REPUBLIC OF THE PHILIPPINES
DEPARTMENT OF FINANCE
BUREAU OF INTERNAL REVENUE

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
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ANGARA ABELLO CONCEPCION REGALA & CRUZ
22nd Floor ACCRALaw Tower, 2nd Avenue cor. 30th St.
Crescent Park West, Bonifacion Global City, 1635 Taguig

Attention: **ATTY. ERIC R. RICALDE**
ATTY. FATIMA FAYE E. CORDOVA
and
ATTY. AZZEDINE G. SADSAD

Gentlemen:

This refers to your request for confirmation of your opinion that the merger between Philippine Foremost Milling Corporation (PFMC) and Mindanao Grain Processing Co., Inc. (MGPCI), with PFMC as the surviving corporation, qualifies as 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. PFMC is a domestic corporation duly registered with the Securities and Exchange Commission (SEC). It has an authorized capital stock of Pesos (P) divided into ( ) common shares with a par value of 1 Pesos (P) per share. The amount of capital stock of PFMC which has actually been subscribed and paid-up is (P).

2. MGPCI is a domestic corporation duly registered with the SEC. It has an authorized capital stock of Pesos (P) divided into (common shares with a par value of Pesos (P per share. The amount of capital stock of MGPCI which has actually been subscribed and paid-up is (P).

3. On February 28, 2020, at the meeting duly called for the purpose, the majority of the Board of Directors of PFMC and MGPCI approved the merger between the two corporations. On June 19, 2020, a special meeting was conducted both by PFMC and MGPCI wherein the said merger was approved by their stockholders owning 100% of the total issued and outstanding capital stock of PFMC and MGPCI.

4. On June 22, 2020, PFMC and MGPCI entered into a Plan of Merger, with PFMC as the Surviving Corporation for the reason that it is desirable and advantageous to both corporations and their respective stockholders.

5. Under the Plan of Merger, each MGPCI stockholder shall receive PFMC shares using an exchange rate of PFMC shares for every 1 MGPCI share. Further, no PFMC share shall be issued to the directors of MGPCI and each of whom will hold only one (1) qualifying share in MGPCI, as a result of the merger. As a result, the following PFMC shares shall be issued:

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a. La Filipina Uy Gong co Corporation – shares of PFMC
b. Roderico R. Bioco – shares of PFMC

6. Also, under the Plan of Merger, the effective date of the merger is at the end of the month of the approval by the SEC. On December 17, 2020, SEC approved the Article and Plan of Merger of the constituent corporations and issued the Certificate of Filing of the Plan and Articles of Merger on the same date (Effective Date).

7. Upon the Effective Date of the Merger, all the rights, powers, privilege, immunities and franchises of PFMC, and all property, real or personal, bank deposits, rights and all receivables due on whatever account, including subscriptions to shares and other choses in action, and all and every other interest of or belonging to or due to PFMC as of December 31, 2019 up to the effective date of merger, shall be taken and deemed to be transferred to and vested in MGPCI by operation of law, without further act or deed, except as may be otherwise provided. Moreover, PFMC shall assume all the debts and liabilities of MGPCI, as of the Effective Merger Date (including such debts and liabilities of MGPCI as of 31 December 2019, to the extent not fully discharged as of the Effective Merger Date), in the same manner as though PFMC itself incurred such liabilities and obligations and any such claim by or against MGPCI shall be prosecuted by or against PFMC; provided however, that PFMC may avail of all defenses otherwise available to MGPCI.

8. The Audited Financial Statements of PFMC as of December 31, 2019 indicate that PFMC has total assets of (P) total liabilities of Pesos (P. 0) and total stockholders' equity of Pesos (

9. On the other hand, the Audited Financial Statements of MGPCI as of December 31, 2019 indicate that MGPCI has total assets of ( ) Pesos (P), total liabilities of (P .00) and total stockholders' equity of

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

1. No gain of loss shall be recognized on the merger and the subsequent transfer of properties to PFMC. Accordingly, the exchange is exempt from the following taxes:
   a. Income and capital gains tax (CGT); and
   b. Documentary stamp tax (DST) on the sale, transfer and assignment of real properties.
2. The transfer shall not be subject value-added tax (VAT);
3. Any unused input VAT of MGPCI, as of the effective date of merger, will be absorbed and utilized by PFMC, as the surviving corporation;
4. The transfer shall not be subject to donor's tax;
5. The only DST due on the transaction is the DST imposed on the original issuance of shares of stock of PFMC at P2.00 for every P200.00 of the par value of the shares issued as a result of merger; and
6. The excess creditable withholding tax of MGPCI, as of effective date of merger, will be transferred to and utilized by PFMC, as the surviving corporation.

