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

Sec. 40(C)(2), NIRC
BIR Ruling Nos. 214-12, 100-2017

#075-2018
1-29-2018

CASTILLO LAMAN TAN PANTALEON
& SAN JOSE LAW FIRM
The Valero Tower, 122 Valero St., Salcedo Village
1227 Makati City

Attention: **Ma. Guillermina G. Totanes**

Mabel L. Buted

Gentlemen:

This refers to your letter dated December 11, 2017 requesting, on behalf of your client, **Marcventures Holdings, Inc.** (**"MHI"**) for confirmation of your opinion that the statutory merger of MHI, as the surviving corporation, with **Asia Pilot Mining Phils. Corp.** (**"APMPC"**) and **Brightgreen Resources Holdings, Inc.** (**"BHI"**), as the absorbed corporations, is a tax-free transfer/exchange pursuant to Section 40(C)(2) in relation to Section 40(C)(6)(b) of the National Internal Revenue Code of 1997, as amended (the "Tax Code").

MHI is a publicly-listed holding corporation organized and existing under Philippine laws, with business address at 4th Floor, Citibank Center, 8741 Paseo de Roxas Avenue, Makati City, and registered with this Bureau with Tax Identification Number (TIN) It is engaged in dealing with properties of every kind and description to the extent permitted by law without engaging in the business of an investment company or acting as a securities broker or dealer. It wholly owns Marcventures Mining and Development Corporation, a corporation organized and existing under Philippine laws, which is primarily engaged in the business of extracting, mining, smelting, refining and converting mineral ores.

On the other hand, APMPC is a corporation organized and existing under Philippine laws, with principal office at Ground Floor, 31 Bingo Street, Sta. Mesa Heights, Quezon City, and registered with the BIR with TIN It is engaged in the business of operating coal mines and prospecting, exploring, mining, milling, concentrating, converting, smelting, treating, refining, preparing for market, manufacturing, buying, selling, exchanging, and otherwise producing and dealing in all kinds of ore, metal and minerals, hydrocarbons, acids and chemicals, and in the products and by-products of every kind and description and by whatever process, the same can be or may thereafter be produced.

BHI is a financial holding corporation organized and existing under Philippine laws, with principal office at the 4th Floor, Citibank Center, 8741 Paseo de Roxas Avenue, Makati City, and registered with the BIR with TIN

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APMPC, BHI and MHI (hereinafter collectively referred to as the "Parties") believe that the combination of the resources, capabilities, clientele, and operations of MHI, APMPC and BHI *via* a statutory merger will bring about a bigger, stronger, and more competitive mining entity, thereby contributing to the further growth and strength of the merged entity in particular and the mining industry and the national economy in general, which will pave the way towards giving MHI, the surviving corporation, the ability to compete on a global scale. For these reasons, the Parties agreed to merge, with MHI as the surviving corporation, as a consequence of which, properties of APMPC and BHI will be exchanged with the shares of stock of MHI, by way of original issue, and without any intention to donate.

The Plan of Merger and Articles of Merger were approved by a majority of the Board of Directors of MHI on December 15, 2016 and by a majority of the Board of Directors of APMPC and BHI on September 8, 2017. After their Board of Directors approved the merger, the relevant resolutions were authorized, approved, ratified, and confirmed by at least two-thirds (2/3) of the outstanding capital stock of MHI on October 23, 2017 and by at least (2/3) of the outstanding capital stock of APMPC and BHI on September 8, 2017. Thereafter, on October 24, 2017, the Parties entered into a Merger Agreement.

Pursuant to the Plan of Merger, APMPC and BHI shall transfer all their assets and liabilities to MHI as a consequence of the merger, for which MHI, by way of original issue, shall issue a total of common shares to the stockholders of APMPC, with a par value of ₱1.00 per share, and common shares to the stockholders of BHI, also with a par value of ₱1.00 per share.

