December 7, 2018

BIR RULING NO. 1422-18

Section 40 (C) (2) & (6) (b), Tax Code of 1997, as amended; BIR Ruling No. 214-12; BIR Ruling No. 075-18

Wilcon Corporation
90 E. Rodriguez Jr. Avenue
Ugong Norte, Quezon City

Attention: *AAA*

Gentlemen :

This refers to your letter dated April 26, 2017 requesting for confirmation of your opinion that the merger of COLE PACIFIC, INC., EXTENSO MARKETING, INC., VINCIT MARKETING, INC., and LIBERUM MARKETING, INC., as the absorbed corporations and WILCON BUILDER'S DEPOT, INC., as the surviving corporation is a tax-free transfer/exchange pursuant to Section 40 (C) (2) in relation to Section 40 (C) (6) (b) of the Tax Code of 1997, as amended (Tax Code).

Documents show that **Cole Pacific, Inc. (Cole)**, with TIN: 000-000-000-000, is a corporation duly organized and existing under Philippine laws, with principal place of business and office at 1274 EDSA, A. Samson, Quezon City. It is registered with the Securities and Exchange Commission (SEC) under Company Registration No. A200200467 on January 16, 2002. Cole is primarily organized to engage in, conduct, and carry on the business of buying, selling, distributing, marketing at wholesale and retail insofar as may be permitted by law, all kinds of goods, commodities, wares and merchandise of every kind and description, to enter into all kinds of contracts for the export, import, purchase, acquisition, sale at wholesale or retail and other disposition for its own account as principal or in representative capacity as manufacturer's representative, merchandise broker, indentor, commission merchant, factors or agents, upon consignment of all kinds of goods, wares, merchandise or products whether natural or artificial, to engage in the food business, such as but not limited to restaurant, catering, bakeshop and production of edible food items.

Extenso Marketing, Inc. (Extenso), with TIN: 000-000-000-000, is a corporation duly organized and existing under Philippine laws, with principal place of business and office in Brgy. Lagundi, Gapan-Olongapo Road, Mexico, Pampanga. It is registered with the SEC under Company Registration No. CS200716596 on October 22, 2007. Extenso is

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engaged in the business of trading of goods such as construction supplies, bathroom fixtures and supplies, furnitures, kitchen fixtures and supplies on a wholesale/retail basis.

Vincit Marketing, Inc. (Vincit), with TIN: 000-000-000-000, is a corporation duly organized and existing under Philippine laws, with principal place of business and office at L119 C-1 Mindanao Avenue, Talipapa, Quezon City. It is registered with the SEC under Company Registration No. CS200717760 on November 20, 2007. Vincit is engaged in the business of trading of goods such as construction supplies, bathroom and kitchen supplies and equipment, furniture, etc. on a wholesale/retail basis.

Liberum Marketing, Inc. (Liberum), with TIN: 000-000-000-000, is a corporation duly organized and existing under Philippine laws, with principal place of business and office at 16 Commonwealth Avenue, Brgy. Commonwealth, Quezon City. It is registered with the SEC under Company Registration No. CS200804796 on April 1, 2008. Liberum is engaged in the business of trading of goods such as construction supplies, bathroom and kitchen supplies and equipment, furniture, etc. on a wholesale/retail basis.

Wilcon Builder's Depot, Inc. (Depot), with TIN: 000-000-000-000, is a corporation duly organized and existing under Philippine laws, with principal place of business and office at 90 E. Rodriguez Jr. Ave. Ugong Norte, Quezon City. It is registered with the SEC under Company Registration No. CS200259986 on November 13, 2002. Depot is primarily organized to engage in, conduct, and carry on the business of buying, selling, distributing, marketing at wholesale and retail insofar as may be permitted by law, all kinds of goods, commodities, wares and merchandise of every kind and description; to enter into all kinds of contracts for the export, import, purchase, acquisition, sale at wholesale or retail and other disposition for its own account as principal or in representative capacity as manufacturer's representative, merchandise broker, indentor, commission merchant, factors or agents, upon consignment of all kinds of goods, wares, merchandise or products whether natural or artificial.

