



Republic of the Philippines
Department of Finance
Securities and Exchange Commission

OFFICE OF THE GENERAL COUNSEL

19 March 2018

SEC-OGC Opinion No. 18-04

RE: Foreign Equity Ownership;
Travel and Tours

AT PHIL, INC.

G/F, Integrated Bar of the Philippines Building
Corner Edgardo Angara Wing, Jade St.
Ortigas Center, Pasig city

Attention: **VIVIAN SAN MATEO**
LOIDA G. SAMANIEGO

Mesdames:

This refers to your letter dated 21 June 2017, requesting an opinion on whether or not AT Phil, Inc. (API), doing business under the name and style of ASIATRavel.COM, as amended on November 16, 2009, is qualified to have foreign equity of 100%.

You mentioned in your letter that API has been operating since its inception, pursuing its business of tours and travel agency and other related activities, servicing both local and foreign markets. It has not engaged in any of its secondary purposes except those related to travel and tours. You further stated that since its incorporation and up to 21 June 2017, its stockholdings are divided between Filipino and Singaporean investors at a share of 60% and 40%, respectively. The company's total authorized capital stock is fifteen million pesos (Php 15,000,000.00) divided into the same number of shares of fifteen million (15,000,000) at Php1.00 par value per share. Its total paid-up capital amounts to eleven million pesos (Php 11,000,000.00) divided into the same number of shares of eleven million (11,000,000) at Php 1.00 par value per share, which is roughly around USD220,000 using the current exchange rate.

Given the foregoing, you solicit the Commission's opinion on the following questions:

1. Does the company qualify to be 100% owned by foreign investors, such that the local stockholders can now transfer or sell their shares to foreign investors?

2. If the company qualifies to be 100% owned by foreigners, are the owners required to be residents of the Philippines or can they stay as non-resident aliens not doing business in the Philippines?
3. Can a foreign entity alone hold almost 100% ownership of a domestic/Philippine corporation, or should there also be a foreign natural person (individual) investing in the corporation?

Department of Tourism Memorandum Circular No. 2015-06 Series of 2016 defines travel and tour agency¹ as follows:

(k) "Travel and Tour Agency" shall mean a primary tourism enterprise regularly engaged in both Tour Operator and Travel Agency services, as defined in (i).

(i) "Tour Operator" shall mean any person or entity engaged in the business of inbound and/or local tour operation such as organizing and/or conducting tours as well as making online reservations, arranging and booking for transportation and accommodation for a fee, commission, or any form of remuneration.

(j) "Travel Agency" shall mean any person or entity engaged in the business of providing travel -related services such as transportation or accommodation reservations/bookings, documentation of travel papers, sale and/or issuance of tickets and selling of outbound tours for a fee, commission, or any form of remuneration.

(h) "Outbound Tour" shall mean a tour of individuals/groups outside the Philippines.

FIRST QUERY

Of pertinence to your first query are Sections 6 and 7 of the Foreign Investment Act (FIA), to wit:

"Section 6. Foreign Investments in Export Enterprises - Foreign investment in export enterprises whose products and services do not fall within Lists A and B of the Foreign Investment Negative List provided under Section 8 hereof is allowed up to one hundred percent [100%] ownership. Export enterprises which are non-Philippine nationals shall register with BOI and submit the reports that may be required to ensure continuing compliance of the export enterprise with its export requirement. BOI shall advise SEC or BTRCP, as the case may be, of any export enterprise that fails to meet the export ratio requirement. The SEC or BTRCP shall thereupon order the noncomplying export enterprise to reduce its sales to the domestic market to not more than forty percent [40%] of its total production; failure to comply with such SEC or BTRCP order, without justifiable reason, shall subject the enterprise to cancellation of SEC or BTRCP registration, and/or the penalties provided in Section 14 hereof.

