Republic of the Philippines
Department of Finance
Securities and Exchange Commission
**COMMISSION EN BANC**

**IN THE MATTER OF:**
**BOT LEASE AND FINANCE PHILIPPINES, INC.**
*Appellant,*

-versus-

**SEC En Banc Case No. 05-13-292**
Promulgated: 08 November 2022

**INVESTOR PROTECTION AND SURVEILLANCE DEPARTMENT,**
*Appellee.*

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# DECISION

Before the Commission is the Memorandum on Appeal dated 17 May 2013 ("Appeal"), filed on 20 May 2013 by BOT Lease and Finance Philippines, Inc. ("BOT Philippines"), assailing the Letter-Decision dated 29 April 2013 ("Assailed Decision") of the then Investor Protection and Surveillance Department[1] ("IPSD") which found that the loan agreements that it executed were securities in the form of evidence of indebtedness, and directed it to file an exemption.

## THE RELEVANT FACTS

In 2013, BOT Philippines filed with the Commission its 2012 Audited Financial Statements ("AFS") which disclosed, among others, a loan in the aggregate amount of Three Hundred Sixteen Million Five Hundred Seventy-One Thousand Four Hundred Three Pesos (₱316,571,403.00) (the "Loan Amount") which it obtained from its parent, BOT Tokyo. The loan documents disclosed that BOT Philippines and BOT Tokyo agreed to an interest rate ranging from 1.17% to 6.45% payable within two (2) to five (5) years.

Subsequently, in relation to the application for an Amendment of the Articles of Incorporation of BOT Philippines, a conference was called and conducted by the IPSD which resulted in the issuance of a directive for BOT Philippines to file a request for exemption for the issuance of

[1] Now the Enforcement and Investor Protection Department (EIPD).

commercial papers covering the Loan Amount, and to pay the filing fee, pursuant to the SEC Memorandum Circular No. 4, Series of 2011 ("MC No. 4").[2]

In a letter dated 22 May 2012, BOT Philippines requested for the modification of the directive, and argued that the request for exemption should cover only the four (4) Loan Agreements, in the aggregate amount of One Hundred Twenty Million Four Hundred Thirty-Nine Thousand Eighteen and 91/100 Pesos (₱120,439,018.91), executed after 16 June 2011 or the date of effectivity of MC No. 4, consistent with the rule that regulations should be applied prospectively.[3]

On 18 June 2012, the IPSD issued a letter denying the request of BOT Philippines, and reiterated the directive for it to secure an exemptive relief from the Commission covering the Loan Amount. The IPSD argued that the retroactive effect of MC No. 4 was more favorable to BOT Philippines because instead of being penalized for the alleged issuance of unregistered commercial papers in violation of Securities Regulation Code (SRC) Rule 9.2(2)D, it now simply needs to secure the exemption available under MC No. 4.

In its letter dated 25 September 2012, BOT Philippines sought the reconsideration of IPSD's position, and argued that the directive to file an exemptive relief is without basis since the loan agreements between BOT Japan and BOT Philippines were not securities; they were mere loan transactions between a parent and a subsidiary intended to finance the business of the latter in the Philippines.

BOT Philippines also submitted a Position Paper, where it reiterated its position that the loan agreements are not securities as the said instruments did not constitute an investment in the capital of BOT Japan which could have entitled it to a share in the latter's equity. BOT Philippines also argued that not all the elements of the "Howey test" are present.

On 29 April 2013, the IPSD issued the Assailed Decision which maintained that BOT Philippines should file an exemptive relief covering the Loan Amounts, on the basis of the finding that the loan agreements of BOT Philippines and BOT-Tokyo are securities under the SRC.

Unsatisfied, BOT Philippines filed the present Appeal.

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[2] Annex "A" of the Appeal.
[3] Annex "B" of the Appeal.

During the pendency of the Appeal, the different departments of the Commission were rationalized and renamed which resulted in the transfer of the monitoring function of IPSD vis-à-vis financing companies to the newly created Corporate Governance and Finance Department (CGFD).

In compliance with the Order dated 27 January 2014, the CGFD filed its Reply-Memorandum which supported the finding of the IPSD that the Loan Agreements of BOT Philippines and BOT Japan were securities.

