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

MARUBENI CORPORATION – MANILA BRANCH,
Appellant

SEC En Banc Case No. 11-11-250

-versus-

THE COMPANY REGISTRATION AND MONITORING DEPARTMENT,
Appellee.

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DECISION

For consideration of the Commission *En Banc* is the *Memorandum of Appeal*, dated 25 November 2011, filed by Marubeni Corporation-Manila Branch ("***Appellant***") assailing the 27 October 2011 Decision ("***Assailed Decision***") of the Company Registration and Monitoring Department ("***CRMD***") denying Appellant's request for reconsideration of the computation of the additional security and directing it to deposit the required additional securities with an actual market value of at least P1,487,793.18 (net of charges) and pay the corresponding penalties that may be assessed thereon.

Appellant is the Philippine Branch of a multinational company organized and existing under and by virtue of the laws of Japan. [1] Its Branch Office is registered with the Commission on 20 March 1967 under SEC Registration No. F000000493 (per Commission's records). The CRMD, on the other hand, is a department of the Commission, which is charged, among others, with the issuance of license to transact business to foreign corporations and with the monitoring of compliance of licensed foreign corporation with their responsibilities under the Corporation Code and other existing laws.[2]

Appellant alleges that on 29 September 2011, it sought to comply with Section 126 of the Corporation Code by submitting to CRMD an additional security consisting of Treasury Bills[3] in the amount of Two Hundred Thousand Six Hundred Eighteen Pesos

[1] 25 November 2011 Memorandum of Appeal, Paragraphs 4 and 5. Records, p. 93.
[2] http://www.sec.gov.ph/about/departments-and-offices/ [Last accessed: 15 August 2016]
[3] Note 1, Annex "**B**". Records, p. 68.

and 71/100 (Php 200,618.71).[4] Said additional security deposit is computed based on the Appellant's total Gross Income (net of costs) of Php 4,813,945.00 and is more than double the amount prescribed under Section 126 of the Corporation Code. However, CRMD refused to accept said security deposit on the ground that it was insufficient considering that "Gross Income", as basis for the computation of additional security, should mean that no deductions shall be allowed from the entire amount.[5] Consequently, CRMD issued a Confirmation of Payment[6] requiring the deposit of additional securities in the total amount of One Million Four Hundred Eighty Seven Thousand Seven Hundred Ninety Three Pesos and 18/100 (Php 1,487,793.18) plus a penalty in the amount of Seven Thousand Five Hundred Pesos (Php 7,500.00).[7] Thereafter, Appellant requested CRMD for reconsideration,[8] but was denied by the latter in its assailed decision.

Hence, the present Appeal.

Appellant argues that CRMD's interpretation of Gross Income as synonymous to Gross Revenue has no basis in law, jurisprudence, regulations, and Philippine Accounting Standards. Section 126 of the Corporation Code clearly provides that the requirement of deposit securities should be based on the branch office's Gross Income, which has obtained a definite meaning in law, jurisprudence and regulations, and which is not synonymous with Gross Revenue. It contends that since the Corporation Code failed to define the term "Gross Income", existing jurisprudence and other laws which defined such term may be resorted to. Said laws and jurisprudence defined "Gross Income" as gross sales or gross revenue less cost of sales/services. Furthermore, it argues that the SEC-OGA Memorandum[9] is not a valid basis to prevent Appellant from deducting the cost of sales in the computation of its gross income on the ground that it is not a rule that must be complied with by the general public. Said memorandum was not issued by the Commission *En Banc*, the government agency empowered to promulgate rules and regulations to implement the provisions of the Corporation Code as provided under Section 143[10] of the said Code, and was merely an internal memorandum issued by the Office of the General Accountant (**OGA**) to CRMD concerning Synnex Concentrix Corporation, and therefore, can only bind the latter entity. Moreover, assuming hypothetically that the SEC-OGA Memorandum enjoys the imprimatur of the *Commission En Banc*, still it is not enforceable against appellant due to lack of publication and filing with the University of the Philippines (U.P) Law Center as required by Section 3, Chapter II, Book VII, Revised Administrative Code.

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[4] Id., Paragraph 7. Records, p. 92.
[5] Id., Paragraph 8. Records, pp. 91 – 92.
[6] Id., Annex "**F**". Records, p. 8.
[7] Id., Paragraph 9. Records, p. 91.
[8] Id., Annex "**H**". Records, pp. 1 – 3.
[9] Id., Annex "**C**". Records, pp. 65 – 66.
[10] Section 143. *Rule-making power of the Securities and Exchange Commission.* – The Securities and Exchange Commission shall have the power and authority to implement the provisions of this Code, and to promulgate rules and regulations reasonably necessary to enable it to perform its duties hereunder, particularly in the prevention of fraud and abuses on the part of the controlling stockholders, members, directors, trustees or officers.

