REPUBLIC OF THE PHILIPPINES
DEPARTMENT OF FINANCE
BUREAU OF INTERNAL REVENUE

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September 28, 2023

REVENUE MEMORANDUM CIRCULAR NO. 112-2023

SUBJECT : **Clarification on the Duty of the Food and Drug Administration to Determine Classification of Beverages Pursuant to Sec. 150-B of the National Internal Revenue Code of 1997, as Amended, and as Implemented by Revenue Regulations No. 20-2018**

TO : All Internal Revenue Officers, Employees, and Others Concerned

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I. BACKGROUND

Republic Act (RA) No. 10963, otherwise known as the "Tax Reform for Acceleration and Inclusion (TRAIN)," took effect on January 1, 2018. **Section 47** of the said law introduced **Section 150-B** in the **National Internal Revenue Code (NIRC) of 1997**, providing for the imposition of excise tax on **Sweetened Beverages.**

Section 150-B(B)(1) of the NIRC of 1997, as amended, defines sweetened beverages and lists the categories of beverages included in the definition, to wit:

> **"SEC. 150-B.** ***Sweetened Beverages.*** **–**
>
> xxx xxx xxx
>
> (1) *Sweetened beverages* (SBs) refer to non-alcoholic beverages of any constitution (liquid, powder, or concentrates) that are pre-packaged and sealed in accordance with the Food and Drug Administration (FDA) standards, that contain caloric and/or noncaloric sweeteners added by the manufacturers, and shall include, but not be limited to the following, as described in the Food Category System from Codex Alimentarius Food Category Descriptors (Codex Stan 192-1995, Rev. 2017 or the latest) as adopted by the FDA:
>
> xxx xxx xxx"

Likewise, **Section 150-B(C)** of the same Code enumerates the five (5) classes of products, including **milk products**, that are excluded from the coverage of sweetened beverage excise tax, viz.:

> "(C) ***Exclusions.*** — The following products, as described in the food category system from Codex Alimentarius Food Category Descriptors (Codex Stan 192-1995, Rev. 2017 or the latest) as adopted by the FDA, are excluded from the scope of this Act:
>
> (1) **All milk products**, including plain milk, infant formula milk, follow-on milk, growing up milk, powdered milk, ready-to-drink milk and flavored milk, fermented milk, soymilk, and flavored soymilk;
>
> xxx xxx xxx" [Emphasis supplied]

Section 6 of **Revenue Regulations (RR) No. 20-2018,** the implementing rules and guidelines on the imposition of excise tax on sweetened beverages, reiterates the above-cited

exclusions and in addition provides for the definition of **milk product**, as a product excluded from excise tax, as follows:

> "**Milk product** refers to products obtained by any processing of milk, which may contain food additives, and other ingredients functionally necessary for the processing (Codex General Standard for the Use of Dairy Terms (Codex Stan 206-1999):
>
> xxx xxx xxx" [Emphasis supplied]

Based on the foregoing provisions of the NIRC of 1997, as amended, and RR No. 20-2018, the products that are subject to the imposition of sweetened beverage excise tax are those that are included in the definition of "sweetened beverages" and in accordance with the descriptors found in the Food Category System from the Codex Alimentarius Food Category Descriptors (Codex Stan 192-1995, Rev. 2017 or the latest) as adopted by the FDA. At the same time, certain products are excluded from the coverage of sweetened beverage excise tax, based likewise on the Food Category Descriptors of the relevant Codex Stan. A major product category covered by the exclusions under Section 150-B(C) of the NIRC of 1997, as amended, is milk product, which the implementing Revenue Regulations especially elaborated on.

Notably, whether a beverage product is subject to excise tax or covered by the exclusions is determined by reference to the Codex Stan 192-1995, Rev. 2017 or the latest as adopted by the FDA, as expressly provided under the above-cited provisions of tax law and revenue regulations.

Classification of beverages is crucial to the correct and appropriate imposition and collection of excise tax on sweetened beverages. Hence, this Circular is issued to clarify the duty of the Food and Drug Administration to determine classification of beverages pursuant to Section 150-B of the NIRC of 1997, as amended, and as implemented by Revenue Regulations No. 20-2018, in order that the BIR may protect revenues and safeguard against improper classification giving rise to exclusions from excise tax to the detriment of the government.

