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

Sec. 108 (B)(2), 1997 Tax Code, as amended	000-00	CT- 169-2021	Person to Contact: Chief, Law & Legislative Division Tel. Nos. 926-55-36/927-09-63

Date: MAY 18 2021

VIOVICENTE & PEREZ-VIOVICENTE LAW OFFICES
Unit 810, One Corporate Center
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Ortigas Center, Pasig City

Attention: **Ernesto L. Viovicente**
Counsel for Tas Plan

Gentlemen:

This refers to your letter dated January 7, 2020, requesting on behalf of your client, Tas Plan, Inc. (Tas Plan), for confirmation that its sales of services to the Head Office of Taisei Corporation (Taisei), are subject to zero percent (0%) value-added tax (VAT) pursuant to Section 108(B)(2) of the National Internal Revenue Code (NIRC) of 1997, as amended.

It is represented that Taisei is a foreign corporation organized and existing under the laws of Japan. It is engaged in construction business on projects outside of the Philippines. On May 11, 1994, Taisei was allowed by the Securities and Exchange Commission (SEC) to establish a Representative Office in the Philippines under SEC Registration No. . Said Representative Office sought to conduct surveys and feasibility studies of possible project that may be undertaken by the head office in the Philippines; negotiate and finalize documentation of papers relative to head office project; and participate in international bidding for the head office.

On January 5, 1998, Taisei branched out in the Philippines under SEC Registration No. . Said Branch Office was formed to engaged in and undertake, either alone or jointly with others, the construction, operation, and/or maintenance of infrastructure, irrigation, power, tourism, and other projects under any of the schemes allowed under the Build-Operate-Transfer (BOT) law, as well as foreign funded projects covered by bilateral agreements between the government of the Philippines and foreign governments/financial institutions and generally to perform any and all acts connected with the business aforementioned or arising therefrom or incidental thereto as may be allowed by law, rules and regulations.

On August 10. 2004, Taisei's Certificate of Withdrawal of its license (SEC Registration No.) of a foreign corporation to transact business in the Philippines was issued by SEC.

On the other hand, Tas Plan (TIN:) is a corporation duly organized and existing under Philippine laws engaged in providing specialty, technical and consultation services to foreign or domestic projects. It is 99.9976% owned by Taisei.

Tas Plan provides design and shop drawings, and estimation work for Taisei Head Office. These services are performed in the Philippines by Tas Plan and are delivered to

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Taisei in Japan. Taisei pays Tas Plan in Japanese yen which is inwardly remitted from Japan to Tas Plan's Mizuho Bank account in Makati City. These designs and shop drawings, and estimation work that Taisei buys from Tas Plan are used by the former for its construction projects outside of the Philippines.

In reply, please be informed that Section 108 (B)(2) of the NIRC of 1997, as amended provides that:

> *"Section 108. Value-added Tax on Sale of Services and Use or Lease of Properties. -*
>
> *x x x x*
>
> *(B) Transactions Subject to Zero Percent (0%) Rate. - The following services performed in the Philippines by VAT-registered persons shall be subject to zero percent (0%) rate:*
>
> *x x x x*
>
> *(2) Services other than those mentioned in the preceding paragraph* ***rendered to a person engaged in business conducted outside the Philippines or to a nonresident person not engaged in business who is outside the Philippines when the services are performed****, the consideration for which is paid for in acceptable foreign currency and accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP);" (Emphasis supplied)*

In *Sitel Philippines Corporation v. Commissioner of Internal Revenue*[1], the Supreme Court, citing Burmeister case, clarified the essential condition to qualify for zero-rating under the above-cited provision, to wit:

> *"In Burmeister, the Court clarified that an essential condition to qualify for zero-rating under the aforequoted provision is that the service-recipient must be doing business outside the Philippines, to wit:*
>
> *The Tax Code not only requires that the services be other than "processing, manufacturing or repacking of goods" and that payment for such services be in acceptable foreign currency accounted for in accordance with BSP rules. Another essential condition for qualification to zero-rating under Section 102(b)(2) is that the* ***recipient of such services is doing business outside the Philippines****. x x x*
>
> *This can only be the logical interpretation of Section 102(b)(2). If the provider and recipient of the "other services" are both doing business in the Philippines, the payment of foreign currency is irrelevant. Otherwise, those subject to the regular VAT under Section 102(a) can avoid paying the VAT by simply stipulating payment in foreign currency inwardly remitted by the recipient of services. To interpret Section 102(b)(2) to apply to a payer-recipient of services doing business in the Philippines is to make the payment of the regular VAT under Section 102(a) dependent on the generosity of the taxpayer. The provider of services can choose to pay the regular VAT or avoid it by stipulating payment in foreign currency inwardly remitted by the payer-recipient. Such interpretation*