On 17 January 2022, BOT Philippines filed a Manifestation which raised, among others, that even assuming that the subject instruments are securities, the Appeal has been rendered moot and academic with the effectivity of the 2015 Implementing Rules and Regulations of the SRC ("2015 SRC Rules"), which increased the threshold of debt-instruments from Fifty Million Pesos (₱50,000,000.00) to One Hundred Fifty Million Pesos (₱150,000,000.00), and removed the requirement on the filing of the notice of exemption and the written notice of disclosure.

On 2 February 2022, through a Manifestation dated 31 January 2022, the CGFD maintained that there exists no supervening event or circumstance which would render the case moot and academic.

**ISSUE**

Whether the IPSD (now CGFD) was correct in holding that the Loan Agreements entered into by BOT Philippines and BOT Tokyo are securities in the form of evidence of indebtedness under the SRC.

**RULING**

We grant the Appeal.

In the Assailed Decision, the IPSD concluded that the Loan Agreements executed by BOT Japan and BOT Philippines are securities because they are long-term commercial papers which, under Rule 3.1(H) of the SRC IRR are considered as evidence of indebtedness.[4] The IPSD also ruled that the said finding is in accord with the concept of "securities" under the SRC which is broad enough to cover both equity securities and debt securities, and may be in the form of bonds, notes, and similar instruments.

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[4] "Long term commercial paper means an evidence of indebtedness of any person with a maturity of more than three hundred sixty-five (265) days. The terms shall include, but not limited to, bonds and notes." (see page 3 of the Decision)

The CGFD supported the position of IPSD by arguing that under the rules, control is not a determining factor in considering evidence of indebtedness. SRC Rule 9.1(2)(D) does not distinguish, and even considers evidence of indebtedness issued to directors, officers, stockholders, and related interests (DOSRI) as security. The CGFD thus dismissed the argument of BOT Philippines that the concept of evidence of indebtedness as "securities" takes into account both the investor, i.e., the public, and the issuer who acts independently of the investors.

Section 3.1 of the SRC defines securities as follows:

> "**Section 3.** *Definition of Terms.* - 3.1. "Securities" are **shares, participation or interests in a corporation or in a commercial enterprise or profit-making venture** and **evidenced by a certificate, contract, instruments**, whether written or electronic in character. It includes:
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> (a) Shares of stocks, bonds, debentures, notes, **<u>evidences of indebtedness</u>**, asset-backed securities;
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> xxx" (Emphasis and underscoring supplied)

The term securities as used in the United States (US) Securities Exchange Act of 1934 bears a similar definition, to wit:

> "The term 'security' means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting trust certificate, certificate of deposit, for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a 'security'; or any certificate or interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited."

In the US case of ***Reves et al vs. Ernst & Young,***[5] the US Supreme Court stated that the US Congress enacted a definition of "security"

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[5] Reves et al. vs. Ernst & Young, 494 U.S. 56, February 21, 1990.

sufficiently broad to encompass virtually any instrument that might be sold as an investment. Since the US Securities Act defines "security" to include "any note," **the presumption is that every note is a security** and that presumption may be rebutted ***only by a showing that the note bears a strong resemblance to the one of the enumerated categories of instrument that does not fall under the securities category***.[6]

In the said case, the ***family resemblance test*** identifies four factors in deciding whether a transaction involves a "security," namely:

1. Whether the seller's purpose is to raise money for the general use of a business enterprise or to finance substantial investments and the buyer is interested primarily in the profit the note is expected to generate;
2. Whether the issuer's "plan of distribution" of the instrument seeks to establish some form of common trading in the notes, either for speculative or investment purposes;
3. Whether there is a reasonable public expectation that the instruments should be treated as securities; and
4. Whether some factors such as the existence of another regulatory scheme significantly reduce the risk of the instrument, thereby rendering the application of the Securities Acts unnecessary.

Although foreign case law is merely persuasive authority, said case provides a useful framework in our own examination of the scope of the term securities.

Just like the securities acts of other jurisdictions, specifically the United States of America, the SRC has adopted a broad definition of securities with the intent of covering practically all forms and varieties thereof that are known or considered, or ought to be known or considered, to be such in the commercial or financial world. Thus, in the case of *Gabionza vs. Court of Appeals*[7] (the "Gabionza Case"), the Supreme Court ruled that the term "securities" embodies a flexible rather than static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek to use the money of others with a promise of profits.

