Securities and Exchange Commission PHILIPPINES

BAGONG PILIPINAS

OFFICE OF THE GENERAL COUNSEL

24 April 2024

**SEC OGC Opinion No. 24-09**
**Re:** Doing Business in the Philippines

**ATTY. OLIVER S. GARCIA**
19F Yuchengco Tower, RCBC Plaza
6819 Ayala Ave., Makati City
oliversgarcia@gmail.com

**Dear Atty. Garcia:**

This refers to your letter dated 08 April 2019, requesting, on behalf of Lhotse Enterprises Limited (Lhotse), for an opinion on whether or not it is required to obtain a license in the Philippines.

In your letter, you disclosed the following matters:

a) You stated that Lhotse is a foreign corporation organized and existing under the laws of the British Virgin Islands and that it is a shareholder of the following Philippine corporations:

| Name of corporation | Number of shares | Percentage of ownership |
|---|---|---|
| Orient Capital Ventures Inc. (OCVI) | 49,998 | 40% |
| Megasports Holdings Inc. (MHI) | 831 | 33.24% |

b) "Other than these passive equity participations in OCVI and MHI, Lhotse does not have any further activities in the Philippines:
   1. No office/s in the Philippines;
   2. No employee/s in the Philippines;
   3. No activity/ies in the Philippines; and
   4. No product/s or service/s offered in the Philippines"; and

c) "Lhotse, however, has a services agreement with OCVI xxxx [to] provide support, maintenance[,] and development services xxxx performed entirely outside of the Philippines."

You are now requesting for confirmation of your opinion that Lhotse is "not doing business in the Philippines and as such is not required to obtain a license from the Securities and Exchange Commission [SEC]."

***Definition of "doing business"***

Section 3(d) of the Foreign Investments Act (FIA) of 1991[1], as amended, and its Implementing Rules and Regulations, provide that the phrase "doing business" shall include:

a) soliciting orders, *service contracts*, opening offices, whether called "liaison" offices or branches;
b) appointing representatives or distributors domiciled in the Philippines or who in any calendar year stay in the country for a period or periods totaling one hundred eighty (180) days or

[1] Republic Act (R.A.) No. 7042, 13 June 1991.

more;

c) participating in the management, supervision or control of any domestic business, firm, entity or corporation in the Philippines; and

d) any other act or acts that imply a *continuity* of commercial dealings or arrangements and contemplate 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.

Provided, however, that the phrase "doing business" shall *not* be deemed to include:

a) mere investment as a shareholder by a foreign entity in domestic corporations duly registered to do business, and/or the exercise of rights as such investor;
b) having a nominee director or officer to represent its interests in such corporation;
c) appointing a representative or distributor domiciled in the Philippines which transacts business in its own name and for its own account.

From the foregoing, it is clear that ***mere investment in the form of stock ownership or subscription in a domestic corporation does not fall within the coverage of the term "doing business" for purposes of licensing of foreign corporations.***[2]

The question now is whether Lhotse's service agreement with OCVI is included in the term "doing business" in the Philippines.

Notably, there is no general rule or governing principle as to what constitutes "doing" or "transacting" business. Each case must be judged in the light of its own peculiar environmental circumstances.[3]

***Service agreement vis-à-vis doing business***

In determining whether a service contract is deemed "doing business" in the Philippines, several factors may be considered:

a) ***As to perfection and consummation.*** As a general rule, foreign corporation will not be regarded as doing business in a State simply because it enters into contracts with the residents of the State, where such contracts are consummated outside the State.[4]

   In a 1955 case, ***Pacific Vegetable Corp. vs. Singson,***[5] the Supreme Court held that Pacific is not doing business in the Philippines because:
   1. its contract covering copra was entered into and was consummated in the United States;
   2. the payment of the price was made at San Francisco, California; and
   3. the delivery of the copra was stipulated to be at the Pacific Coast.

   However, technological advancement has introduced new goods and new ways by which objects of commerce, in general, are delivered and consummated. Thus in 2017, in ***SEC-OGC Opinion No. 17-03,***[6] the Commission opined that a foreign online gaming company is deemed doing business in the Philippines even though its activities are carried outside of the Philippines since the salient points of the online commercial transactions were consummated within the Philippines although they are done in a virtual plane;

b) ***As to place of performance.*** An essential condition to be considered as "doing business" in the Philippines is the actual performance of specific commercial acts ***within the territory of the Philippines.***[7]

   In ***SEC-OGC Opinion No. 09-12***[8], the Commission had the occasion to render an opinion on whether or not a foreign company engaged in providing dedicated private voice

[2] SEC-OGC Opinion addressed to Atty. Cynthia D. Nuval-Ambrosio dated 30 June 1995.
[3] *Commissioner of Internal Revenue vs. British Overseas Airways Corporation and Court of Tax Appeals,* G.R. No. L-65773-74, 30 April 1987. [Per J. Melencio-Herrera, En Banc]
[4] 36 Am. Jur. 2d Foreign Corporations, Sections 335 and 336 as cited in *Columbia Pictures Inc. vs. Court of Appeals,* G.R. No. 110318, 28 August 1996. [Per J. Regalado, En Banc]
[5] G.R. No. L-7917, 29 April 1955. [Per J. Bautista Angelo]
[6] SEC-OGC Opinion No. 17-03 addressed to Sycip, Salazar, Hernandez & Gatmaitan dated 04 April 2017.
[7] SEC-OGC Opinion No. 11-40 addressed to Mr. Lee Soon Kook dated 30 September 2011.
[8] SEC-OGC Opinion No. 09-12 addressed to Puyat Jacinto & Santos Law dated 29 May 2009.

network rendering services to customers located outside the Philippines is considered as "doing business" in the Philippines. In that opinion, the Commission opined that the company is doing business in the Philippines because it made its services available to entities in the Philippines while also performing acts such as engaging local telecommunications entities for the provision of local loop and co-location services and/or value-added service providers and hiring of on-site engineers or contractors for the supervisions of equipment like routers and firewalls, among others.

c) ***As to income derived.*** Activities within the Philippine jurisdiction that do not create earnings or profits to the foreign corporation do not constitute doing business in the Philippines.