Section 7. Foreign Investment in Domestic Market Enterprises - Non-Philippine nationals may own up to one hundred percent (100%) of domestic market enterprises unless foreign ownership therein is prohibited or limited by the Constitution, existing law or the Foreign Investment Negative List under Section 8 hereof. (As amended by R.A. 8179). "²

¹ Revised Rules and Regulations to Govern the Accreditation of Travel and Tour Agencies

² Republic Act No. 7042 (As amended by R.A. 8179) An Act To Promote Foreign Investments, Prescribe The Procedures For Registering Enterprises Doing Business In The Philippines, And For Other Purposes

Relative thereto, Section 1(a), Rule IV of the Implementing Rules and Regulations (IRR) of the FIA provides the qualifications for the Registration of Investments of Non-Philippine Nationals:³

SECTION 1. QUALIFICATIONS.

a. Any **non-Philippine national may do business or invest in a domestic enterprise up to one hundred percent (100%) of its capital** provided:

- (1) it is investing in a **domestic market enterprise in areas outside the FINL**; or
- (2) it is investing in an **export enterprise whose products and services do not fall within Lists A and B** (except for defense-related activities, which may be approved pursuant to Section 8(b)(1) of the Act) of the FINL.

Provided further that, as required by existing laws, the country or state of the applicant must also allow Filipino citizens and corporations to do business therein.

Since API operates the business of tours and travel agency and other related activities **servicing both local and foreign markets**, we have to determine if it falls under an export enterprise or a domestic market enterprise.

The FIA⁴ defines the following:

e. The term "**export enterprise**" shall mean an enterprise wherein a manufacturer, processor or service **including tourism enterprise exports sixty percent (60%) or more of its output**, or wherein a trader purchases products domestically and exports sixty percent (60%) or more of such purchases;

f. The term "**domestic market enterprise**" shall mean an enterprise which produces goods for sale, or **renders services to the domestic market entirely or if exporting a portion of its output fails to consistently export at least sixty percent (60%) thereof**;

In this relation, "export" and "output"⁵ are defined by the IRR as follows:

h. **Exports** shall mean the volume or the Philippine port F.O.B. peso value, determined from invoices, bills of lading, inward letters of credit, loading certificates, and other commercial documents, of products exported directly by an export enterprise or **the value of services including tourism sold by service-oriented enterprises to non-resident foreigners** or the net selling price of export products sold by an export enterprise to another export enterprise that subsequently exports the same; *Provided*, That sales of export products to another export enterprise shall only be deemed exports when actually exported by the latter, as evidenced by loading certificates or similar commercial documents; and *Provided, finally*, that without actual exportation, the following shall be considered constructively exported for purposes of the Act: (1) sales of products to bonded manufacturing warehouses of export enterprises; (2) sales of products to export processing zone enterprises; (3) sales of products to export enterprises operating bonded trading warehouses supplying raw materials used in the manufacture of export products; and (4) sales of products to foreign military bases, diplomatic missions and other agencies and/or instrumentalities granted tax immunities of locally manufactured, assembled or repacked products whether paid for in foreign currency or pesos funded from inwardly remitted foreign currency. xxx

³ Implementing Rules and Regulations (IRR) of Republic Act No. 7042 (Foreign Investment Act of 1991)

⁴ R.A. No. 7042, *supra* note 1

⁵ Section 1, Rule 1, IRR *supra* note 2

i. **Output** shall refer to the export enterprise's total sales in a taxable year. The term sales shall refer to value in case of heterogeneous products and volume in case of homogeneous products. xxx

Based from the above definitions, we cannot conclude whether API is an export enterprise or a domestic market enterprise because you mentioned only that API has been operating as travel and tour agency servicing both local and foreign markets, and providing full travel services at packaged prices in the online travel market. **You did not provide information as to whether it exports sixty percent (60%) or more of its output to fall under the definition of an export enterprise, or if it fails to consistently export at least sixty percent (60%) thereof in order to be considered as a domestic market enterprise.**

Nonetheless, **assuming API is an export enterprise**, it should not fall within Lists A and B of the Foreign Investment Negative List (FINL) in order for it to be 100% foreign-owned. The business of travel and tours agency and services is not included in List A, nor is it covered by List B, of the FINL.