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[6] *Ibid.*

[7] G.R. No. 161057, September 12, 2008.

We find a reiteration of the foregoing principle in the US case of *Hamilton Jewelers vs. Department of Corporations,*[8] where the California Court of Appeals ruled:

> "However, as this court pointed out in Sarmento v. Arbax Packing Co. (1964) 231 Cal. App. 2d 421, at page 424 [41 Cal. Rptr. 869], "**No hard and fast rule fixes that which constitutes a 'security.' Rather, the question is determined on a case by case basis. The crucial question is whether the [37 Cal. App. 3d 335] transaction comes within the regulatory purpose of the Corporate Securities Law**." (Italics added.) In so stating, we cited Silver Hills Country Club v. Sobieski (1961) 55 Cal. 2d 811, at page 814 [13 Cal. Rptr. 186, 361 P.2d 906, 87 A.L.R.2d 1135], where the state Supreme Court pursued the same "crucial question" despite the fact that the transaction there involved came within the literal statutory definition of "security" (former Corp. Code, § 25008).
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> The purpose of the Corporate Securities Law (former Corp. Code, § 25000 et seq.) was explained by the court in Silver Hills Country Club v. Sobieski, supra, 55 Cal. 2d 811, as follows: "**Section 25008 defines a security broadly to protect the public against spurious schemes, however ingeniously devised, to attract risk capital**." (Id. at p. 814.) (Italics added.) "Since the act does not make profit to the supplier of capital the test of what is a security, it seems all the more clear that its objective is to afford those who risk their capital at least a fair chance of realizing their objectives in legitimate ventures whether or not they expect a return on their capital in one form or another." (Emphasis supplied)

From the foregoing statutory and jurisprudential bases, this Commission holds that **all shares, participation or interests in a corporation or in a commercial enterprise or profit-making venture evidenced by a certificate, contract or other instrument, whether written or electronic in character, within the Philippines are securities or presumed to be securities.**

A certificate or evidence of indebtedness is *a written representation of debt securities or obligations of corporations* such as long-term commercial and short-term commercial papers.[9] A certificate of indebtedness pertains to certificates for the creation and maintenance of a permanent improvement revolving fund, similar to a "bond." Being equivalent to a bond, it is properly understood as an acknowledgment of

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[8] Civ. No. 14067. Court of Appeals of California, Third Appellate District. February 15, 1974 (https://law.justia.com/cases/california/court-of-appeal/3d/37/330.html)

[9] Decasa, Lucia M., *Securities Regulations Code Annotated with Implementing Rules and Regulations*, 2004, 1st ed., p.7.

an obligation to pay a fixed sum of money. It is usually used for the purpose of long-term loans.[10]

Under the SRC, an evidence of indebtedness is considered securities and must be registered with the Commission unless the issuer shows that the same is exempt from registration. Subsection 8.1 of the SRC mandates that "**securities shall not be sold or offered for sale or distribution** within the Philippines, <u>without a registration statement</u> duly filed with and approved by the Commission."

Securities transactions are impressed with public interest and are thus subject to public regulation.[11] In the case of *Herbosa vs. CJH Development Corporation,*[12] the Supreme Court emphasized that the purpose of the provision of the SRC requiring the registration of securities is to afford public protection from investing in worthless securities.

Relative thereto, it has been the position of the Commission that the registration requirements prescribed under the SRC are applicable if the registrant or someone acting for the registrant **intends a public offering or distribution of that registrant's securities.**[13] Whether a particular transaction involves a public offering depends on all the surrounding circumstances. The test is:

> "*Is there a sufficient subsisting connection between the company or the person making the offer and the persons to whom the offer is made as friends, customers or co-adventurers, etc., or are the persons mere outsiders*? If they are mere outsiders, the offer is made to the public; and in such case, the fact that the offer is made to a limited class, e.g., to the members of a single company (not being the company offering its shares), or to the members of a few companies, or to the members of a particular profession, or to the investors in a particular class of companies, does not make it less an offer to the public." [14]

Thus, as a general rule, selling or offering for sale or distribution of all securities within the Philippines are subject to registration. However, the law recognizes and affords **exemptions** by reason of the **small amount or limited character of the offering,**[15] i.e., the registration requirements shall not apply to any of the classes of securities listed under Subsection 9.1 of the SRC ("***exempt securities***") or to the sale of

