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

SEC-OGC Opinion No. 16-06
01 April 2016
Re: Retail Trade; Restaurant and Gift Shop owned by Hotel

Atty. Nicholas C. Santizo
Unit 905, The Infinity Building,
10th Avenue and 26th Street,
Fort Bonifacio Globa City,
Taguig City

Sir:

This refers to your letter dated 09 October 2015 requesting an opinion on whether or not a restaurant and gift shop owned by a corporation, which has the primary purpose of operating a hotel, may be considered as "incidental" to the hotel business even though the same shall be open to the public and shall not be for the exclusive use of the hotel guests, and therefore, not within the purview of Republic Act No. 8762, the "Retail Trade Liberalization Act of 2000", as amended (RTLA).

At the onset, it is provided in Section 3 of the RTLA on the definition of "Retail trade" that:

"Section 3. Definition. – As used in this Act.

(1) 'Retail trade' shall mean any act, occupation or calling of habitually selling to the general public merchandise, commodities or good for consumption, but the restriction of this law shall not apply to the following:

(a) xxx

(c) Sales in restaurant operations by a hotel owner or inn-keeper irrespective of the amount of capital: provided that the restaurant is incidental to the hotel business xxx"

It is further stated in Rule I Section 2 of the Implementing Rules and Regulations of (IRR) of the RTLA that:

"Section 2. Sales Not Considered As Retail. - The following sales are not considered as retail:

a. xxx
c. Sales arising from restaurant operations by a hotel owner or inn-keeper irrespective of the amount of capital, provided, that the restaurant is incidental to the hotel business xxx".

The Commission has already opined that engaging in the selling of merchandise as an incident to the primary purpose of a corporation does not constitute retail trade. In an opinion issued by the Commission, it was stated that "since a hospital, by its very nature, cannot operate without a pharmacy to cater to its patients, it is believed that the putting up by a hospital of its own pharmacy does not constitute a "retail trade" within the purview of the Retail Trade Nationalization Law." The same was based on the exception granted under then Republic Act. No. 1180 or the Retail Trade Nationalization Law excluding from the term "retail business" the operation of a restaurant by a hotel-owner or keeper since the same does not constitute the act or habitually selling direct to the general public merchandise, commodities or goods for consumption[1]. This same exception was included in the RTLA as quoted above.

From the foregoing, it is clear that sales in restaurant operations by a hotel owner are not considered retail as long as the same is incidental to the hotel business. Hence, since the primary clientele of a restaurant located inside the hotel premises are hotel guests and its services are offered in order to provide a convenient dining option for guests of the hotel, the sales from the operations of the said restaurant does not fall under the definition of retail.

As to whether or not the above shall hold true if the said restaurant will also cater and be open to the public and shall not be for the exclusive use of hotel guests, we answer in the affirmative and confirm that the sales from such restaurant operations are still not considered as retail. In this case, the use of and access by non-hotel guests does not modify the purpose of the establishment by the hotel of a restaurant, i.e. to make dining easier for hotel guests.

The above discussion on restaurants also applies to the establishment of a gift shop.

In the subject letter-request, it is represented that the gift shop will be located within the hotel premises, be designated a separate name from the hotel, and will be made accessible, not only to hotel guests, but to the general public. At this point, still pivotal is the issue on whether or not the sales from the gift shop is incidental to the hotel operations.

Hotel operations stress the need to provide the greatest ease and comfort to hotel guests whether it be through providing clean rooms, access to leisure facilities like pools, gyms and various sports courts, or even valet parking. Further, hotels are normal venues for vacations as well as celebrations of different occasions from weddings to birthdays or anniversaries. Connected to these vacations and celebrations are the souvenirs and gifts purchased to commemorate such events.

In this connection, illustrative is SEC Opinion No. 11-34[2] issued in relation to Fitness First Philippines, Inc. (FFPI) wherein the Commission stated that "the sale of drinks, sundry apparel and articles of hygiene solely within gym premises owned and operated by FFPI and exclusively to persons who have enrolled as gym members in order to avail of the facilities in the gym premises, is incidental to the business of FFPI" and that "Gym operation, by its nature, involves transacting with gym members or guests that need to be attired properly,

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[1] SEC Opinion dated 12 November 1999 addressed to Atty. Cynthia Y . Legaralde-De La Paz as reiterated in SEC Opinion No. 11-02 dated 13 November 2002 where the Commission opined that the sale of mobile devices and accessories by a telecommunications operator is incidental to the business of the telecommunication operator and hence, does not constitute "retail trade".

[2] SEC-OGC Opinion No. 11-34 dated 03 August 2011 addressed to Atty. Ma. Adelina S. Gatdula.

require hydration and rehydration, and make use of the shower facilities of the gym, sale of drinks, sundry apparel and hygiene articles". FFPI's object in making beverages, gym apparel and articles of hygiene available within gym premises is to afford its members a hassle free and complete gym experience.

Hence, in establishing a gift shop within the hotel premises where hotel guests, as well as the public, may be able to purchase souvenirs and other gift items easily and without the hassle of having to venture outside the hotel, the hotel is merely adding a feature that is incidental to its hotel operations in line with providing quality service.

From the foregoing, both sales from the restaurant and gift shop operations by a hotel, as long as incidental to the hotel operations, are not considered retail.

It shall be understood that the foregoing opinion is rendered based solely on the 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 courts, or upon the Commission in other cases of similar or dissimilar circumstances.[3] 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,

CAMILO S. CORREA
General Counsel

[3] SEC Memorandum Circular 2003-15 (No. 7).