The authorized capital stock, issued and outstanding capital stock of APMPC, BHI and MHI as set forth in their respective General Information Sheets are as follows:

APMPC (Prior to the Effective Date of Merger)

Type of Share	Authorized	Issued and outstanding	Par value	No. of shares	Amount
Common	shares	shares	PHP		PHP

BHI (Prior to the Effective Date of Merger)

Type of Share	Authorized	Issued and outstanding	Par value	No. of shares	Amount
Common	shares	shares	PHP		PHP

MHI (Prior to the Effective Date of Merger)

Type of Share	Authorized	Issued and outstanding	Par value	No. of shares	Amount

Common	shares	shares	PHP		PHP

Beginning the Effective Date of Merger, the authorized capital stock and issued and outstanding capital stock of MHI shall be as follows:

MHI (Beginning the Effective Date of Merger)

Type of Share	Authorized	Issued and outstanding	Par value	No. of shares	Amount
			PHP		PHP
Common	shares	shares			

Per representations and documents submitted, the assets and liabilities of BHI and APMPC are as follows:

1. **BHI**

Nature of Properties	Amount	**Liabilities**	Amount
Assets			
Current (Cash)	PhP	Current Liabilities	PhP
Non-Current (Investment)		Equity	
Total	**PhP458,460,526.00**		**PhP**

2. **APMPC**

Nature of Properties	Amount	**Liabilities**	Amount
Assets			
Current (Cash)	PhP	Current Liabilities	PhP
Non-Current (Investment & Advances)		Equity	
Total	**PhP**		**PhP**

Based on the foregoing representations, you now request for a ruling that:

A. The statutory merger among MHI, APMPC and BHI, whereby all the assets and liabilities of BHI and APMPC will be transferred in exchange for shares in MHI is a merger within the contemplation of Section 40 (C)(2)(a) and (b) in relation to Section 40(C)(6)(b) of the Tax Code, as amended. As such, the transaction qualifies as a tax-free exchange and no gain or loss should be recognized by the parties;

B. The substituted bases of the shares of stock of MHI received by both APMPC and BHI shall be determined in accordance with Section 40(C)(5)(a) of the 1997 Tax Code, as amended;

C. The substituted bases of the properties received by MHI from both APMPC and BHI shall be determined in accordance with Section 40(C)(5)(b) of the 1997 Tax Code, as amended;

D. The transfer of properties by BHI and APMPC to MHI (a) shall not be subject to output value-added tax (VAT) and (b) any unutilized input VAT of APMPC and BHI shall be transferred to and absorbed by MHI in accordance with Section 4.106-8(b)(3) of Revenue Regulations (RR) No. 16-2005;

E. The transfer by APMPC and BHI of their properties to MHI as well as the surrender of the shares of their stockholders in exchange for the common shares of MHI are not subject to donor's tax in the absence of donative intent;

F. The surrender of the shares of stock by the stockholders of APMPC and BHI shall not be subject to DST. However, the original issuance of MHI shares to the stockholders of APMPC and BHI as a consequence of the merger shall be subject to DST in accordance with Section 174 of the Tax Code;

G. The excess and unutilized creditable withholding taxes (CWT) of APMPC and BHI shall be transferred to MHI which may be applied as a tax credit by MHI against its income tax due for the succeeding taxable years or may be the subject of a claim for refund or issuance of a tax credit certificate (TCC);

H. Pursuant to Section 27(E)(2) of the Tax Code, MHI may carry forward and credit any excess and unexpired minimum corporate income tax (MCIT) credits against its normal income taxes due for the three (3) immediately succeeding taxable years; and

I. Any excess and unexpired net operating loss carry-over (NOLCO) of APMPC and BHI shall not form part of their assets to be transferred to MHI pursuant to the merger.

In reply thereto, please be informed as follows:

A, B & C. The foregoing merger of APMPC, BHI and MHI is a merger within the contemplation of Section 40(C)(2)(a) in relation to Section 40(C)(6)(b) of the Tax Code because MHI shall acquire/assume all the assets and liabilities of APMPC and BHI and the same is advisable, expedient and in the best interest of the merging corporations and their respective stockholders since the purpose of the merger is to combine the resources, capabilities, clientele, and operations of MHI, APMPC and BHI to bring about a bigger, stronger, and more competitive mining entity able to compete on a global scale. Hence, the merger of MHI, APMPC and BHI is being undertaken for a *bona fide* business purpose and not for the purpose of escaping the burden of taxation.

The merger of APMPC, BHI and MHI qualifies for non-recognition of gain or loss for income tax purposes in accordance with Section 40(C)(2) of the Tax Code, where no gain or loss shall be recognized by APMPC and BHI, as the transferors of all assets and liabilities, to MHI pursuant to the Plan of Merger.

Accordingly, no gain or loss shall be recognized by MHI, as the transferee, on its receipt of the asset and liabilities of APMPC and BHI pursuant to and as a consequence of the merger.