[10] Traders Royal Bank vs. Court of Appeals, G.R. No. 93397, March 3, 1997.
[11] Abacus Securities Corporation vs. Ampil, G.R. No. 160016, February 27, 2006.
[12] G.R. No. 210316, November 28, 2016.
[13] SEC-OGC Opinion No. 09-04, Re: Registration of Securities, February 16, 2009.
[14] *Ibid.*
[15] SEC Opinion addressed to Ms. Judith Philips, February 2, 1996.

any security in any of the transactions enumerated under Subsection 10.1 of the SRC ("***exempt transactions***").

The 2015 SRC Rules,[16] as amended by SEC Memorandum Circular No. 6, s. 2021,[17] provides:

> "9.1.2. The registration requirements shall not likewise apply to the following:
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> 9.1.2.1. Any evidence of indebtedness issued by a financial institution that has been licensed by the BSP to engage in banking or quasi-banking shall be exempt from registration under Section 8.1 of the Code;
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> 9.1.2.2. Evidence of indebtedness issued to the BSP under its open market and/or rediscounting operations;
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> 9.1.2.3. Bills of exchange arising from a bona fide sale of goods and services that are distributed and/or traded by banks or investment houses duly licensed by the Commission and BSP through an organized market that is operated under the rules approved by the Commission;
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> 9.1.2.4. Any security issued or guaranteed by multilateral financial entities established through a treaty or any other binding agreement to which the Philippines is a party or subsequently becomes a member (hereinafter referred as Multilateral Financial Entities or MFE), e.g., international financial institutions, multilateral development banks, development finance institutions or any other similar entities; or by facilities or funds established, administered, and supported by MFEs; Provided, that the issuer shall file an offering circular/memorandum in a format prescribed by the Commission and containing among others; (1) information about the issuer and the security to be issued, (2) information about the MFE, and (3) information about the guarantee;
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> **9.1.2.5. The registration requirements shall not likewise apply to evidence of indebtedness, e.g., commercial papers, that meet the following conditions:**
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> **9.1.2.5.1. Issued to not more than nineteen (19) non-institutional lenders;**
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> **9.1.2.5.2. Payable to a specific person;**
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> **9.1.2.5.3. Neither negotiable nor assignable and held on to maturity; and**

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[16] 2015 Implementing Rules and Regulations of the Securities Regulation Code, August 4, 2015.
[17] SEC Memorandum Circular No. 6, s. 2021, Amendments on the SRC Rules 9 and 10, April 23, 2021.

> **9.1.2.5.4. In an amount not exceeding One Hundred Fifty Million Pesos (PhP150,000,000.00) or such higher amount as the Commission may prescribe.**
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> 9.1.3. Notwithstanding that a particular class of securities is exempt from registration, the conduct by any person in the purchase, sale, distribution of such securities, settlement and other post-trade activities shall comply with the provisions of the Code and the rules issued thereunder. Moreover, the purchase and sale of such security shall not be exempt from the coverage of the provisions of the Code on civil and other related liabilities, and other applicable provisions of the Code on fraud.
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> 9.1.4. Consistent with public interest and for the protection of investors, the Commission, may require an Issuer of a class of securities exempted from registration, to make available to investors and file with the Commission periodic disclosures regarding the Issuer, its business operations, its financial condition, its governance principles and practices, its use of investor funds, and other appropriate matters, and may also provide for suspension and termination of such requirement with respect to such Issuer." (Emphasis and underscoring supplied)

On account thereof, this Commission holds that although a contract of loan is an evidence of indebtedness which falls under the definition of "securities" under the SRC, the subject Loan Agreements executed by and between BOT Philippines and BOT Japan are not required to be registered as their terms meet the conditions under Subsection 9.1.2.5 of the 2015 SRC Rules, as amended.

First, the loan was issued in favor of the subsidiary corporation and payable to the parent corporation. They were neither negotiable nor assignable, and were held on maturity.

