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

Sec. 40(C)(2) & (6)(b) of the NIRC, as amended; RR No. 18-01
BIR Ruling No. S40-0427-2020; BIR Ruling No. S40-0384-2020
S40M-0474-2021
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ABAYA INVESTMENTS CORPORATION
Suite A, 8th Floor, Strata 100 Building, Emerald Avenue
Ortigas Complex, Pasig City

Attention: **Ms Marlyn C. De Leon**
Corporate Secretary

Gentlemen:

This refers to your request for confirmation that the merger of Wawona Holdings, Inc. ("WHI"), as the absorbed corporation and Abaya Investments Corporation ("AIC"), as the surviving corporation, qualifies as a tax-free merger under Section 40(C)(2) of the National Internal Revenue Code of 1997 (NIRC), as amended,

BACKGROUND

1. WHI is a corporation duly organized and existing under Philippine laws with principal office at 8th Floor, Strata 100 Building, F. Ortigas, Jr. Road, Ortigas Center, Pasig City. It has an authorized capital of Thirty Million Pesos (P30,000,000.00) divided into Three Million (3,000,000) shares at Ten Pesos (P10.00) par value of which the amount of Thirty Million (P30,000,000.00) has been subscribed and paid. WHI's primary purpose is to purchase, subscribe for or otherwise dispose of real and personal property of every kind and description, including but not limited to shares of stocks, debentures, notes, evidences of indebtedness and other securities.

2. AIC is likewise a corporation duly organized and existing under Philippine laws with principal office at 8th Floor, Strata 100 Building, F. Ortigas, Jr. Road, Ortigas Center, Pasig City. As of June 30, 2016, it has an authorized capital of Sixty Million Pesos (P60,000,000.00) divided into Six Million (6,000,000) shares at Ten Pesos (P10.00) par value of which the amount of Forty-One Million Two Hundred Fifty Thousand Pesos (P41,250,000.00) has been subscribed and the amount of Thirty-Six Million Five Hundred Thousand Pesos (P36,562,500.00) has been paid. AIC is engaged in the leasing of commercial buildings and lot located in Metro Manila and Cagayan de Oro City and has stocks investments in various corporations since its incorporation on December 27, 1944.

3. WHI and AIC have agreed that a merger between them will be mutually advantageous and will result in specific benefits to them, such as but not limited to

increased financial strength through pooling of resources, a more diversified and stable capital base, increased operating economies and efficiencies, and reduction of overall business expenses.

4. The merger of WHI and AIC was approved by the Securities and Exchange Commission (SEC) on November 18, 2016.

5. Pursuant to the Articles and Plan of Merger, WHI will convey, assign and transfer to AIC all its assets and liabilities existing as of June 30, 2016, while AIC will issue a total of Thirteen Million Ninety-Four Thousand Three Hundred Ninety-Seven (13,094,397) shares to the existing stockholders of WHI.

In reply thereto, please be informed, as follows:

1. The foregoing merger of WHI and AIC is a merger within the contemplation of Section 40 (C) (2) (a) in relation to 40 (C) (6) (b) of the NIRC, as amended, because the acquisition and assumption by AIC of all the assets and liabilities of WHI will result in specific benefits to both corporations, such as but not limited to increased financial strength through pooling of resources, a more diversified and stable capital base, increased operating economies and efficiencies, and reduction of overall business expenses. Hence, the merger of WHI and AIC is being undertaken for a *bona fide* business purpose and not for the purpose of escaping the burden of taxation.

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

Accordingly, no gain or loss shall be recognized by AIC, as the transferee, on its receipt of the assets and liabilities of WHI 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 WHI 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 NIRC, as amended*)

The basis of the properties transferred in the hands of the transferee (AIC) shall be the same as it would be in the hands of the transferor (WHI) increased by the amount of the gain, if any, recognized to the transferor (WHI) 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 WHI to AIC shall comply with the rule that cash and other cash items will be excluded from the computation of the adjusted

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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 WHI to AIC, based on WHI's audited financial statements as of June 30, 2016 shall be as follows:

	Amount (in Php)	**Allocated Liabilities**	**Allocated Shares**	**Substituted Basis (in Php)**
Cash and cash equivalents				
Other current assets				
Land – TCT No. 208743				
Land – TCT No. 208744				
Land – TCT No. 208745				
Land – TCT No. 206759				
Land – TCT No. 307546				
Improvement				
Investment in shares of stock (*Mindanao Energy Systems, Inc. – Certificate of Stock No. 229 – 144,606 shares at P100.00 per share*)				
TOTAL				

Liabilities	**Amount (in Php)**
Accounts payable and accrued expenses	
Advances from stockholders	
TOTAL	

2. 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 any of the parties to the merger – WHI to donate to AIC its assets since the transaction is purely for legitimate business purpose. Thus, the aforesaid merger will not be subject to gift tax since there is no intention to donate, and the transaction is a *bonafide* merger effected solely for business reasons.