II. THE ROLE OF THE FOOD AND DRUG ADMINISTRATION

The **NIRC of 1997**, as amended, mentions the **FDA** in the definition of sweetened beverages and the exclusions therefrom, to wit:

> "Sweetened beverages (SBs) refer to non-alcoholic beverages ... that contain caloric and/or noncaloric sweeteners added by the manufacturers ... as described in the Food Category System from Codex Alimentarius Food Category Descriptors (Codex Stan 192-1995, Rev. 2017 or the latest) **as adopted by the FDA**." *(Sec.150-B(B)(1))*
> (Emphasis and underscoring supplied)

> "The following products, as described in the food category system from Codex Alimentarius Food Category Descriptors (Codex Stan 192-1995, Rev. 2017 or the latest) **as adopted by the FDA**, are excluded from the scope of this Act xxx"
> *(Sec. 150-B(C))*
> (Emphasis and underscoring supplied)

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Section 6 of **RR No. 20-2018** provides for the role of the agency in determining beverage classification, as follows: "The proper classification of beverages shall be subject to the determination by the FDA."

The Department of Health, through Department Circular No. 2019-0319 dated August 1, 2019, circularized the adoption by the FDA of the Food Category System and Descriptors of the

General Standard for Food Additives (CODEX STAN 192-1995, Rev. 2018) "to serve as basis for the identification and classification of food products in its processing of applications for authorization."

The FDA, to address requests by sweetened beverage manufacturers, distributors, and traders for "**FDA confirmation of product classification according to Codex ... to aid the BIR in the determination of excise tax and/or granting of tax exemption,**" issued FDA Circular No. 2021-005 dated February 9, 2021, "to provide a uniform procedure for requesting FDA confirmation of the product classification and type sweetener/s used, in aid of TRAIN Law implementation specifically on SB products." [Emphasis and underscoring supplied]

Under the guidelines set forth in the FDA Circular, the requirements prescribed by the agency for submission by manufacturers, distributors, and traders include a request letter indicating the list of products being requested for confirmation; Certificate of Analysis issued within twelve (12) months by an FDA Recognized Laboratory for each product indicating the presence of such declared sweetener/s; and Scanned copy or photograph of the actual label as approved by the FDA showing the list of ingredients.

Based on the foregoing, it can be inferred that the FDA's identification and classification of food products, in general, is undertaken for the purpose of processing applications for authorization that food manufacturers and traders of raw materials submit to the agency, and the Codex it has adopted serves as the basis for such identification and classification. The authorization is issued by the FDA for purposes of registration and regulatory compliance. On the other hand, the confirmation or certification of product classification that the office carries out – upon request by manufacturers, distributors and traders in the hopes that their products will be exempted from the sweetened beverage excise tax – is in the form of letter response and based on a review of the documentary requirements, including the list of ingredients, submitted by the requesting entities.

In this regard, it bears emphasizing the importance of proper classification of beverages, as such classification shall be the basis for the inclusion of certain beverages in the coverage of sweetened beverages, which are subject to excise tax, as well as the exclusion therefrom of those beverages that fall within the scope of products listed under Section 150-B(C) of the NIRC of 1997, as amended, and Section 6 of RR No. 20-2018 that are excluded from sweetened beverage excise tax. Integral and central to proper classification is the mandatory use of and reference to the relevant Codex as basis for such classification.

To illustrate, Section 150-B(C) of the NIRC of 1997, as amended, and Section 6 of RR No. 20-2018 expressly exclude **all milk products**, including plain milk, infant formula milk, follow-on milk, growing up milk, powdered milk, ready-to-drink milk and flavored milk, fermented milk, soymilk, and flavored soymilk from the coverage of sweetened beverages subject to excise tax under Section 150-B(B)(1) of the same Code.

A careful reading of the Food Category Descriptors from Codex Stan 192-1995, Rev. 2018 or latest, as adopted by the FDA, reveals that descriptions of some milk products admit of exclusions.

