July 23, 2019

BIR RULING NO. 404-19

E.O. 226; Secs. 57 (B); 106 (A) (1) (a); 196
NIRC; BIR Ruling No. 334-2011

Feria Tantoco Robeniol Law Offices
8th Flr. DPC Place, 2322 Chino Roces Ave.
Makati City

Attention: *AAA*
BBB
CCC

Gentlemen :

This refers to your letter dated March 01, 2013 requesting, on behalf of **First Gen Hydro Power Corporation ("FGHPC")**, confirmation of your opinion that the sale by **FGHPC** of electricity generated through hydropower in favor of the **National Grid Corporation of the Philippines ("NGCP")** is exempt from income and expanded withholding taxes, and is subject to zero percent (0%) value added tax (VAT) on account of **FGHPC's** registration with the Board of Investments (BOI) under Executive Order No. 226, otherwise known as the "Omnibus Investments Code of 1987."

It is represented that **FGHPC** (TIN: 000-000-000-000) is a domestic corporation duly organized under the Philippine laws, with office address at 3/F Benpres Bldg., Exchange Road cor. Meralco Avenue, Pasig City; that it is registered with the Securities and Exchange Commission (SEC) bearing SEC Certificate of Registration No. CS200603812 dated March 13, 2006; that it is primarily engaged in power generation and is an important part of the various energy-related businesses of the Lopez group of companies, which is also publicly known as a leading provider of clean and renewable energy in the Philippines with a total installed capacity of 2,763 megawatts ("MW"); that it is registered with the Board of Investments per Certificate of Registration No. 2007-070 dated April 13, 2007 as a **New Operator of One Hundred Twelve (112) MW Pantabangan-Masiway Hydro Electric Project** on a pioneer status under the Omnibus Investments Code of 1987 (E.O. 226); that **FGHPC** shall be entitled to income tax holiday (ITH) for above-registered activity for a

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period of six (6) years beginning from the date of registration on April 13, 2007; that on October 9, 2012, the BOI approved **FGHPC's** application for an extension of one (1) year in its ITH, covering the period from April 13, 2013 to April 12, 2014; and that the ITH of **FGHPC** shall be limited only to the revenue generated from the registered activity as **New Operator of One Hundred Twelve (112) MW Pantabangan-Masiway Hydro Electric Project**.

FGHPC, under the Specific Terms and Conditions of its BOI Registration for the above registered activity, is required to observe the following production and sales schedule:

Year	1	2	3	4	5
Capacity (MW)					
Pantabangan	100	100	100	100	100
Masiway	12	12	12	12	12
Total	112	112	112	112	112
Average capacity utilization of the 2 plants	52.92%	52.92%	52.92%	52.92%	52.92%
Operating Hours	6,386	6,386	6,386	6,514	6,512
Net Generation					
MWh	378,501	378,501	378,501	386,087	3,385,969
Kwh	378,500,774	378,500,774	378,500,774	386,087,386	385,968,845
Selling rate P/kwh	4.1142	4.2170	4.3225	4.3435	4.4821
Revenues	_____	_____	_____	_____	_____

It is further represented that on February 23, 2011, the **NGCP** and **FGHPC** entered into an **Ancillary Services Procurement Agreement ("ASPA")** whereby **FGHPC** shall sell to **NGCP** electricity capacity for the following:

1. Contingency Reserve — A generating capacity to adjust automatically the total system generation in response to sudden reduction of generation output or tripping of generating unit.

2. Dispatchable Reserve — A generating capacity necessary to replenish the Contingency Reserve.

3. Reactive Power Support — The capability of the generating unit to absorb from or supply reactive power to the grid in order to maintain the system voltage within the +/– 5 level. The purpose of Reactive Power Support is to supplement other Reactive Power sources connected to the grid, and to

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contribute to network voltage control.

4. Black Start Service — The capability of the generating unit to restore power system from partial or total system black out. The objective of the Black Start Ancillary Service is to energize a section of the grid without the use of an external power sources, allowing further connection of transmission circuits, and demand to be progressively connected, until the network is re-integrated.

that the ancillary services to be provided by **FGHPC** to **NGCP** under the **ASPA** include the sale of electricity from **FGHPC's** Pantabangan Hydro Electric Power Plant as confirmed by the Certification dated November 23, 2012, issued by the **Energy Regulatory Commission ("ERC")**. The ERC also clarified that these ancillary services are necessary to support the transmission of capacity and energy from resources to loads while maintaining reliable operation of the transmission system in accordance with good utility practice and the Philippine Grid Code.