[1] Acquired through a tax-free exchange as annotated at the back of the TCT

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3. No documentary stamp tax (DST) is due on the transfer of assets made pursuant to the Plan of Merger under Section 199 (m) of the NIRC, as amended by Republic Act No. 9243, in relation to Section 40 (C) (2) of the NIRC, as amended. *(BIR Ruling No. S40-0427-2020 dated July 30, 2020)*

However, a DST at the rate of P1.00[2] on each P200 par value, or fractional part thereof, shall be imposed on the original issuance of shares by AIC to the stockholders of WHI as a consequence of the merger as provided under Section 174 of the NIRC, as amended.

4. The transfer of properties of WHI to AIC as a consequence of the merger shall not be subject to any output tax, pursuant to Section 4.106-8(b)(3) of Revenue Regulations (RR) No. 16-2005, as amended by RR No. 4-2007 and as further amended by RR No. 10-2011. The conveyance of properties to effectuate a merger is not made in the course of business but by operation of law pursuant to the merger. Thus, any unused input tax as of the effective date of merger will be absorbed by AIC, as the surviving corporation pursuant to Section 4.106-8(b)(3) of RR No. 16-2005, as amended by RR Nos. 4-2007 and 10-2011.

5. Any excess and unutilized creditable withholding taxes (CWT), if any, which form part of the assets to be transferred by WHI as of the effective date of the merger, shall be transferred to and vested in AIC, as the surviving corporation, and such excess CWT may be utilized by the latter against its income tax liabilities for 2016 and succeeding years or may be the subject of a claim for refund or issuance of a tax credit certificate (TCC). *(BIR Ruling No. 100-2017 dated March 2, 2017)*

6. The excess and unexpired Minimum Corporate Income Tax (MCIT), of the absorbed corporation, WHI, as of the effective date of the merger, shall be carried forward and credited against the normal income tax due of the surviving corporation, AIC, for the three (3) immediately succeeding taxable years pursuant to Section 27 (E) (2) of the NIRC, as amended. Since the excess and unexpired MCIT of WHI is among the rights, privileges, property and/or interest of WHI, the excess and unexpired MCIT of the latter shall be transferred to and vested in AIC on the effective date of the merger. Thus, WHI's excess and unexpired MCIT, if any, shall be carried forward and credited against the normal corporate income tax of AIC subject to the three-year-carry-forward period reckoned from the date of payment of WHI of its MCIT.

7. It is to be emphasized, however, that the net operating loss carry-over (NOLCO) under Section 34(D) (3) of the NIRC, as amended, and as implemented by RR No. 14-2001, of WHI, if any, is not one of the assets that can be transferred and absorbed by the surviving corporation, AIC, as this privilege or deduction can be availed of by WHI only. Accordingly, the tax-free merger between WHI and AIC does not cover the NOLCO of the former.

8. The retained earnings of ISCC 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 NIRC, as amended, the parties to the merger should comply with the following requirements set forth under RR No. 18-2001:

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[2] The Articles and Plan of Merger was approved by the SEC on November 18, 2016

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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 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

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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/dissolving corporation and the surviving/transferee 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.

The parties shall cause to annotate at the back of the Transfer Certificates of Title and Certificates of Stock, the date the merger was executed, the original/historical/adjusted costs 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 Corporate Secretary of this condition shall be penalized under Section 275 of the NIRC, as amended. It is further required that within ninety (90) days from receipt of this ruling, the parties to the transaction must submit to the Legal and Legislative Division, Bureau of Internal Revenue, proof of annotation of the original/historical/adjusted bases of the properties and/or real properties involved in the transfer and certified true copies by the Corporate Secretary, of duly annotated Certificates of Stock, in respect of 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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PROFORMA ENTRIES - MERGER

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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: (see table A below)
		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: (see tables B and C below)

Individual Shareholders' Book — Provision for Tax as follows:

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 as follows:

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