[1] G.R. No. 201326, February 8, 2017

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removes Section 102(a) as a tax measure in the Tax Code, an interpretation this Court cannot sanction. A tax is a mandatory exaction, not a voluntary contribution.

x x x x

Thus, when Section 102(b)(2) speaks of ***"[s]ervices other than those mentioned in the preceding subparagraph,"*** *the legislative intent is that only the services are different between subparagraphs 1 and 2. The requirements for zero-rating, including the essential condition that the recipient of services is doing business outside the Philippines, remain the same under both subparagraphs.*

Significantly, the amended Section 108(b) [previously Section 102 (b)] of the present Tax Code clarifies this legislative intent. Expressly included among the transactions subject to 0% VAT are "[s]ervices other than those mentioned in the [first] paragraph [of Section 108(b)] rendered to ***a person engaged in business conducted outside the Philippines or to a nonresident person not engaged in business who is outside the Philippines*** *when the services are performed, the consideration for which is paid for in acceptable foreign currency and accounted for in accordance with the rules and regulations of the BSP."*

Corollary, in the case of *Accenture, Inc. v. Commissioner of Internal Revenue*[2], the Supreme Court emphasized that the taxpayer has the burden to prove not only that the recipient of the service is a foreign corporation but also that said corporation is doing business outside the Philippines:

"Consequently, to come within the purview of Section 108(B)(2), it is not enough that the recipient of the service be proven to be a foreign corporation; rather, it must be specifically proven to be a nonresident foreign corporation.

There is no specific criterion as to what constitutes "doing" or "engaging in" or "transacting" business. We ruled thus in Commissioner of Internal Revenue v. British Overseas Airways Corporation:

There is no specific criterion as to what constitutes "doing" or "engaging in" or "transacting" business. Each case must be judged in the light of its peculiar environmental circumstances. The term implies a continuity of commercial dealings and arrangements, and contemplates, to that extent, the performance of acts or works or the exercise of some of the functions normally incident to, and in progressive prosecution of commercial gain or for the purpose and object of the business organization. "In order that a foreign corporation may be regarded as doing business within a State, there must be continuity of conduct and intention to establish a continuous business, such as the appointment of a local agent, and not one of a temporary character."

It is worth noting that Republic Act (RA) No. 7042 or the Foreign Investments Act of 1991 provides the definition of "doing business" relative to foreign corporations:

[2] G.R. No. 190102, July 11, 2012

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SEC. 3. Definitions. – As used in this Act:

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d) the phrase "doing business" shall include soliciting orders, service contracts, opening offices, whether called "liaison" offices or branches; appointing representatives or distributors domiciled in the Philippines or who in any calendar year stay in the country for a period or periods totaling one hundred eighty (180) days or more; participating in the management, supervision or control of any domestic business, firm, entity or corporation in the Philippines; and any other act or acts that imply a continuity of commercial dealings or arrangements, and contemplate to that extent the performance of acts or works, or the exercise of some of the functions normally incident to, and in progressive prosecution of, commercial gain or of the purpose and object of the business organization: Provided, however, That the phrase "doing business" shall not be deemed to include mere investment as a shareholder by a foreign entity in domestic corporations duly registered to do business, and/or the exercise of rights as such investor; nor having a nominee director or officer to represent its interests in such corporation; nor appointing a representative or distributor domiciled in the Philippines which transacts business in its own name and for its own account.

Section 3(d) of RA No. 7042 states that "opening offices, whether called "liaison" offices or branches is considered as "doing business". Also, the Implementing Rules and Regulations of RA No. 7042 qualifies that a "branch" office of a foreign company **carries out the business activities of the head office and derives income from the host country**.

Based on the foregoing, it is deemed certain that this Office cannot sustain the position of Tas Plan because the factual antecedents surrounding their transaction runs contrary to the qualifications set forth by the above-cited jurisprudence. The mere existence of a branch of a foreign corporation negates the application of Section 108 (B)(2) of the NIRC of 1997. Hence, its transactions with Taisei Corporation cannot be treated as subject to zero percent (0%) VAT.

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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