Second, the Loan Agreements were not offered and/or meant to be offered to the public, as defined in Subsection 3.1.17 of the 2015 SRC Rules.[18] The loans obtained by BOT Philippines from its parent company, BOT Japan, through the subject Loan Agreements represented money

[18] *Supra*, no. 9. Subsection 3.1.17. **Public offering** is any offering of securities to the public or to anyone, whether solicited or unsolicited. Any solicitation or presentation of securities for sale through any of the following modes shall be presumed to be a public offering:
3.1.17.1. Publication in any newspaper, magazine or printed reading material which is distributed within the Philippines;
3.1.17.2. Presentation in any public or commercial place;
3.1.17.3. Advertisement or announcement on radio, television, telephone, electronic communications, information communication technology or any other forms of communication; or
3.1.17.4. Distribution and/or making available flyers, brochures or any offering material in a public or commercial place or to prospective purchasers through the postal system, information communication technology and other means of information distribution.

borrowed by the former to carry out and further its business operations in the Philippines; the loan amount never became a capital investment by BOT Japan in BOT Philippines. Suffice it to state that the Loan Agreements executed by BOT Japan and BOT Philippines are simple mutuum,[19] which gave rise to an obligation on the part of the latter to pay the loan amount (plus stipulated interests) that it used for its business. In the absence of any evidence or record to the contrary, the Loan Agreements are exempt from registration.

Third, considering that the loan transactions were essentially between a parent company and its subsidiary, executed in relation to the business operations of the latter, no misrepresentation to the public could be attributed to, or deduced therefrom that will support a conclusion that these entities were circumventing the law by executing the debt instruments instead of shares. Neither could we deduce from the execution of the loan transactions that BOT Philippines was acting as an investment company that was sourcing funds from the public and executing loan agreements instead of shares. The Loan Agreements, having been executed to enable BOT Philippines to obtain the needed funds for its operations from its parent, is a legitimate loan transaction that does not require to be registered with, or an exemption from the Commission. This finds support in the *Gabionza Case* where the Supreme Court held that negotiable or debt instruments issued or executed to satisfy isolated individual obligations need not be registered with the Commission, to wit:

> "This analysis is highly myopic and ignorant of the bigger picture. **It is one thing for a corporation to issue checks to satisfy isolated individual obligations, and another for a corporation to execute an elaborate scheme where it would comport itself to the public as a pseudo-investment house and issue postdated checks instead of stocks or traditional securities to evidence the investments of its patrons.** The Revised Securities Act was geared towards maintaining the stability of the national investment market

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[19] "Respondents' claims, as articulated in their testimonies before the trial court, cannot prevail over the clear terms of the document attesting to the relation of the parties. "If the terms of a contract are clear and leave no doubt upon the intention of the contracting parties, the literal meaning of its stipulations shall control."

Articles 1933 and 1953 of the Civil Code provide the guideposts that determine if a contractual relation is one of simple loan or *mutuum*:

Art. 1933. By the contract of loan, *one of the parties delivers to another*, either something not consumable so that the latter may use the same for a certain time and return it, in which case the contract is called a commodatum; or *money* or other consumable thing, *upon the condition that the same amount of the same kind and quality shall be paid*, in which case the contract is simply called a loan or mutuum." (Abella vs Abella. G.R. No. 195166; July 8, 2015) x----------------------------------------------------------------x

> against activities such as those apparently engaged in by ASBHI. As the DOJ Resolution noted, ASBHI adopted this scheme in an attempt to circumvent the Revised Securities Act, which requires a prior license to sell or deal in securities. After all, if ASBHI's activities were actually regulated by the SEC, it is hardly likely that the design it chose to employ would have been permitted at all."[20]

In view of the foregoing, the grant of the Appeal is in order.

**WHEREFORE**, premises considered, the Memorandum on Appeal dated 17 May 2013 filed by BOT Lease and Finance Philippines, Inc. is hereby **GRANTED**. The Assailed Letter-Decision issued by the IPSD is hereby **REVERSED AND SET ASIDE**.

**SO ORDERED.**

Makati City, Philippines.

**EMILIO B. AQUINO**
Chairperson

**JAVEY PAUL D. FRANCISCO**
Commissioner

**KELVIN LESTER K. LEE***
Commissioner

**KARLO S. BELLO**
Commissioner

**MCJILL BRYANT T. FERNANDEZ**
Commissioner

*On Official Business

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[20] Gabionza v. CA, G.R. No. 161057, September 12, 2008.