



Republic of the Philippines
SECURITIES AND EXCHANGE COMMISSION
SEC Bldg. EDSA, Greenhills, Mandaluyong City

OFFICE OF THE GENERAL COUNSEL

10 February 2011

SEC-OGC Opinion No. 11-15
Applicability of Foreign
Ownership Restriction; Holding
Companies

Mr. Rodolfo Ma. A. Ponferrada
Assistant Corporate Secretary
ISM Communications Corporation
The Penthouse, Alphaland Southgate Tower
2258 Chino Roces Avenue corner EDSA
Makati City

Sir:

This refers to your letter dated 22 September 2010 requesting an opinion on nationality restrictions on ownership of shares of stock of *ISM Communications Corporation* ("ISM").

In your letter, you manifested that: a) ISM is a publicly listed holding company that has a 77.7% stake in *Eastern Telecommunications Philippines, Inc.* ("ETPI") and a 17.5% stake in *Acenti GmbH* ("Acenti"); b) ETPI is a grantee of a legislative franchise for the operation of telecommunications, as it is engaged in the provision of telecommunications services, while Acenti is a German company engaged in the provision of in-room entertainment to the hotel industry mostly in Europe; c) Prior to 2002, ISM was engaged in the mining business, under the name of *Itogon-Suyoc Mines, Inc.* but in 2002, the name and primary purpose of the company were changed. Consequently, ISM divested itself of its mining business and became a holding company; d) As a company engaged in the mining industry, operating under the name *Itogon-Suyoc Mines, Inc.*, ISM has been required by the regulators such as the Philippine Stock Exchange ("PSE") and the Commission to comply with the nationality restriction of forty percent (40%) foreign ownership of shares of stock. You believe that this restriction was applied to ISM because of its past business.

Now you are requesting the Commission to confirm your opinion that as a holding company, ISM is: a) Not covered by the forty percent (40%) foreign ownership restriction of shares of stocks; b) Not required to comply with Article XII, Section 11 of the Constitution¹ and the rules and regulations issued pursuant

¹ Const. art. XII sec.11. No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philippines at least sixty per centum of whose capital is owned by such citizens, nor shall such franchise, certificate, or authorization be exclusive in character

thereto, of the PSE, the Commission and other regulatory government agencies; c) Because ISM is a "*mere holding company*" and not an operator of a public utility, the Constitutional restriction does not apply to it.

A holding company has been defined by the Commission in several opinions. A holding company has been aptly defined as "a corporation organized to hold the stock of another or other corporations."² Its essential feature is that it holds stock.³ The term "holding company" is equivalent to a parent corporation, having such an interest in another corporation, or power of control, that it may elect its directors and influence its management. A parent or holding company is one that controls another as a subsidiary or affiliate by the power to elect its management. Affiliates are those concerns that are subject to common control and operated as part of a system.⁴

As a general rule, the primary purpose of the corporation determines its classification. However, where the corporation actually engages in one of its secondary purpose, it may also be classified in accordance with said secondary purpose.⁵ It is the corporation's purpose clause that confers, as well as limits, the powers that a corporation may exercise⁶ and the character of a corporation is usually determined by the objects of its formation and the nature of its business as stated in the articles.⁷

The primary purpose of ISM as stated in its Amended Articles of Incorporation as of 28 May 2009 ("Amended Articles"), confirms that it is a holding company:

To engage in any and all business related to pay-television (including cable and satellite), multi-media and information technology and other related businesses, including the development, licensing, marketing, sales, resale, distribution, operations, upgrading and maintenance of content and computer software, primarily for but not limited to pay television or internet applications, provide internet, intranet, extranet and other telecommunications value-added services to any and all types of information technology users, in the local, regional, and global markets, including but not limited to manufacturing, assembling, processing, producing, inventing and

or for a longer period than fifty years. Neither shall any such franchise or right be granted except under the condition that it shall be subject to amendment, alteration, or repeal by the Congress when the common good so requires. The State shall encourage equity participation in public utilities by the general public. The participation of foreign investors in the governing body of any public utility enterprise shall be limited to their proportionate share in its capital, and all the executive and managing officers of such corporation or association must be citizens of the Philippines.

² SEC Opinion dated July 27, 1987 to Director R.P. Lirio SES Department IV Central Bank of the Philippines citing 6A Fletcher Cyc. Corps., 1981 rev. vol., sec. 2821 at 300.

³ *Id.*, citing Fletcher, sec. 2821, citing Noyes, *Inter-corporate Relations*, (2nd ed.), sec. 285.

⁴ SEC Opinion dated November 28, 1990 to Atty. Rolando P. Navarro citing Ballantine on Corporation Sec.134.

⁵ SEC Opinion dated December 19, 1995 to Atty. Tomas F. Tuason IV, Philippine Stock Exchange, Inc.

⁶ SEC Opinion dated February 2, 2006 to Atty. Aissa V. Encarnacion Philippine Stock Exchange, Inc. citing Campos, J., et al., *The Corporation Code*, Vol. I, p. 74.

