



Republic of the Philippines
Department of Finance
Securities and Exchange Commission
SEC Building, EDSA, Greenhills, Mandaluyong City
Office of the General Counsel

November 03, 2015

SEC-OGC Opinion No. 15-15
Re: Holding Companies
Deemed Domestic Market
Enterprises; Subject to FINL

MR. ARSENIO A. ALFILER, JR.

Assistant Corporate Secretary, Waterfront Philippines, Inc.
7th Floor Manila Pavilion Hotel
United Nations Avenue corner Ma. Orosa St., Manila

Dear Mr. Alfiler:

This refers to your letter dated 13 October 2015, requesting for an opinion on whether Waterfront Philippines, Inc. ("Waterfront"), a holding company, is not subject to any foreign equity limit.

A holding company has been defined by the Commission in several opinions. It has been aptly defined as "a corporation organized to hold the stock of another or other corporations"¹. Its essential feature is that it holds stock.² 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.³

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.⁴ It is the corporation's purpose clause that confers, as well as limits, the powers that a corporation may exercise⁵ 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.⁶

¹ SEC Opinion No. 14-32 dated 10 November 2014 addressed to Herrera Teehankee and Cabrera citing SEC Opinion No. 11-15 dated 10 February 2011 addressed to Mr. Rodolfo Ma. A. Ponferrada.

² *Ibid.*

³ SEC Opinion dated November 28, 1990 addressed to Atty. Rolando P. Navarro citing Ballantine on Corporation Sec.134.

⁴ SEC Opinion dated December 19, 1995 addressed to Atty. Tomas F. Tuason IV, Philippine Stock Exchange, Inc.

⁵ SEC Opinion dated February 2, 2006 addressed to Atty. Aissa V. Encarnacion Philippine Stock Exchange, Inc. citing Campos, J., et al., The Corporation Code, Vol. I, p. 7.

⁶ *Id.*, citing 18A Am Jur 2d, Corporations § 204.

The primary purpose of Waterfront as stated in its Amended Articles of Incorporation as of 02 February 2015, confirms that it is a holding company:

“To carry on the business of an investment holding company and for that purpose either in the name of the said corporation or in the name of any other corporation in which it shall have an equity interest, to receive, purchase or otherwise acquire an interest in, hold, own, pledge, mortgage, assign, dispose and generally deal in all kinds of securities including but not limited to shares of stock of corporations which shall include but shall not be limited to financial services institutions such as banking, insurance, stockbroking, leasing, hire purchase and other forms of financial services as are found in modern financial market; to acquire and hold real property (except land) and personal property of all kinds; to purchase, acquire, convey, lease, mortgage, contract for, manage, administer and/or operate alone or jointly with others any interest in real and personal property which includes but not limited to hotels, inns, restaurants, cafes, bars, stores and offices, barbershops and beauty lounges, sports facilities, places of amusements and entertainment of all kinds; to enter into any lawful arrangement for sharing profits with any corporation, association, partnership, person or entity, domestic or foreign in carrying on or of any business which the corporation is authorized to carry on; or to grant concessions, rights or licenses to others to operate, manage or deal with the same; and to do any and all things necessary, suitable, convenient, proper or incidental to the accomplishment of the above purposes.”

The question now is whether a holding company is subject to any foreign equity limit. As previously discussed by the Commission in its 23 November 2009 Opinion⁷ and as reiterated in a 10 November 2014 Opinion⁸, a holding company is deemed a domestic market enterprise which is subject to the minimum capitalization requirements under the Foreign Investment Act⁹, viz:

“The Implementing Rules and Regulations of the Foreign Investments Act of 1991¹⁰, Section 1 (k) provides:

“Domestic market enterprise” shall mean an enterprise which produces goods for sale, or renders service or *otherwise engages in any business in the Philippines.*” (Emphasis added.)

Further, Section 1 (f) of the same rules provides:

“Doing business” shall include soliciting orders, service contracts, opening offices, whether liaison offices or branches; appointing representatives or distributors, operating under full control of the foreign corporation, domiciled in the Philippines or who in any calendar year stay in the country for a period totaling one hundred eighty [180] days or more; participating in the management, supervision or control of any

⁷ SEC Opinion dated 23 November 2009 addressed to Gonzales Batiller David Leabres & Reyes.

⁸ *Supra*, note 1.

⁹ Republic Act No. 7402, as amended by Republic Act No. 8179.

¹⁰ *Ibid.*

domestic business, firm, entity or corporation in the Philippines; *and any other act or acts that imply a continuity of commercial dealings or arrangements, and contemplate to that extent the performance of acts or works, or the exercise of some of the functions normally incident to and in progressive prosecution of commercial gain or of the purpose and object of the business organization.*" (Emphasis supplied.)

Under Executive Order No. 584¹¹, 2 domestic market enterprises, with paid-in equity capital of less than the equivalent of US\$200,000, are restricted to a maximum of forty percent (40%) foreign equity.

The dominant character of a holding company is the ownership of securities by which it is possible to control or substantially influence the policies and management of one or more operating companies in a particular field of enterprise.

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A mere '*investment*' can easily be differentiated from the business of a '*holding company*' in terms of control. In the former transaction, the investor merely aims at the employment of funds for profit without having the intention to assume direct responsibilities of control and management. **Whereas the dominant character of a '*holding company*' is the ownership of securities coupled with an element of control and power to influence the policies and management of one or more operating companies in a particular field of enterprise. In other words in the case of a '*holding company*' the intention is not merely to invest in securities but to put up a corporation engaged in the business of owning, operating and managing its subsidiaries or affiliates."**

From the foregoing, it is clear that holding companies fall under the definition of domestic enterprises as the act of owning and acquiring interests in other corporations by purchasing their shareholdings are considered "doing business". Hence, Waterfront, being a holding company which is deemed a domestic market enterprise, will be subject to Section 8¹² of the FIA and Item 6, List B of the Tenth Regular Foreign Investment Negative List ("FINL"), which provides that a domestic market enterprise with paid-in equity capital of less than the equivalent of US\$200,000.00 is partially reserved to Philippine Nationals, i.e., foreign equity participation is limited only up to forty percent (40%) for foreigners. In other words, the nationality requirement limiting foreign ownership to a maximum of 40% will apply to Waterfront if its capitalization is below the minimum set forth in the above mentioned provisions of the Negative List. Otherwise, if its capitalization is equivalent or more than US\$200,000.00, then it is not subject to foreign equity limits.

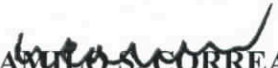
Nevertheless, it shall be understood that the foregoing opinion is rendered based solely on the facts and circumstances disclosed and relevant solely to the particular issues raised

¹¹ Now Executive Order No. 184 "Promulgating the Tenth Regular Foreign Investment Negative List" which retained the same provision on Domestic Market Enterprises.

¹² "Small and medium-sized domestic market enterprises, with paid-in equity capital less than the equivalent two hundred thousand US dollars (US\$200,000) are reserved to Philippine nationals, xxx"

therein and shall not be used in the nature of a standing rule binding upon the Commission in other cases or upon courts, 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 null and void.

Very truly yours,


CAMILO S. CORREA
General Counsel

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