Based on the foregoing, you now request for confirmation of your opinion as follows:

1. The income derived by **FGHPC** from the sale of electricity from Ancillary Services to **NGCP** is exempt from income and withholding taxes; and

2. The sale by **FGHPC** of electricity from Ancillary Services to **NGCP** is subject to zero percent (0%) VAT.

In reply, please be informed that under Section 2.57.5 (B) (2) of Revenue Regulations (RR) No. 2-98, as amended by RR No. 6-2001 implementing Section 57 (B) of the Tax Code of 1997, as amended, the withholding tax prescribed in the said Regulations shall not apply to income payments to persons enjoying exemption from the income tax provided by Republic Act No. 7916 and the Omnibus Investments Code of 1987. *(BIR Ruling No. 334-2011 dated September 7, 2011)*

Records show that **FGHPC**'s operation of the **One Hundred Twelve (112) MW Pantabangan-Masiway Hydro Electric Project** is a BOI registered activity. As such, income payments received by **FGHPC** directly in connection with the sale of electricity generated through the operation of the said Hydro Electric Project, are exempt from the creditable withholding tax imposed under RR No. 2-98, as amended by RR No. 6-2001, for a period of six (6) years beginning from the date of its registration on April 13, 2007 and for an additional period of one year covering the period from April 13, 2013 to April 12, 2014.

It must be emphasized, however, that the above exemption from income and

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creditable withholding taxes covers only the revenues derived from **FGHPC's** sale of electricity generated through its **One Hundred Twelve (112) MW Pantabangan-Masiway Hydro Electric Project** within the **six (6)-year ITH period** reckoned from April 13, 2007 and from April 13, 2013 up to Aril 12, 2014. It is noted that the **Ancillary Procurement Agreement (ASPA)** was only executed on April 10, 2017 or after the expiration of the ITH period. Thus, the sale of the ancillary services by **FGHPC** under the **ASPA** is no longer covered by the **ITH**. Consequently, the sale thereof is subject to the income tax and creditable withholding tax.

Anent the request for VAT-zero rating on **FGHPC's** sale of electricity, Section 4.108-5 of RR No. 16-05, as amended, provides that the sale of power or fuel may be entitled to zero percent (0%) VAT provided that the power or fuel is generated through renewable sources of energy such as, but not limited to, biomass, solar, wind, hydropower, geothermal and steam, ocean energy, and other emerging sources using technologies such as fuel cells and hydrogen fuels. The aforesaid Section states:

> "SEC. 4.108-5. Zero-Rated Sale of Services. —
>
> (b) Transactions Subject to Zero Percent (0%) VAT Rate. — The following services performed in the Philippines by a VAT-registered person shall be subject to zero percent (0%) VAT rate:
>
> xxx xxx xxx
>
> (7) Sale of power or fuel generated through renewable sources of energy such as, but not limited to, biomass, solar, wind, hydropower, geothermal and steam, ocean energy, and other emerging sources using technologies such as fuel cells and hydrogen fuels; Provided, however, that zero-rating shall apply strictly to the sale of power or fuel generated through renewable sources of energy, and shall not extend to the sale of services related to the maintenance or operation of plants generating said power.
>
> xxx xxx xxx"

In this case, the electricity sold by **FGHPC** to **NGCP** is generated through its **One Hundred Twelve (112) MW Pantabangan-Masiway Hydro Electric Project**. Accordingly, the sale thereof is subject to zero percent (0%) VAT.

It should be understood that **FGHPC** shall be constituted as a withholding agent for the government if it acts as employer and any of its employees received compensation income subject to compensation withholding tax, or if it makes payments to individuals or corporations subject to the withholding taxes at source as required under Chapter XIII and Section 57 of the Tax Code of 1997, as amended and implemented by *Revenue Regulations (RR) No. 2-98*, as amended.

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Pursuant to Section 4 of Republic Act (RA) No. 10708, the Company is required to file its tax returns and pay its tax liabilities, on or before the deadline as provided under the 1997 Tax Code, as amended, using the electronic system for filing and payment of taxes of the BIR. It shall file with BOI a complete annual tax incentives report of its income-based tax incentives, VAT and duty exemptions, deductions, credits or exclusions from the tax base, as may be provided under E.O. 226, within the periods prescribed under R.A. 10708's Implementing Rules and Regulations and Joint Memorandum Circular No. 1-2016 dated September 1, 2016.

Likewise, **FGHPC** is required to file on or before the 15th day of the fourth month following the close of its accounting period of a Profit and Loss Statement and Balance Sheet with the Annual Information Return under oath, stating its gross income and expenses incurred during the taxable year.

Finally, **FGHPC**'s books of accounts and other pertinent records shall be subject to periodic examination by revenue enforcement officers of this Bureau for the purpose of ascertaining whether it is complying with the conditions under which it has been granted tax exemption or tax incentives and your tax liability, if any, pursuant to Section 235 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,

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

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