Securities and Exchange Commission
PHILIPPINES

OFFICE OF THE GENERAL COUNSEL

SEC OGC Opinion No. 22-11
Re: License to transact business

19 August 2022

MITSUI & CO (ASIA PACIFIC) PTE. LTD.
36th Floor, GT Tower International
6813 Ayala Avenue, Bel-Air 1209
Makati City, Philippines

Attn: ATTY. LIZA C. SATO
Deputy General Manager
L.Sato@mitsui.com

Dear Atty. Sato:

This refers to your e-mail dated 06 April 2022, requesting for an opinion regarding the license to transact business in the Philippines of Mitsui & Co. (Asia Pacific) Pte. Ltd. (MAP).

In your e-mail, you disclosed the following:

a) MAP was incorporated in Singapore and is 100% owned by Mitsui Co. Ltd of Japan (Mitsui). MAP serves as the regional office of the Mitsui Group in the Asia Pacific region. In this context, the term "*Mitsui Group*" pertains to Philippine-based companies in which Mitsui owns shares of stock;
b) Under Singaporean law, MAP is allowed to engage in any kind of business in general, *except* for business activities that require special license which MAP may be qualified to apply for;
c) Pursuant to the authority granted to MAP under Singaporean law:
    1. It is allowed to lend money to corporations; and
    2. It is exempt from getting any license to lend money as long as MAP does not lend to individuals;
d) MAP has already lent money to members of the Mitsui Group, and it intends to continue lending money to companies **within** the Mitsui Group whenever necessary;
e) Mitsui has several investments in Philippine-incorporated companies as of date;
f) MAP established a branch office in the Philippines which is registered as Mitsui & Co. (Asia Pacific) Pte. Ltd Manila Branch (MAP Manila Branch); and
g) MAP would like to have its MAP Manila Branch to be able to lend money in Philippine Peso (PHP) to any member of the Mitsui Group based in the Philippines if the need arises.

In connection thereto, you seek our opinion on the following queries:

a) Whether or not MAP Manila Branch may lend money to companies within the Mitsui Group (i.e. Philippine-based companies in which MAP Manila Branch's parent company, MAP, owns shares of stock) *without* amending MAP Manila Branch's attached SEC license;
b) If SEC license needs to be amended, whether MAP Manila Branch can include lending of money as a business activity; and

c) Whether or not there is any prerequisite for MAP Manila Branch before it can apply to SEC for such amendment of license.

Nature of a branch office of a foreign company

At the outset, we note that MAP Manila Branch has no separate juridical personality. A branch office of a foreign company carries out the business activities of the head office and derives income from the host country.[1] While branches are treated as separate business units for commercial and financial reporting purposes, in the end, the head office remains responsible and answerable for the liabilities of its branches which are under its supervision and control. Hence, branches have no separate juridical personality.[2]

Branch office's authority, powers, and duties

Sections 140 and 141 of the Revised Corporation Code of the Philippines (RCCP)[3] provide:

> **Section 140.** ***Definition and Rights of Foreign Corporations.*** — For purposes of this Code, a foreign corporation is one formed, organized or existing under laws other than those of the Philippines' and whose laws allow Filipino citizens and corporations to do business in its own country or State. It shall have the right to transact business in the Philippines after obtaining a license for that purpose in accordance with this Code and a certificate of authority from the appropriate government agency.
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> **Section 141.** ***Application to Existing Foreign Corporations.*** — Every foreign corporation which, on the date of the effectivity of this Code, is authorized to do business in the Philippines under a license issued to it shall continue to have such authority **under the terms and conditions of its license**, subject to the provisions of this Code and other special laws (Emphasis supplied).

The authority, powers, and duties of a foreign corporation which intends to do business in the Philippines, such as a branch office, are therefore derived from its License to Transact Business. A reading of the License to Transact Business[4] of MAP Manila Branch reveals that it does not expressly provide for lending funds to other members of the Mitsui Group.

As a rule, corporations are artificial entities granted legal personalities upon their creation by their incorporators in accordance with law. As such, corporate acts that are outside those express definitions under the law or articles of incorporation or those committed outside the object for which a corporation is created are *ultra vires*[5] except when acts are ***necessary*** *and* ***incidental*** to carry out a corporation's purposes conferred by the RCCP[6] and by the corporation's articles of incorporation.[7]

In ***SEC-OGC Opinion No. 22-08,***[8] the Commission opined that a corporation has only such powers as are expressly granted in its charter or in the statutes under which it is created or such powers as are necessary for the purpose of carrying out its express power, to wit:

> It is the corporation's purpose clause that confers, as well as limits, the powers that a corporation may exercise. Express powers include the general powers which are enumerated in Section 35 of the RCCP and those which are sanctioned by the State in the corporation's Articles of Incorporation. Implied or

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[1] Section 1(c) of the Implementing Rules and Regulations (IRR) of Republic Act (R.A.) No. 7042, also known as the Foreign Investments Act (FIA), as amended, 9 July 1996.

[2] *Philippine Deposit Insurance Corporation vs. Citibank NA and Bank of America ST & NA*, G.R. No. 170290, 11 April 2012.