⁷ *Id.*, citing 18A Am Jur 2d, Corporations § 204.

developing any and all kinds of communications and telecommunications products and services; providing technical and maintenance support and services; purchase, sale, import and export, license, distribution and rental of any content, computer hardware, software, equipment and all other types of similar or allied products and components thereof; engage in, conduct, carry on the business of buying and selling, distributing, marketing all kinds of goods, commodities, wares and merchandise over the internet; **to invest in shares of stock or otherwise to acquire interests in any of the foregoing or similar, related or ancillary business or activity, and in connection therewith, to issue guarantees for the obligations of its subsidiaries or affiliates**, and in consequence or as may be necessary or useful and convenient in the premises, undertake such activities which may be reasonably and conveniently carried on in connection with or incidental to the above purpose, or calculated, directly and indirectly to enhance the value of or render profitable any of the Corporation's properties or rights.

As a general rule, a "holding company" or "parent company" has a separate corporate existence, and is to be treated as a separate entity, unless such corporate existence is a mere sham, or has been used as an instrument for concealing the truth, or where the organization or control is shown to be such as that it is but an instrumentality or adjunct of another corporation. *So a holding company is generally held not to be doing or transacting business through its subsidiary where the corporate separate entities are maintained.* Thus, if properly used to perform legitimate functions, the subsidiary and affiliate such as ETPI may maintain its separate juridical personality distinct from its controlling corporation or stockholder, ISM.⁸ Therefore, the fact that EPTI is the grantee of the legislative franchise to operate a public utility (the operation of telecommunications), that is subject to the foreign ownership restriction under Article XII, Section 11 of the Constitution, it does NOT follow that ISM, the holding company is also subject to the same. Be that as it may, a foreign corporation can only have an interest in a corporation operating a public utility up to forty percent (40%) of the said holder of a legislative franchise.

While you have stated in your letter that ISM has divested itself of its mining business in 2002 and became a holding company in the same year, paragraph 20 of the Secondary Purposes of the Amended Articles⁹ provides:

To carry on for itself or for others the business of mining in all its branches and to that end, to acquire, own, improve, develop, sell, lease, and convey lands and tenements or any right, title, interest, or privilege therein; to search, explore, examine, prospect for ores, minerals, and mineral substances of all kinds, grades, forms descriptions and combinations, including but not limited to copper, nickel, manganese, gold, zinc, silver, brass, iron, tin, asbestos, sulphur and other sub-oil products and subsurface deposits of every nature and the products and the byproducts which may be derived, produced, prepared, developed, compounded, made or manufactured therefrom and substances obtained by mixing any of the foregoing with other substances; to locate, purchase, lease and acquire land

⁸ SEC Opinion dated March 18, 1996 to Mr. Efren C. Gutierrez.

⁹ Amended on 7 June 2002.

and/or off-shores areas with rights to prospect, drill, mine, bore and sink wells and shafts; to prospect, drill, produce, convey and transport oil, petroleum and gas, to carry on the business of storing and prospecting for, mining, producing, reginning, manufacturing, piping, transporting, buying and selling petroleum and other oil products and by-products; to buy, sell, furnish and supply the same; to operate and maintain oil and gas wells; to build, construct, purchase, maintain and operate warehouse, pumping plants, pipelines, refineries, factories, mills, workshops, laboratories, and dwelling houses for workmen and others, to manufacture, buy, sell, by wholesale, import, export and deal in pumps, drills, fuses, caps candles, nitroglycerine, dynamite, and the necessary machinery, engines, drills and all appliances and conveniences for use in mining and drilling for oil and gas; and to acquire petroleum, gas, oil and all kinds of minerals leaseholds, rights, properties, franchises, privileges, concessions and other interests.

As mentioned earlier, ***where the corporation actually engages in one of its secondary purposes, it may also be classified in accordance with said secondary purpose.*** In a previous opinion, the Commission declared that, "In a case xxx where mining is a secondary purpose, it may be considered as a mining corporation only when it undertakes its mining purpose and is actually engaged in it." ¹⁰

Consequently, if ISM is engaged in mining, even if it is a holding company, it will be subject to the foreign ownership restriction under Art. XII Sec. 2 of the Constitution,¹¹ as provided in Executive Order No. 858 Promulgating the Eighth Regular Foreign Investment Negative List dated 5 February 2010.¹²

It shall be understood that the foregoing opinion is rendered based solely on the facts and circumstances disclosed and relevant solely to the particular issues raised therein and shall not be used in the nature of a standing rule binding upon the Commission in other cases whether of similar or dissimilar circumstances. If, upon 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,



VERNETTE G. UMALI-PACO

General Counsel 

¹⁰ SEC Opinion dated June 6, 1995 Atty. Juan Ricardo B. Tan citing Letters to Mr. Sixto S. de Guzman, Jr. and Mr. Aniceto Y. Dideles dated August 29, 1972 and November 8, 1972, respectively.

¹¹ " xxx The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State.xxx"

¹² Up to 40% Foreign Equity 17. Exploration, development and utilization of natural resources.