Assuming, on the other hand, that API is a domestic market enterprise, the same rule applies; that is, it should not fall within Lists A and B of investment areas reserved to Philippine nationals. To reiterate, the business of travel and tours agency and services is not included in List A. Neither is it covered by List B because it has a paid-up capital of more than two hundred thousand US dollars (US\$200,000). As held in one opinion, "the general rule is that non-Philippine nationals can own up to one hundred percent (100%) of the equity in export as well as domestic market enterprises. However, the xxx FINL restricts foreign ownership to a maximum of forty (40%) of the equity in small and medium-sized domestic market enterprises in cases where the paid-in capital is less than the equivalent of Two Hundred Thousand US Dollars (US\$200,000). xxx "6

From the foregoing, **and provided API does not own land**, it may be allowed to be 100% owned by foreign nationals. Consequently, transfer of shares from Filipino to foreign investors is allowed. This Commission had already opined that a foreign national may be a transferee of shares of stock, provided the transfer will not violate the statutory/constitutional limitation on alien equity participation.⁷

SECOND QUERY

As to your second question, the Corporation Code ("Code") does not provide residency requirement for stock ownership of a domestic corporation except if the stockholder becomes a member of the board of directors. Section 23 of the Corporation Code requires that at least a majority of the members of the board of directors/trustees must be residents of the Philippines. The required residence is mandatory, hence, it cannot be dispensed with. The requirement is mainly for the protection of the stockholders or members of the corporation against inactivity of the board where no

⁶ SEC-OGC Opinion No. 27-11 dated 20 April 2011, addressed to Ms. Cristine P. Base

⁷ SEC Opinion dated September 6, 1983 addressed to Maranaw Hotels & Resort Corporation; SEC Opinion dated May 12, 1982 addressed to Mr. Romualdo V. Suyosa

quorum can be mustered due to repeated absence of a director or trustee who resides abroad.⁸

The term “resides” should be viewed or understood in its popular sense, meaning the personal, actual or physical habitation of a person, actual residence or place of abode. It signifies physical presence in a place and actual stay thereat. In this popular sense, the term means merely residence, that is, personal residence, not legal residence or domicile. Residence simply requires bodily presence in that place and time of residence is required though; however, the residence must be more than temporary.⁹

THIRD QUERY

As to your third question, subject to the ownership restrictions under the FINL, there is no prohibition in the Code for a juridical entity to be the lone entity that owns almost 100% ownership of a domestic corporation, more so if the latter is permitted by law to be 100% foreign-owned. Section 5 of the Code merely defines “stockholders or shareholders” as “corporators in a stock corporation”, or “those who compose a (stock) corporation”, without any qualification. In this connection, it is already settled that a corporation may own shares of stock in another corporation.¹⁰

It shall be understood, however, that the foregoing opinion is rendered based solely on the facts and circumstances disclosed and relevant solely to the particular issue raised therein and shall not be used in the nature of a standing rule binding upon the Commission in other cases or upon the courts whether similar or dissimilar circumstances.¹¹ If, upon further inquiry and investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered void.

Please be guided accordingly.

Very truly yours,


CAMILLO S. CORREA
General Counsel

⁸ SEC Opinion dated February 26, 1990 addressed to Hon. Lilia R. Bautista; SEC Opinion dated December 8, 1995 addressed to Mr. K.J. Mctavish

⁹ Garcia –Fule vs. Court of Appeals, 74 SCRA 189 [1976], cited in SEC Opinion No. 04-31, dated April 28, 2004 addressed to Alpha Salcedo Condominium Corporation

¹⁰ The Corporation Code of the Philippines Annotated (11th Edition) by Hector S. De Leon and Hector M. De Leon, Jr. (2013).

¹¹ SEC Memorandum Circular No.15, Series of 2003