On February 24, 2012, Cole, Extenso, Vincit, Liberum and Depot (the Constituent Corporations) deemed it advisable, expedient, and in their best interest to merge into a single corporation, pursuant to Title IX of the Corporation Code of the Philippines, with Depot as the surviving corporation, in order to streamline the shareholding structure, increase the efficiency of operations, maximize productive use of properties and resources and thereby avoid unnecessary administrative costs.

The Articles of Merger and the Plan and Agreement of Merger were authorized, approved, ratified, and confirmed by a majority of the Board of directors of the Constituent Corporations at separate meetings held on February 24, 2012.

The SEC approved the Articles of Merger and the Plan and Agreement of Merger of Cole, Extenso, Vincit, Liberum and Depot, with Depot as the surviving entity, on

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August 16, 2012.

Pursuant to the Plan of Merger, Depot will issue a total of Five Hundred Thousand (500,000) common shares to the shareholders of the Absorbed Corporations.

The authorized capital stock issued and outstanding capital stock of each of the Constituent Corporations as set forth in their respective Audited Financial Statements filed with the SEC together with the Articles of Merger and the Plan and Agreement of Merger, are as follows:

COLE PACIFIC, INC. (February 24, 2012)

Type of Share	Authorized	Issued and Outstanding	Par Value	No. of Shares	Amount
Preferred					
Common	100,000,000.00	_____	_____	778,633	_____

EXTENSO MARKETING, INC. (February 24, 2012)

Type of Share	Authorized	Issued and Outstanding	Par Value	No. of Shares	Amount
Preferred					
Common	30,000,000.00	_____	_____	300,000	_____

VINCIT MARKETING, INC. (February 24, 2012)

Type of Share	Authorized	Issued and Outstanding	Par Value	No. of Shares	Amount
Preferred					
Common	30,000,000.00	_____	_____	300,000	_____

LIBERUM MARKETING, INC. (February 24, 2012)

Type of Share	Authorized	Issued and Outstanding	Par Value	No. of Shares	Amount
Preferred					
Common	30,000,000.00	_____	_____	75,000	_____

WILCON BUILDER'S DEPOT, INC. (February 24, 2012)

Type of Share	Authorized	Issued and Outstanding	Par Value	No. of Shares	Amount
Preferred					
Common	50,000,000.00	_____	_____	500,000	_____

Beginning on the Effective Date of Merger, the authorized capital stock and issued and outstanding capital stock of Depot are as follows:

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WILCON BUILDER'S DEPOT, INC. (September 1, 2012)

Type of Share	Authorized	Issued and Outstanding	Par Value	No. of Shares	Amount
Preferred					
Common	200,000,000.00	_____	_____	1,000,000.00	_____

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

1. The statutory merger of the Absorbed Corporations and Depot qualifies for non-recognition of gain or loss for income tax purposes in accordance with Section 40 (C) (2) in relation to Section 40 (C) (6) (b) of the Tax Code, and as such, neither the Absorbed Corporations nor Depot will be subject to income tax, withholding tax, or capital gains tax on the transfer.

2. The cost basis of Depot in the assets of the Absorbed Corporations is the same as the cost basis of the Absorbed Corporations in those assets.

3. The shareholders of the Absorbed Corporations do not recognize gain or loss upon the surrender of their Shares in the Absorbed Corporations in exchange for newly issued Depot Shares; their cost basis in the Absorbed Corporations' Shares is the same as their cost basis in the Depot Shares.

4. The transfer of the assets of the Absorbed Corporations to Depot pursuant to the merger and the surrender by the Shareholders of their Shares in the Absorbed Corporations in exchange for Depot Shares are not transfers of property for less than an adequate and full consideration, hence, do not give rise to a liability for donor's tax.

5. The surrender by the Shareholders of their Shares pursuant to the merger is not subject to documentary stamp tax (DST).

6. The issuance of new shares by Depot to the Shareholders is subject to DST at the rate of P1.00 on each P200.00 par value, or fractional part thereof.

7. The transfer of assets of the Absorbed Corporations to Depot pursuant to the merger is not subject to value-added tax (VAT) and any unused input tax of Cole, Extenso, Vincit, Liberum as of the effectivity of the merger shall be absorbed by Depot pursuant to Section 4.106-8 (b) (3) of RR 16-2005, otherwise known as the Consolidated Value-Added Tax Regulations of 2005, implementing R.A. 9337.

