Republic of the Philippines
Department of Finance
Securities and Exchange Commission

OFFICE OF THE GENERAL COUNSEL

10 May 2017

SEC-OGC Opinion No. 17-04
Re: Foreign Equity Restriction in Ground Handling Services

PUNO LAW
12th Floor East Tower
Philippine Stock Exchange Center
Exchange Road, Ortigas Center
Pasig City

Attention: Maria Elizabeth E. Peralta-Loriega
Alfred D. Molo
Bryan A. San Juan
Frances Vanessa N. Villavert
Christine C. Clemente

Gentlemen:

This refers to your letter dated 22 February 2017 requesting for an opinion and confirmation that the rendering of ground handling services does not constitute an operation of a public utility for purposes of applying the forty percent (40%) maximum foreign equity in public utilities as mandated by the 1987 Constitution.

As stated in your letter, dnata, Inc. (formerly Dnata Wings Aviation Systems Corporation) ("dnata"), your client, is a stock corporation duly organized in the Philippines with the primary purpose of:

> *"To operate, engage, provide Ground Handling Services to all private, military, domestic, and international airlines, including but not limited to Aircraft and/or Ground Support Equipment Repair, catering services, Cargo Warehousing, and generally to do any and all types of services necessary or related to Aviation Industry."*

You stated that under its 2016 General Information Sheet submitted to this Commission, **dnata is 99.9999% owned by a UAE registered company** and **0.0002% owned by a British**

National. At present, it provides ground handling services to *private airlines* at the Manila International Airport and has several contracts with these airlines.

You likewise averred that the Civil Aviation Authority of the Philippines (CAAP) defines ground handling as the "(s) ervices necessary for an aircraft's arrival at, and departure from, an airport, other than air traffic services." [1] According to CAAP Advisory Circular No. 09-007, among the services provided by ground handling services are the following:

a. *Ticketing of passengers and baggage*
b. *Acceptance and processing of cargo, including dangerous goods*
c. Cleaning the aircraft interior
d. Servicing of restroom supplies
e. Servicing of blankets, pillows, magazines
f. Servicing of the aircraft
g. Fueling the aircraft
h. *Loading of the cargo, including dangerous goods*
i. Computation and provision of performance data
j. Correction or deferring of maintenance irregularities
k. Provision of flight planning information
l. Provision of flight planning information
m. Provision of operational flight plan
n. *Security screening of passengers and carry-on baggage*
o. *Enplaning the passengers and their carry-on baggage*
p. Marshalling, towing or assisting the aircraft in departing the gate
q. Deicing of the aircraft
r. Preparation of parking area for arrival of the aircraft
s. Marshalling and parking of the aircraft after landing
t. *Deplaning the passengers and their carry-on baggage*
u. *Off-loading of cargo and baggage*
v. *Provision of the baggage to the deplaned passengers*
w. Security for the aircraft while parked
x. Communications as necessary associated with flight handling, departure and arrival
y. Retention of required records associated with flight handling, departure and arrival
z. Implementation of emergency procedures associated with an incident or accident; and
aa. Auditing of service providers to ensure that associated policies and procedures are being implemented by qualified persons.

In your letter, you argue that dnata does not deal directly with the passengers of the airline companies, as in fact, liability for loss of baggage remains the responsibility of the airline. Furthermore, ground handling services is not one of those enumerated services defined as public utility under the Public Service Act, nor is it listed in the Tenth Regular Foreign Investment Negative List ("FINL-10").

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[1] Part 1 of the Civil Aviation Regulations: General Policies, Procedures and Definitions.

Thus, you request this Commission to confirm that the rendering of ground handling services does not constitute an operation of a public utility for purposes of applying the forty percent (40%) maximum foreign equity in public utilities as mandated by the 1987 Constitution.

We do not confirm your position.