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In reply thereto, please be informed, as follows:

1. The foregoing merger of PFMC with MGPCI 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 PFMC shall acquire/assume all the assets and liabilities of MGPCI and the same will be desirable and advantageous to both corporations and their respective stockholders. Hence, the merger of PFMC and MGPCI is being undertaken for a *bona fide* business purpose and not for the purpose of escaping the burden of taxation.

The merger of PFMC and MGPCI 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, that no gain or loss shall be recognized by PFMC and MGPCI, as the transferor of all assets and liabilities, to PFMC pursuant to the Plan of Merger.

No gain or loss shall be recognized by PFMC, as the transferee, on its receipt of the assets and liabilities of MGPCI 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 MGPCI 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 (PFMC) shall be the same as it would be in the hands of the transferor (MGPCI) increased by the amount of the gain, if any, recognized to the transferor (PFMC) 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 properties are 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 MGPCI to PFMC 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 MGPCI to PFMC, based on MGPCI's Audited Financial Statements as of December 31, 2019 shall be as follows:

	Amount	Allocated Liabilities	Allocated Shares	Substituted Basis (in Php)
Cash				
Receivables				
Inventories				

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Prepayments and other current assets				
Receivables-noncurrent portion				
Property, plant and equipment - net				
Retirement plan asset				
Total				

Liabilities	Amount (in Php)
Trade and other payables	
Income tax payable	
Other current liabilities	
Total	

2. The transfer of assets/properties of MGPCI to PFMC as a consequence of the merger is exempt from VAT pursuant to Section 109 (x) of the Tax Code of 1997, as amended.

Moreover, Section 4.106-8(b)(3) of Revenue Regulations (RR) No. 16-2005, as amended, specifically excludes mergers from being subject to output tax, to wit:

> *"**SECTION 4.106-8**. <u>Change or Cessation of Status as VAT-registered Person.</u> –*
>
> *xxx xxx xxx*
>
> ***(b) Not subject to output tax.***
>
> *The VAT shall not apply to goods or properties existing as of the occurrence of the following:*
>
> *(1) xxx xxx xxx*
>
> *(3) Merger or consolidation of corporations. The unused input tax of the dissolved corporation, as of the date of merger or consolidation, shall be absorbed by the surviving or new corporation."*

Thus, the above-mentioned transaction shall not be subject to output tax, and any unused input tax of MGPCI as of the effective date of merger will be transferred to and absorbed by PFMC pursuant to Section 4.106-8(b)(3) of RR No. 16-2005, as amended, the said transfer being considered a transaction "not subject to output tax" under the said Section.

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 any of the parties to the merger – PFMC and MGPCI to donate to PFMC its 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 of 1997, as amended by Republic Act No. 9243, in relation to Section 40 (C) (2) of the Tax Code of 1997, 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.*

Moreover, 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 PFMC to the stockholders of MGPCI as a consequence of the merger as provided under Section 174 of the Tax Code of 1997, as amended.

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

6. The excess and unexpired minimum corporate income tax (MCIT) of MGPCI, as of the effective date of the merger as of year 2019, if any, shall be carried forward and credited against the normal income tax due of PFMC for the three (3) immediately succeeding taxable years pursuant to Section 27(E)(2) of the Tax Code of 1997, as amended. Since the excess and unexpired MCIT of MGPCI are among the rights, privileges, property and/or interest of MGPCI, their excess and unexpired MCIT shall be transferred to and vested in PFMC on the effective date of the merger. Thus, MGPCI's excess and unexpired MCIT shall be carried

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forward and credited against the regular corporate income tax of PFMC subject to the three-year-carry-forward period reckoned from the date of MGPCI of their MCIT.

7. It is to be emphasized, however, that the net operating loss carry-over (NOLCO) under Section 34(D) (3) of the Tax Code of 1997, as amended, and as implemented by RR No. 14-2001, of MGPCI, if any, is not one of their assets that can be transferred and absorbed by the surviving corporation, PFMC, as this privilege or deduction can be availed of by MGPCI only. Accordingly, the tax-free merger does not cover the NOLCO of MGPCI.

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 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.

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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/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.

Furthermore, the parties shall cause to annotate at the back of the Transfer Certificates of Title (TCT) and Certificates of Stock, 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.

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,

LILIA CATRIS GUILLERMO
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: (see table 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 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.