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8. Any unutilized creditable withholding tax (CWT) of the Absorbed Corporations as of the Effective Date of Merger is among the rights, privileges, immunities, franchises, property, receivables, and interest of the Absorbed Corporations transferred to Depot against its income tax due for the taxable year 2012, and in the succeeding taxable years, or may be subject of a claim for refund or issuance of tax credit certificate. Beginning the Effective Date of Merger, any withholding tax certificate issued by a payor of income in the name of the Absorbed Corporations may be applied by Depot against its income tax due for the taxable year 2012, and in its succeeding taxable years, or may be subject of a claim for refund or issuance of a tax credit certificate.

9. Any unexpired minimum corporate income tax (MCIT) of the Absorbed Corporations as of the Effective Date of Merger is among the rights, privileges, immunities, franchises, property, receivables, and interest of the Absorbed Corporations transferred to Depot by operation of law pursuant to the merger, and carried forward and credited against the regular corporate income tax liability of Depot subject to the three-year-carry-forward period reckoned from the date of payment of the Absorbed Corporations of the MCIT.

10. Any Net Operating Loss Carry Over (NOLCO) balance of the Absorbed Corporations as of the Effective Date of merger, will be among the rights, privileges, immunities, franchise, property, receivables, and interest of the Absorbed Corporations transferred to Depot by operation of law pursuant to the merger as long as there is no effective change in ownership (*i.e.*, not less than 75% in nominal value of outstanding issued shares is held by or on behalf of the same persons or not less than 75% of the paid-up capital of the corporation is held by or on behalf of the same persons).

In reply, please be informed as follows:

1. The foregoing merger of the Absorbed Corporations and Depot is a merger within the contemplation of Section 40 (C) (2) in relation to Section 40 (C) (6) (b) of the Tax Code because Depot's acquisition/assumption of all the assets and liabilities of the Absorbed Corporations is being undertaken for a *bona fide* business purpose and not for the purpose of escaping the burden of taxation.

   The merger of the Absorbed Corporations and Depot qualifies for non-recognition of gain or loss for income tax purposes in accordance with Section 40 (C) (2) of the Tax Code. Accordingly, no gain or loss shall be recognized by Depot, as the transferee, on its receipt of the

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asset and liabilities of the Absorbed Corporations pursuant to and as a consequence of the merger.

2 & 3. The basis of the shares of stocks to be received by Shareholders of the Absorbed Corporations 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 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)

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

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. (Sec. 40 (C) (4) (b), *supra*)

The substituted bases of the properties transferred by the Absorbed Corporations to Depot 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.

Accordingly, the allocated shares and the substituted basis of the properties transferred by the absorbed corporations shall be as follows:

COLE PACIFIC, INC.

Assets	Amount	Allocated Liabilities	Allocated Shares	Substituted Basis
Cash	_____		_____	_____
Trade receivables	_____	_____	_____	_____
Merchandise inventories	_____	_____	_____	_____

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Other Current Assets	_____	_____	_____	_____
Investments in an associate	_____	_____	_____	_____
Property and equipment — net	_____	_____	_____	_____
TOTAL	_____	_____	_____	_____

Liabilities	Amount
Short-term borrowings	_____
Current portion of long-term debt	_____
Payables and other current liabilities	_____
Income tax payable	_____
Long term debt — net of current portion	_____
Total	_____

EXTENSO MARKETING, INC.

Assets	Amount	Allocated Liabilities	Allocated Shares	Substituted Basis
Cash	_____		_____	_____
Trade receivables	_____	_____	_____	_____
Merchandise inventories	_____	_____	_____	_____
Other Current Assets	_____	_____	_____	_____
Property and equipment — net	_____	_____	_____	_____
TOTAL	_____	_____	_____	_____

Liabilities	Amount
Current portion of long-term debt	_____
Payables and other current liabilities	_____
Income tax payable	_____
Long term debt — net of current portion	_____
Total	_____

VINCIT MARKETING, INC.