Under FINL-10, foreign equity participation in corporations engaged in the operation and management of public utilities is limited to a maximum of forty percent (40%)[2]. Under the Constitution and the Public Service Law, "**public utility**" is defined as one organized for hire or compensation to serve the public which is given the right to demand its service should they like to do so. It is a business or service engaged in regularly supplying the public with some commodity or service of public consequence such as electricity, gas, water, transportation, telephone or telegraph service.[3]

In a previous opinion, the Commission held that ***it is the nature and not* the name** of the activity which determines whether or not the business activity is covered by the Negative List. Thus, while the FINL-10 does not expressly include a corporation engaged in ground handling services, the same, nonetheless, is considered a public utility.[4] The Commission ratiocinated thus:

> "Previously, the Secretary of Justice opined that NAIA Terminal III is a "public service" or a "public utility" within the contemplation of the law. It explained:
>
> > As xxx defined, a "public service" includes every person that may "own, operate, manage, or control xxx for hire or compensation, with general or limited clientele, whether permanent, occasional or accidental, and done for general business purposes, any xxx wharf or dock xxx and other similar public services xxx
> >
> > "Wharf" is defined in Section 13(o) of P.D No. 857 as -
> >
> > xxx a continuous structure built parallel to along the margin of the sea or alongside riverbanks, canals, or waterways where vessels may lie alongside to receive or discharge cargo, embark or disembark passengers, or lie at rest."
> >
> > On the other hand, "dock" as defined in Section 3(j) "includes locks, cuts entrances, graving docks, inclined planes, slipways, quays, and other works and things appertaining to any dock."

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[2] List A No. 19.
[3] Albano vs. Reyes GR No. 83551, 11 July 1989
[4] SEC Opinion dated 03 November 2015 addressed to Romulo Mabanta Buenaventura Sayoc & Delos Angeles

> In the case of Albano vs. Reyes (175 SCRA 264), the Supreme Court noted that the Manila International Container Port ("MICP") could be considered a public utility, or a public service on the theory that it is a "wharf" or a "dock" as contemplated under the Public Service Act.
>
> Since the NAIA Terminal III is intended to serve as a facility for passenger handling and other services related to the movement of passengers, baggages and goods, as well as the care, convenience and security of passengers, visitors and other airport users, it is believed that the NAIA Terminal III is a public service similar to a "wharf" or "dock", and therefore, it is deemed to be a "public utility" or "public service" within the contemplation of the Public Service Act and of R.A. No. 6957, as amended. This is consistent with the ruling that an airport, with its beacons, land, fields, runways and hangers is analogous to a harbor with its lights, wharves, and docks (Coleman v. City of Oakland, 295 p. 59; Dupart v. St. Louis, 321 Mo. 514).

Airport authorities therefore, such as the Manila International Airport Authority, Subic Bay Metropolitan Authority, Clark International Airport Corporation, the Mactan-Cebu International Airport Authority, and the Civil Aviation Authority of the Philippines, are operators of public utility.

In an opinion, the Secretary of Justice concluded that port service contractors and port facility operators, although mere contractors of the Philippine Ports Authority ("PPA"), in the execution of their respective contracts and undertakings with the PPA, aid the latter in the fulfillment of the PPA's mandate to provide services within the Ports Districts and approaches thereof. This arrangement places the port service contractors and port facility operators under the category of public utility.

The same conclusion applies to your query. There is no question that services to facilitate passenger handling and other services related to the movement of passengers, baggages and goods, as well as the care, convenience and security of passengers, visitors and other airport users are necessarily part and parcel of airport operations. Obviously, ground handling services which include both aircraft movement and baggage handling, are activities essential to airport operations. Thus, such activities are the business of public utilities.

Following the conclusion of the Secretary of Justice, if the ground handling services are not carried out by the public utility, but rather contracted out to corporations or firms, the contractors are actually aiding the public utility to provide the services incidental to its airport operations.

This arrangement likewise places the contractor corporations under the category of public utility.

In view of the foregoing, a corporation which is 100% foreign owned, duly registered with the Commission, authorized to do business in the Philippines as a domestic market enterprise under the Foreign Investments Act of 1991, as amended, and having a paid-in equity capital of at least US$200,000.00, **may not engage in the business of airport ground handling services, which include moving of aircraft and baggage handling".**[5]

It shall be understood, however, that the foregoing opinion is rendered based solely on the facts and circumstances disclosed and relevant solely to the particular issue raised therein and shall not be used in the nature of a standing rule binding upon the Commission in other cases or upon the courts whether similar or dissimilar circumstances. If, upon further inquiry and investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered void.[6]

Please be guided accordingly.

Very truly yours,

for: **CAMILO S. CORREA**
General Counsel

[5] *Ibid.*
[6] SEC Memorandum Circular No.15, Series of 2003