[3] Revised Corporation Code of the Philippines (RCCP), Republic Act No. 11232, February 20, 2019

[4] "a) Export, import, and wholesale of various kinds of commodities, agency business of all kinds;
b) Manufacturing of all types of machineries;
c) Export, import, and wholesale of various kinds of articles of commerce not prohibited by law such as:
   i. ferrous and non-ferrous metals,
   ii. all kinds of machines and appliances,
   iii. all kinds of chemical products, fertilizers, pharmaceuticals,
   iv. cereals, sugar, oil, feeds, processed food stuffs and drinks,
   v. textile products and their raw materials,
   vi. lumber, cement and other building materials, rubber pulp paper and their manufactured goods, sundry goods, industrial water and drinking water,
d) Development, manufacturing, processing, scrapping, and recycling business relating to the above-mentioned commodities;
e) Acquisition, planning, preservation, utilization, and disposition of copyrights, patent right, other intellectual property rights, know-how, system technology, and other software and acting as an intermediary in such transactions;
f) Information processing supply, translation, and production and wholesale of audio and visual copyright products;
g) Sawing business and lumber processing business;
h) Movable assets leasing business;
i) Buy and wholesale of secondhand goods;
j) Warehousing business;
k) Leasing and development of real estates and acting as an intermediary in such transactions;
l) Researching business of relating to hand, [land] sea, sky (sic);
m) Operation and management of sports facilities, hotel business, and travel business;
n) Planning, administration and implementation of various events;
o) Maintenance and management of buildings; and
p) Consultancy business relating to the foregoing items."

[5] Section 44, RCCP, *supra*.

[6] Section 35, RCCP, *ibid.*

[7] *University of Mindanao Inc. v. Bangko Sentral ng Pilipinas (BSP), et. al.*, G.R. No. 194964-65, 11 January 2016.

[8] SEC-OGC Opinion No. 22-08 addressed to Gammad Law Office dated 30 May 2022.

> incidental powers, on the other hand, are those which are "essential or necessary to carry-out its purpose or purposes as stated in the Articles Incorporation.
>
> The power to "exercise such other powers as may be essential or necessary to carry out its purpose or purposes stated in the articles of incorporation" is an implied power of a corporation as recognized under paragraph (k) of Section 35 of the RCCP. Clearly, the implied powers of a corporation pertain only to such powers as are reasonably necessary to enable a corporation to carry out the express powers granted.

In ***SEC-OGC Opinion No. 07-12***[9], the following rules and principles were applied in the determination of what business or activities are covered by a branch license:

> The rules governing the construction of charters of corporations are, for the most part, the same as those which govern the construction and interpretation of statutes, contracts and other written instruments.[10]
>
> In the determination of what business may be carried on by a corporation, **reference must be had to its charter, and unless the power to carry on a particular business is either expressly or impliedly conferred thereby, it does not exist.**[11]

In ***SEC-OGC Opinion No. 19-39***,[12] the Commission opined that:

> There will always be instances when doubts may arise as to whether an act may be reasonably implied from the purposes of the corporation. These doubts will sometime be due to poor draftsmanship or lack of foresight on the part of the original incorporators or their legal counsel or, as is oftentimes the case, situations or circumstances may come up which could not have been foreseen at the time of the incorporation. Many times, the purpose clause can be reasonably 'stretched' as to impliedly cover these new and unexpected situations. But in those cases where it cannot, a proper amendment thereof would be necessary.

The test to determine whether a corporate act is in accordance with its purposes is a question of the ***logical relation*** of the act to the corporate purpose expressed in the charter, i.e. *whether the act in question is in direct and immediate furtherance of the corporation's business, fairly incident to the express powers and reasonably necessary to their exercise.* The following requisites must concur:

a) the act is one which is lawful in itself, and not otherwise prohibited;
b) the act is done for the purpose of serving corporate ends; and
c) the act is reasonably tributary to the promotion of those ends, in a substantial, and not in a remote and fanciful sense.[13]

Engagement in lending activities

Based on the foregoing discussion, MAP Manila Branch may lend a part of its corporate funds to members of the Mitsui Group without amending its license since the said act is fairly *incidental* to the express powers granted to the MAP Manila Branch under its License to Transact Business. The management of a corporation, in the absence of express restrictions, has the discretionary authority to enter into contracts and transactions which may be deemed reasonably incidental to its business purposes.

It must be noted, however, that the lending activity to be undertaken by MAP Manila Branch should be strictly limited to the members of the Mitsui Group and should not be pursued as a regular and a separate business activity. It should be resorted to only when need arises and should only be done for the purpose of serving corporate ends.

Since there is no need to amend the License to Transact Business, there is no more need to answer letters (b) and (c) of your query. However, should MAP Manila Branch intend to pursue lending as a regular business activity, we recommend consulting with the Corporate Governance and Finance Department (cgfd@sec.gov.ph) as the operating department which has jurisdiction over lending companies.

The foregoing opinion is rendered based solely on facts and circumstances disclosed and relevant solely to the particular issues raised therein.[14] It shall not be used in the nature of a standing rule binding

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[9] SEC-OGC Opinion No. 07-12, addressed to Manabat Delgado Amper & Co. dated 3 May 2012.
[10] SEC-OGC Opinion addressed to Chemical Industries of the Philippines, Inc. dated 10 September 1992 as cited in SEC-OGC Opinion No. 07-12, *ibid.*
[11] SEC-OGC Opinion addressed to Atty. Milnar T. Lammawin, Omengan Construction & Development Corporation dated 11 December 1989 as cited in SEC-OGC Opinion No. 07-12, *ibid.*
[12] SEC-OGC Opinion addressed to Mr. Amado J. Lansang, Jr. dated 24 March 1982 as cited in SEC-OGC Opinion No. 19-39 addressed to Mr. Romualdo I. Katigbak dated 18 September 2019.
[13] *Montelibano, et al. v. Bacolod-Murcia Milling Co., Inc.,* G.R. No. L-15092, 18 May 1962, as cited in *University of Mindanao Inc. v. BSP, ibid.*
[14] SEC Memorandum Circular No. 15, Series of 2003, 16 December 2003.

upon the Commission in other cases or upon the courts whether of similar or dissimilar circumstances. If upon further inquiry or investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered void.

Please be guided accordingly.

Very truly yours,

for:

ROMUALD C. PADILLA
General Counsel