As an example, under the category Fluid Milk and Milk Products, the Codex lists Fluid Milk (plain), Other Fluid Milk (plain), Fluid Buttermilk (plain), and Flavoured Fluid Milk Drinks, to wit:

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"FOOD CATEGORY SYSTEM
PART I: Food Category System
01.0 Dairy products and analogues, excluding products of food category 02.0
01.1 Fluid Milk and Milk Products
01.1.1 Fluid Milk (plain)
01.1.2 Other Fluid Milk (plain)
01.1.3 Fluid Buttermilk (plain)
01.1.4 Flavoured Fluid Milk Drinks"

The description for **Flavoured Fluid Milk Drinks** under 01.1.4 of the Codex is as follows: "Includes all mixes and ready-to-drink fermented or not fermented milk-based drinks with flavourings and/or food ingredients that intentionally impart flavour, excluding mixes for cocoa (cocoa-sugar mixtures, category 05.1.1). It should be noted that the said description should satisfy or be aligned with the definition of **Fluid Milk** under 01.1, the category under which Flavoured Fluid Milk Drinks belongs, as "'milk products' ... that are obtained by the processing of milk, and may contain food additives and other ingredients functionally necessary for processing." (Underscoring supplied)

Therefore, the classification of a product under consideration, as to whether it satisfies the definition of **milk product,** (i.e., "products obtained by any processing of milk, which may contain food additives, and other ingredients functionally necessary for the processing") **necessarily entails an analysis of its composition and the production process involved in its manufacture.**

In the light of the foregoing discussion, with emphasis on milk products, a review of the relevant Codex Stan shows that a product which contains milk, or marketed and advertised as a "milk drink" does not automatically make it a flavoured fluid milk drink or any of the other milk products enumerated in the Codex Stan that fall within the coverage of products excluded from the sweetened beverage excise tax under Section 150-B(C) of the NIRC of 1997, as amended, and Section 6 of RR No. 20-2018.

To fall within the scope of milk products as contemplated by Section 150-B of the same Code, a product must satisfy the descriptors set forth in the Codex Alimentarius Food Category Descriptors (Codex Stan 192-1995, Rev. 2018 or Latest) that the FDA adopted or any revision thereof that the agency will adopt in the future. Only when the Codex Stan includes a product or beverage as belonging to the milk product categories listed thereunder, whether by express inclusion or based on an analysis of the ingredients and the production process, that such product or beverage may be classified as a milk product and, hence, excluded from the sweetened beverage excise tax. Furthermore, a determination of whether a beverage is a milk product within the meaning of the Codex, and hence excluded from excise tax, also requires an analysis of its composition and the production process. On the other hand, when the Codex Stan explicitly excludes certain products or beverages from a milk product category, then the same are not deemed as milk products and, therefore, excluded from the exclusion from the coverage of sweetened beverages and, hence, subject to excise tax.

Nowhere in the statutes is the FDA expressly vested with the power and authority to identify and classify food products. Nonetheless, under Republic Act No. 9711, otherwise known as "The Food and Drug Administration Act of 2009," the agency is endowed with the function of issuing, among others, "appropriate authorizations to ensure safety, efficacy, purity, and quality" of applicable health products. It must be noted, however, that these authorizations are limited to permits, licenses, certificates of registration and the like, and do not cover identification and classification of food products for taxation purposes.

III. THE POWER OF THE BUREAU OF INTERNAL REVENUE TO DETERMINE TAXABILITY

Let it be clarified that for the purpose of administration of excise tax laws and regulations, particularly the implementation of the excise tax on sweetened beverages, the FDA's function is limited to the adoption of the relevant version of the Codex Alimentarius Food Category Descriptors (Codex Stan 192-1995) and, at best, the determination of the proper classification of beverages. Furthermore, the FDA's determination should be based on reference to and understanding of the Codex Stan 192-1995 version that it has adopted and strict adherence to the parameters set forth therein.

It bears emphasizing, however, that the FDA's determination of beverage classification is in no way absolute, final and conclusive and is subject to the discretion of the BIR to review such determination. **The Bureau reserves its right to classify the products for taxation purposes should the FDA fail to strictly adhere to the applicable Codex Descriptors.**

The Supreme Court has ruled in a number of cases that the interpretation placed upon a statute by the executive officers, whose duty is to enforce it, is entitled to great respect by the courts. **Hence, the proper determination of whether a product or beverage is subject to the imposition and payment of excise tax or is covered by the exclusions therefrom rests with the Commissioner of Internal Revenue**.

IV. EFFECTIVITY

All concerned are hereby enjoined to be guided accordingly and give this Circular as wide a publicity as possible.

This Circular shall take effect immediately.

ROMEO D. LUMAGUI, JR.
Commissioner of Internal Revenue
016008

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