The basis of shares of stocks received by APMPC and BHI Shareholders upon the exchange shall be the same as the basis of the properties, stocks, or securities exchanged, decreased by (1) the money received and (2) the fair market value of the 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. (Section 40(C)(5)(a) of the Tax Code of 1997, as amended)

The basis of the property transferred in the hands of the transferee (MHI) shall be the same as it would be in the hands of the transferors (APMPC and BHI) increased by the amount of the gain, if any, recognized to the transferors on the transfer. (Section 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 property transferred pursuant to such exchange, then such excess shall be considered as a gain from the sale or exchange of a capital asset or of property which is not a capital asset, as the case may be. (Section 40(C)(4)(b), *supra*)

The substituted bases of the properties transferred by APMPC and BHI to MHI should strictly comply with the rule that cash and other cash items will be excluded from the computation of the adjusted bases 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.

Moreover, the transferors shall observe the provisions of Revenue Regulations No. 06-13 in the determination of the fair market value of the properties/assets transferred.

D. No VAT shall be due on the transfer made pursuant to the Plan of Merger following Section 4.106-8(b)(3) of RR No. 16-2005, as amended.

E. 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 done, and (3) the intent to do an act of liberality *(animus donandi)*.

Clearly, there is no intention on the part of any of the transferors, APMPC and BHI to donate to MHI its assets since the transaction is purely for legitimate business purposes.

Thus, the aforesaid 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.

F. No DST is due on the transfer made pursuant to the Plan of Merger under Section 199(m) of the Tax Code, as amended by Republic Act No. 9243, in relation to Section 40(C)(2) of the Tax Code, as amended.

However, DST shall be imposed on the original issuance of shares by MHI to the stockholders of APMPC and BHI as a consequence of the merger as provided under Section 174 of the Tax Code, as amended.

G. Following BIR Ruling No. 100-2017, dated March 02, 2017, the excess and unutilized creditable withholding taxes (CWT) of the absorbed corporations, APMPC and BHI as of the Effective Date of Merger, which form part of the assets to be transferred by the absorbed corporations to the surviving corporation as a consequence of the merger, may be applied as a tax credit by MHI against its income tax due for succeeding taxable years, or may be subject of a claim for refund or issuance of a TCC.

H. Any excess and unexpired MCIT of the absorbed corporations, as of the Effective Date of the Merger shall be carried forward and credited against the normal income tax of the surviving corporation, MHI, for the three (3) immediately succeeding taxable years pursuant to Section 27(E)(2) of the 1997 Tax Code. Since the excess and unexpired MCITs of the absorbed corporations are among its rights, privileges, property and/or interest, the excess and unexpired MCIT of the latter shall be transferred and vested in MHI on the Effective Date of the Merger. Thus, APMPC and BHI's excess and unexpired MCIT shall be carried forward and credited against the normal corporate income tax of MHI subject to the three-year-carry-forward period reckoned from the date of payment by the absorbed corporations of their MCITs.

I. The net 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 the absorbed corporations is not one of the assets of the latter that can be transferred and absorbed by the surviving corporation as this privilege or deduction can be availed of merely by the absorbed corporations. Accordingly, the tax-free merger between APMPC, BHI and MHI does not cover any NOLCO of the former as part of the assets that can be transferred and absorbed by the latter corporation.

However, 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, 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 thereto, 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 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 or 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 tax-free exchange occurred a copy of the request for ruling filed with, and the corresponding ruling issued by the Bureau of Internal

Revenue, both duly stamped received by the appropriate office of the Bureau of Internal Revenue. Such persons shall include as a note to their respective audited financial statements for the taxable year in which the exchange occurred a statement to the effect that they hold such assets/shares acquired in a tax-free exchange and the year in which such exchange occurred, and in the taxable years until the subject properties are subsequently transferred to another transferee.

The parties shall cause to annotate, at the back of the Transfer Certificates of Title and Certificates of Stock, the date the deed of exchange 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 exchange; provided, however, that any violation by the Corporate Secretary of this condition shall be penalized under Section 275 of the same Code. It is further required that within ninety (90) days from receipt of this ruling, the parties to the transaction must submit to the Law and Legislative Division, Bureau of Internal Revenue, certified true copies by the Corporate Secretary, of duly annotated Certificates of Stock, in respect to the shares of stock of the transferee corporation, including the revised allocation of shares and re-computation of the substituted bases of the properties which shall be in accordance with RMR No. 2-2002.

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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