In ***Cargill Inc. v. Intra Strata Assurance Corporation***[9], the Supreme Court noted that most of the Cargill's activities do not bring any direct receipts or profits to the foreign corporation, thus, it held that it is not doing business in the Philippines.

d) ***As to continuity.*** An isolated transaction by a foreign corporation cannot qualify as "doing business" since it lacks the element of continuity.

As pronounced by the Court in ***Magna Ready Mix Concrete Corporation vs. Andersen Bjornstad Kane Jacobs, Inc.***[10], citing ***Eriks Pte. Ltd. Vs. Court of Appeals***:

> The phrase "isolated transaction" has a definite and fixed meaning, i.e., a transaction or series of transactions set apart from the common business of a foreign enterprise in the sense that there is no intention to engage in a progressive pursuit of the purpose and object of the business organization. Whether a foreign corporation is "doing business" does not necessarily depend upon the frequency of its transactions, but more upon the nature and character of the transactions.

Likewise, in ***Steelcase, Inc. v. Design International Selections, Inc.***[11], the Court held the following:

> The following acts shall not be deemed "doing business" in the Philippines:
>
> xxxx
>
> 8. Performing services auxiliary to an existing isolated contract of sale which are not on a continuing basis, such as installing in the Philippines machinery it has manufactured or exported to the Philippines, servicing the same, training domestic workers to operate it, and similar incidental services.

***Twin Characterization Test***

However, the ultimate test of doing business is that laid down in the landmark case of ***The Mentholatum Co., Inc., et. al. v. Mangiliman***[12] called the **Twin Characterization Test** where a foreign corporation is considered as "doing business" in the following instances:

a) ***Substance Test.*** When the foreign corporation is continuing the body or substance of the business or enterprise for which it was organized or whether it has substantially retired from it and turned it over to another; and

b) ***Continuity Test.*** When the foreign corporation is engaged in activities which imply a continuity of commercial dealings and arrangements, and contemplates, to that extent, the performance of acts or works or the exercise of some of the functions normally incident to, and in the progressive prosecution of the purpose and object of its organization.

The Twin Characterization Test has since become the hallmark of what constitutes doing business in the Philippines. What is determinative of doing business is not really the number or quantity of the transactions, but more importantly, the ***intention*** of an entity to continue the body of its business in the country. The number and quantity of transactions are merely evidence of such intention.[13]

---

[9] G.R. No. 168266, 15 March 2010 [Per J. Carpio, Second Division]; see also *Commissioner of Internal Revenue vs. BW Shipping Philippines*, C.T.A. EB CASE No. 2254. 29 October 2021.
[10] . G.R. No. 196158, 20 January 2021. [Per J. Hernando, Third Division]
[11] G.R. No. 171995, 18 April 2012. [Per J. Mendoza, Third Division]
[12] G.R. No. 47701, 27 June 1941. [Per J. Laurel. First Division]
[13] *Eriks Pte. Ltd. vs. Court of Appeals and Enriquez*, G.R. No. 118843. 06 February 1997. [Per J. Panganiban, Third Division]

In the case of Lhotse, it was stated that the services (i.e., support, maintenance, and development) are performed entirely outside of the Philippines. However, the facts provided are lacking of the following information, which are crucial to categorically answer the question of whether or not Lhotse is doing business in the Philippines:

a) Place of perfection or consummation of the contract;
b) Duration of the service agreement;
c) Nature of the services provided and the specific business the company is engaged in;
d) Regularity of the services performed;
e) Source of income, i.e. whether or not Lhotse will derive income from the performance of the services, support and maintenance mentioned in the letter; and
f) Performance of services auxiliary to an existing isolated contract which are not on a continuing basis.

Based on the limited disclosure of facts and absent any other circumstances which would clarify Lhotse's intention, the Commission opines that Lhotse is *not doing business in the Philippines* and is therefore *not required to secure a license from the Commission* ***provided*** that the following circumstances occur:

a) Lhotse only invested in OCVI and MHI through **stock ownership or subscription**;
b) Lhotse's service agreement with OCVI for support, maintenance, and development is all **performed outside of the Philippines**;
c) Lhotse and OCVI's service agreement is an **isolated transaction**; and
d) Lhotse has **no intention to continue the body of its business in the country,** as evidenced by activities implying continuing commercial dealings and arrangements normally incident to, and in progressive prosecution of the purpose or object of its organization.

It shall be understood that the foregoing opinion is rendered solely on the basis of the facts, circumstances and documents disclosed/submitted, and should be considered relevant solely to the particular issue raised therein. It shall not be used in the nature of a standing rule binding upon the Commission in other cases or upon the courts whether of similar or dissimilar circumstances.[14] If upon investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered null and void.

Please be guided accordingly.

Very truly yours,

**ROMUALD C. PADILLA**
*General Counsel*

[14] Section 7, SEC Memorandum Circular (MC) No. 15, Series of 2003, 16 December 2003.