January 17, 2006

MR. ROMEO H. DURAN
Tax Principal
Punongbayan & Araullo

SEC Opinion No. 06-04
Effective Date of Merger

Sir:

This is in response to your letter dated December 28, 2005 requesting opinion as to whether Total (Philippines) Corporation (hereafter referred to as TPC) and Superkalan Gaz Corporation (hereafter referred to as SGC) can make the following stipulation in their plan of merger:

> *"Effective Date of Merger. Upon approval of this Plan of Merger by the stockholders of TPC and SGC, the Articles of Merger shall be filed by TPC and SGC with the Securities and Exchange Commission ("SEC"). The Merger shall be effective on January 1, 2006 (hereinafter referred to as "Effective Date of Merger"), on the condition that this Effective Date of Merger is approved the SEC. Accordingly, this Plan of Merger, as well as the Articles of Merger, will have no legal effect and will not be legally binding as between TPC and SGC, nor will the rights and obligations of third parties as regards TPC or SGC be affected, without the issuance by the SEC of a Certificate of Merger. Upon the issuance of the Certificate of Merger by the SEC, the Effective Date of Merger shall become operative and binding between TPC and SGC."*

Under Sections 79 of the Corporation Code, it is provided that:

"SECTION 79. *Securities and Exchange Commission's approval and effectivity of merger or consolidation. — . . .. Where the Commission is satisfied that the merger or consolidation of the corporations concerned is not inconsistent with the provisions of this Code and the existing laws, it shall issue a certificate of merger or of consolidation, as the case may be, at which time the merger or consolidation shall be effective. . .". (emphasis supplied)*

(12)

Stated differently, the above quoted provision provides that it is only upon the issuance by the Commission of the Certificate of Merger when the merger shall become effective.

A reading, however, of the proposed stipulation in the Plan of Merger reveals that TPC and SGC have agreed that the effective date of merger shall be on January 1, 2006. Notice should be taken of the fact that this date has already lapsed and there is no indication that the Articles of Merger have already been filed with the Commission. Hence even assuming that the said articles have already been filed, the Certificate of Merger has yet to be issued. Clearly then, should the Commission approve the Articles of Merger the Certificate of Merger would only be issued after the effective date of merger set by the parties.

Following strictly Section 79 of the Corporation Code, the merger shall only be effective upon the issuance by the Commission of the Certificate of Merger.

Jurisprudence dictates however that, in the exercise of supervisory and regulatory functions over corporations and partnerships registered with the Commission, the Corporation Code should be given a reasonable or liberal construction which will best execute its purpose, even though such construction is not within its strict literal interpretation. A strict construction should not be permitted to defeat the policy and purpose of the Code. Therefore, "a literal interpretation is to be rejected if it would be unjust or lead to absurd results" *(Soriano v. Offshore Shipping and Manning Corp. 177 SCRA 513, 519 [1989])*.

This principle was enunciated in the Opinion dated June 15, 2004[1] addressed to Mr. Joel L. Tan-Torres, Partner, Tax Division of SGV & Co. rendered by the Commission which involved a query similar to the one posed in this letter request.

In the said Opinion, the Commission opined that the stipulated cut-off date, or in this case the effective date of merger, shall be binding on the parties to the merger agreement.

It was further noted therein that to promote and uplift the development of trade relations and encourage friendly commercial intercourse among corporations, the Corporation Code should be given a judicious, not a stern and discordant interpretation, provided that its primordial end (protection of public interests) is served. Likewise, we concur with your observation that the proposed stipulation would not prejudice the rights of the general public or third parties transacting with either TPC or SGC nor would it result to any decrease in the payment of tax of either of the parties.

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[1] SEC OPINION NO. 36-04, Re: Effectivity of the Merger

With the foregoing, we confirm your position that the parties can make the proposed stipulation pertaining to the effective date of the merger.

It shall be understood that the opinion rendered is based solely on facts disclosed in the query 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.

Very truly yours,

VERNETTE G. UMALI-PACO
General Counsel