred by SMYAC to SMYPC, based on SMYAC's audited financial statements as of June 30, 2019 shall be as follows:

Assets	**Amount (in Php)**	**Allocated Liabilities**	**Allocated Shares**	**Substituted Basis (in Php)**
Cash and Cash Equivalents				
Trade and Other Receivables				
Inventories				
Prepaid expenses and other current assets				
Investment in an Associate				
Property, plant and equipment – net				
Right-of-use assets- net				
Other noncurrent assets				

Liabilities	Amount (in Php)
Accounts Payable and accrued expenses	
Loans Payable	
Income and other taxes payable	
Lease liabilities-current portion	
Current maturities of long-term debt- net of debt issue cost	
Long-term debt- net of current maturities and debt issue cost	
Lease liabilities- net of current portion	
Retirement liability- net	
Deferred tax liabilities- net	
TOTAL	

2. The transfer of assets/properties of SMYAC to SMYPC as a consequence of the merger is exempt from VAT pursuant to Section 109 (X) of the Tax Code of 1997, as amended. The transfer of assets/properties to effectuate a merger is not made in the course of business but by operation of law pursuant to the merger.

3. 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 SMYAC to donate to SMYPC their assets since the transaction is purely for legitimate business purpose. Thus, the aforesaid merger will not be subject to donor's tax since there is no intention to donate, and the transaction is a *bonafide* merger effected solely for business reasons.

4. No DST is due on the transfer of assets made pursuant to the Plan of Merger under Section 199 (m) of the Tax Code, as amended, in relation to Section 40 (C) (2) of the Tax Code, as amended. *(BIR Ruling No. 100-2017 dated March 2, 2017)*

In the case of *Pilipinas Shell Petroleum Corporation vs. Commissioner of Internal Revenue* (C.T.A. Case No. 6477 dated April 20, 2003), the Court stated that all the integral parts of the merger including the surrender of shares in exchange for shares, should be treated as a single and continuing transaction subject only to one DST. The Court held, as follows:

> "As earlier stated, DST is in the nature of an excise tax because it is really imposed on the privilege to enter into a transaction. Its imposition, therefore, should be only once. And in a statutory merger, there is only one transaction, i.e., the issuance by the surviving corporation of its own shares of stock to the stockholders of the absorbed corporation in exchange for the shares surrendered by the shareholders of the absorbed corporation. All other transactions which are an integral and inherent part of the merger, such as the absorption of real property, should no longer be subject to another round of DST. In other words, all the integral parts of the merger (e.g., surrender of shares in exchange for shares, transfer of assets, assumption of liabilities, etc.) should be treated as a single and continuing transaction subject only to one DST. The transfer of real property is not a transaction separate and distinct from the

> merger but an integral part or a mere continuation of the initial transaction which was previously consummated."

However, DST at the rate of P2.00 on each P200 par value, or fractional part thereof, shall be imposed on the original issuance of shares by SMYPC to the stockholders of SMYAC as a consequence of the merger as provided under Section 174 of the Tax Code, as amended.

5. Any excess and unutilized creditable withholding taxes (CWT), which form part of the assets to be transferred by SMYAC as of the effective date of the merger, shall be transferred to and vested in SMYPC, as the surviving corporation, and such excess CWT may be utilized by the latter. *(BIR Ruling No. 100-2017 dated March 2, 2017)*

6. It is to be emphasized, however, that the net operating loss carry-over (NOLCO) under Section 34(D) (3) of the Tax Code, as amended, and as implemented by Revenue Regulations No. 14-2001, of SMYAC, if any, is not one of their assets that can be transferred and absorbed by the Surviving Corporation, SMYPC, as this privilege or deduction can be availed of by SMYAC only. Accordingly, the tax-free merger between SMYAC and SMYPC does not cover the NOLCO of the former.

7. The excess and unexpired minimum corporate income tax (MCIT) of SMYAC, as of the effective date of the merger, if any, shall be carried forward and credited against the normal income tax due of SMYPC for the three (3) immediately succeeding taxable years pursuant to Section 27(E)(2) of the Tax Code, as amended; and

8. The retained earnings of SMYAC are subject to the ten percent (10%) final withholding tax on dividends constructively received by its individual shareholders pursuant to Section 24 (B) (2) of the Tax Code, as amended. *(BIR Ruling No. 1422-18 dated December 7, 2018)*

In order that the above-described reorganization can be considered as merger under Section 40 (C) (2) and (6) (b) of the Tax Code of 1997, as amended, the parties to the merger should comply with the following requirements set forth under Revenue Regulations No. 18-2001:

A. The plan of reorganization should be adopted by each of the corporations, parties thereto, the adoption being shown by the acts of its duly constituted responsible officers and appearing upon the official records of the corporation. Each corporation, which is a party to the reorganization, shall file, as part of its return for the taxable year within which the reorganization occurred a complete statement of all facts pertinent to the non-recognition of gain or loss in connection with the reorganization, including:

   1. A copy of the plan of reorganization, together with a statement executed under the penalties of perjury, showing in full the purposes thereof and in detail all transactions incident to, or pursuant to the plan;

   2. A complete statement of all cost or other basis of all property, including all stocks or securities, transferred incident to the plan;

   3. A statement of the amount of stock or securities and other property or money received from the exchange, including a statement of all distribution of other disposition made thereof. The amount of each kind of stock or

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securities and other property received shall be stated on the basis of the fair market value thereof at the date of the exchange;

4. A statement of the amount and nature of any liabilities assumed upon the exchange, and the amount and nature of any liabilities to which any of the property acquired in the exchange is subject.

B. Every taxpayer, other than a corporation, party to the reorganization, who received stock or securities and other property or money upon a tax-free exchange in connection with a corporate reorganization shall incorporate in his income tax return for the taxable year in which the exchange takes place a complete statement of all facts pertinent to the non-recognition of gain or loss upon such exchange, including:

   1. A statement of the cost or other basis of the stock or securities transferred in the exchange; and

   2. A statement in full of the amount of stock or securities and other property or money received from the exchange, including any liabilities assumed upon the exchange, and any liabilities to which property received is subject. The amount of each kind of stock or securities and other property (other liabilities assumed upon the exchange) received shall be set forth upon the basis of the fair market value thereof at the date of the exchange.

C. Records in substantial form shall be kept by every taxpayer who participates in a tax-free exchange in connection with a corporate reorganization showing the cost or other basis of the transferred property or money received (including any liabilities assumed on the exchange, or any liabilities to which any of the properties received were subject), in order to facilitate the determination of gain or loss from subsequent disposition of such stock of securities and other property received from the exchange.

In addition to the foregoing requirements, the parties shall enclose with their respective income tax returns for the taxable year in which the merger occurred a copy of the request for ruling filed with, and the corresponding ruling issued by, the Bureau of Internal Revenue, both duly stamp-received by the appropriate office of the Bureau of Internal Revenue.

Such parties shall include as a note to their respective audited financial statements for the taxable year in which the merger occurred a statement to the effect that they hold such assets/shares acquired in a merger and the year in which such merger occurred, and in the taxable years until the subject properties are subsequently transferred to another transferee.

Moreover, the shareholders of the Absorbed Corporation and the Surviving Corporation shall record in their respective books of accounts the mandatory accounting entries stated in Annex "A" hereof, pursuant to Revenue Memorandum Order (RMO) No. 17-2016.

Furthermore, the parties shall cause to annotate at the back of the Transfer Certificates of Title (TCT) and Certificates of Stock of the properties transferred, the date the merger was executed, the original or historical cost of acquisition of the properties or 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 Register of Deeds or by the Corporate Secretary of this condition shall be penalized under Section 269 or 275, as the case may be, of the Tax Code of 1997, as amended.

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Finally, the parties are required to submit to the Law and Legislative Division, Bureau of Internal Revenue, proof of annotation of the substituted basis of the shares of stock and/or real properties involved in the transfer within ninety (90) days from receipt of this ruling. Violation of this requirement is subject to the penalties provided in Section 275 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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PROFORMA ENTRIES - MERGER

Annex "A"