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Assets	Amount	Allocated Liabilities	Allocated Shares	Substituted Basis
Cash	_____		_____	_____
Trade receivables	_____	_____	_____	_____
Merchandise inventories	_____	_____	_____	_____
Other Current Assets	_____	_____	_____	_____
Property and equipment — net	_____	_____	_____	_____
Deferred Tax assets	_____	_____	_____	_____
TOTAL	_____	_____	_____	_____

Liabilities	Amount
Short-term borrowings	_____
Payables and other current liabilities	_____
Total	_____

LIBERUM MARKETING, INC.

Assets	Amount	Allocated Liabilities	Allocated Shares	Substituted Basis
Cash	_____		_____	_____
Trade receivables	_____	_____	_____	_____
Merchandise inventories	_____	_____	_____	_____
Other Current Assets	_____	_____	_____	_____
Property and equipment — net	_____	_____	_____	_____
Deferred Tax assets	_____	_____	_____	_____
TOTAL	_____	_____	_____	_____

Liabilities	Amount
Short-term borrowings	_____
Current Portion of long-term debt	_____
Payables and other current liabilities	_____
Long-term debt-net of current portion	_____

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Deferred tax liability	_____
Total	_____

SUMMARY

Name of Company	Total assets transferred	Total number of shares allocated	Substituted Basis
Cole Pacific, Inc.	_____	_____	_____
Extenso Marketing, Inc.	_____	_____	_____
Vincit Marketing, Inc.	_____	_____	_____
Liberum Marketing, Inc.	_____	_____	_____
Total	_____	_____	_____

4. 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 any act of liberality *(animus donandi)*.

   Clearly, there is no intention on the part of any of the parties to the merger — Absorbed Corporations to donate to Depot their 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 *bona fide* merger effected solely for business reasons.

5. 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 (R.A.) No. 9243, in relation to Section 40 (C) (2) of the Tax Code. However, DST at the rate of P1.00 [1] on each P200.00 par value, or fractional part thereof, shall be imposed on the original issuance of shares by Depot to the stockholders as a consequence of the merger as provided under Section 174 of the Tax Code.

6. The transfer of properties of the Absorbed Corporations to Depot as a consequence of merger will 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

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merger. Thus, any unused input tax as of the effective date of merger will be absorbed by Depot, as the surviving corporation pursuant to Section 4.106-8 (b) (3) of RR No. 16-2005, as amended.

7. The excess and unutilized CWT of the Absorbed Corporations, as of the effective date of the merger, which form part of the assets to be transferred by the Absorbed Corporations to Depot as a consequence of the merger, may be applied as a tax credit by Depot against its income tax due for the taxable year 2012, the effective date of the merger being September 1, 2012, and in the succeeding taxable years, or may be the subject of a claim for refund or issuance of a tax credit certificate (TCC).

8. The excess and unexpired MCIT of the Absorbed Corporations, as of the effective date of the merger as of year 2012, if any, shall be carried forward and credited against the normal income tax due of the surviving corporation, Depot, for the three (3) immediately succeeding taxable years pursuant to Section 27 (E) (2) of the Tax Code.

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

10. The unrestricted retained earnings of the absorbed corporations are subject to the ten percent (10%) final withholding tax on dividends constructively received by its shareholders pursuant to Section 24 (B) (2) of the Tax Code.

In order that the above-described reorganization can be considered as merger under Section 40 (C) (2) and (6) (b) of the Tax Code, the parties to the merger should comply with the following requirements set forth under RR 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:

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(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 the cost or other basis of all properties, 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 or 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; and

(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, who is a 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 the stock or securities and other property or money received from the exchange, including any liability assumed upon the exchange, and any liability 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 exchange.

C. Permanent 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 liability assumed on the exchange, or any liability to which any of the properties received were

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subject), in order to facilitate the determination of gain or loss from a subsequent disposition of such stock or securities and other property received from the exchange. (par. 9803-8, Prentice Hall 1963, ed., p. 9611)

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 stamped 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.

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 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 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 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 ascertained that the facts are different, then this ruling shall be considered null and void.

Very truly yours,

(SGD.) CAESAR R. DULAY
Commissioner of Internal Revenue

Footnotes

1. Old DST rate is used since the transaction took place prior to the effectivity of Republic Act No. 10963 or the TRAIN Law.

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