Particulars	Individual Shareholders' Book (The entry/ies shall be per individual shareholder of the absorbed corporation)	Transferee' s Book
Journal Entry to Record the Tax-Free Exchange	Investment in (name of transferee) xxx.xx Investment in (name of dissolving corporation) xxx.xx Dividend Income (net of FWT on dividend) xxx.xx To record the Tax-Free Exchange (TFE) of investment in (share type) shares of (name issuing corporation/s) with aggregate fair market value of P_______ in exchange for (type and no. of share) of (name of transferee) with par value of P_____ per share.	Investment in (issuing corp. for shares of stock) xxx.xx PPE - Land & Improvement (for real props) xxx.xx Others Assets (as applicable) xxx.xx Liabilities xxx.xx Capital Stock xxx.xx Additional Paid-In Capital xxx.xx To record the Tax-Free Exchange (TFE) of real properties, investment in (share type) shares of (name issuing corp/s), and other assets with aggregate fair market value of P_______, including liabilities assumed resulting from merger, in exchange for (type and no. of share) of (name of transferee) with par value of P_____ per share.
Balance Sheet Notes Entry	Investment includes (no. and type of share/s) with par value of P_______ in (name of transferee) resulting from the Tax-Free Exchange of investment in (no. and type of share/s) of (issuing corporation/s) covered by Stock Certificate No/s. ______________ which were acquired for the total cost of (substituted basis) and which have fair market value as of the date of exchange amounting to P___________.	Real properties, investment in (no. and type of share/s) of (issuing corporation/s) and other assets were acquired through merger as evidenced by Plan of Merger and Articles of Merger, including the increase of the Authorized Capital Stock of (name of transferee), approved by the Securities and Exchange Commission on (date). The total acquisition cost/substituted cost to (name of transferee) of the investment/s amounts to (FMV at the time of exchange). The real properties, investment/s and other assets were previously covered by Transfer Certificate of Title and Stock Certificate No/s. ________ issued by (issuing corporation/s) and are now presently covered by Stock Certificate No/s. _______ constituting (no. and type of share/s) [total] shares in the name of (name of transferee).
Proforma Entries to Record Subsequent Sale / Transfer	Cash or Accounts receivables xxx.xx Investment in (name of transferee) xxx.xx Gain on Sale of Investment xxx.xx To record subsequent sale / transfer of investment acquired thru Tax-Free Exchange Current xxx.xx Tax Payable xxx.xx Provision for Tax as follows:	Cash or Accounts receivables xxx.xx Investment in (name of issuing corporation) / PPE - Land & Improvement / Other Assets xxx.xx Gain on Sale of Investment xxx.xx To record subsequent sale / transfer of real properties, investment/s and/or other assets acquired thru Tax-Free Current xxx.xx Tax Payable xxx.xx Provision for tax as follows:

Individual Shareholders' Book – Provision for Tax:

	Tax Type	Tax Rate*	Multiply By	Amount
1)	Net Capital Gains Tax	5% on P100,000 and 10% on excess	Gains realized on TFE	
OR	Stock Transaction Tax	1/2 of 1%	FMV of inv/s at the time of TFE	xxx.xx
2)	Net Capital Gains Tax	15%	Gains realized on subsequent sale of investment/s	
OR	Stock Transaction Tax	6/10 of 1%	Selling Price of investment at the time of subsequent sale	xxx.xx
	Total Tax Payable			xxx.xx

- If subsequent sale/s of investment/s was/were made before January 1, 2018, the tax rates used in the computation of Net Capital Gains Tax and Stock Transaction Tax at the time of tax-free exchange shall apply

- Computation of Gain Realised on Subsequent Sale of Investment:

Selling Price	xxx.xx
Less: Cost (Substituted Basis)	xxx.xx
Net Capital Gain on sale of unlisted shares	xxx.xx

- Per RMO 17-2016, the substituted basis of the stock or securities received by the transferor on a tax-free exchange shall be as follows: (1) The original basis of the property, stock or securities to be transferred; (2) Less: (a) money received, if any, and (b) the fair market value of the other property received, if any; (3)Plus: (a) the amount treated as dividend of the shareholder, if any, and (b) the amount of any gain that was recognized on the exchange if any.

Transferee's Book – Provision for Tax:

	Tax Type	Tax Rate*	Multiply By	Amount
1)	Net Capital Gains Tax	15%	Gains realized on subsequent sale of investment/s	
OR	Stock Transaction Tax	6/10 of 1%	Selling Price of investment at the time of subsequent sale	xxx.xx
	Total Tax Payable			xxx.xx

	Tax Type	Rate	Multiply By	Amount
1)	Withholding Tax-ONETT	1.5% to 6% per RR No. 6-2001	Fair Market Value (FMV) of the property/ies at the time of subsequent sale / transfer	xxx.xx
2)	Documentary Stamp Tax (DST)	1.5% for every P1,000 and fractional part thereof		xxx.xx
3)	Value-Added Tax (VAT)	12%		xxx.xx
	Total Tax Payable			xxx.xx

*Gain on sale of property/ies is subject to Normal Corporate Income Tax (NCIT)

*FMV at the time of subsequent sale / transfer refers to the selling price, zonal value or the value reflected in the tax declaration, whichever is highest.