We resolve to DENY the instant appeal.

Section 126 of the Corporation Code states:

Section 126. *Issuance of a license.* – xxx

Within sixty (60) days after the issuance of the license to transact business in the Philippines, the license, except foreign banking or insurance corporation, shall deposit with the Securities and Exchange Commission for the benefit of present and future creditors of the licensee in the Philippines, securities satisfactory to the Securities and Exchange Commission, consisting of bonds or other evidence of indebtedness of the Government of the Philippines, its political subdivisions and instrumentalities, or of government-owned or controlled corporations and entities, shares of stock in "registered enterprises" as this term is defined in Republic Act No. 5186, shares of stock in domestic corporations registered in the stock exchange, or shares of stock in domestic insurance companies and banks, or any combination of these kinds of securities, with an actual market value of at least one hundred thousand (P100,000.) pesos; **Provided, however, That within six (6) months after each fiscal year of the licensee, the Securities and Exchange Commission shall require the licensee to deposit additional securities equivalent in actual market value to two (2%) percent of the amount by which the licensee's <u>gross income</u> for that fiscal year exceeds five million (P5,000,000.00) pesos.** The Securities and Exchange Commission shall also require deposit of additional securities if the actual market value of the securities on deposit has decreased by at least ten (10%) percent of their actual market value at the time they were deposited. The Securities and Exchange Commission may at its discretion release part of the additional securities deposited with it if the gross income of the licensee has decreased, or if the actual market value of the total securities on deposit has increased, by more than ten (10%) percent of the actual market value of the securities at the time they were deposited. The Securities and Exchange Commission may, from time to time, allow the licensee to substitute other securities for those already on deposit as long as the licensee is solvent. Such licensee shall be entitled to collect the interest or dividends on the securities deposited. **In the event the licensee ceases to do business in the Philippines, the securities deposited as aforesaid shall be returned, upon the licensee's application therefor and upon proof to the satisfaction of the Securities and Exchange Commission that <u>the licensee has no liability to Philippine residents, including the Government of the Republic of the Philippines</u>.**[11]

It cannot be overemphasized that the Commission is empowered to issue rules and regulations to implement the provisions of the Corporation Code.[12] Needless to say, included in the said grant of authority is the power to interpret its provisions.

A reading of Section 126 of the Corporation Code, particularly on security deposit, would readily reveal that its intendment is to provide reasonable assurance that obligations of a branch office to Philippine residents, including the government, will be settled. In view thereof, the OGA, on 19 May 2009, rendered an opinion interpreting

[11] Emphasis and underscoring supplied.

[12] Section 143, Batas Pambansa Blg. 68, also known as the Corporation Code of the Philippines.

"Gross Income" in the aforesaid provision to mean "gross amount without any deduction."[13] Said interpretation was confirmed by the Commission *En Banc* on 19 August 2010[14] through SEC Resolution No. 369, s. 2010.[15]

The definition of "Gross Income" under the National Internal Revenue Code (NIRC), as well as under other laws[16] and jurisprudence[17] cited by Appellant, *i.e.*, Gross Income = Gross Revenue – Cost of Sales or Services, is for the purpose of imposing the appropriate tax. To reiterate, the purpose of security deposit under Section 126 of the Corporation Code is to guarantee the settlement of foreign corporation's obligations in the Philippines. These obligations may include accrued expenses and payables arising from cost of sales or services. Thus, to follow the definition of "Gross Income" under the NIRC would significantly reduce the base and render inadequate the security deposit of foreign corporations. Moreover, the securities deposit requirement is also intended to persuade foreign corporations to invest in or buy Philippine securities in order to foster the social and economic development of the country.[18]

Administrative issuances may be distinguished according to their nature and substance: legislative and interpretative. A legislative rule is in the matter of subordinate legislation, designed to implement a primary legislation by providing the details thereof. An interpretative rule, on the other hand, is designed to provide guidelines to the law which the administrative agency is in charge of enforcing.[19]

In a long line of cases decided by the Supreme Court, it has consistently held that administrative regulation interpretive of a statute, and not declarative of certain rights and corresponding obligations, is given retroactive effect as of the date of the effectivity of the statute.[20] In fact, it does not require publication in order to be effective. Its applicability needs nothing further than its bare issuance for it gives no real consequence more than what the law itself has already prescribed.[21]

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[13] Note 9, supra.

[14] SEC Opinion No. 11-14 addressed to Attys. Alonzo Q. Ancheta and Paula Katherina A. Gan, 09 March 2011.

[15] RESOLVED, by a 4-1 vote, To CONFIRM the position of OGA that there should be no deduction from "Gross Income" as basis in the computation of the 2% security deposit prescribed for branch offices under Section 126 of the Corporation Code...

[16] Implementing Rules and Regulations of Republic Act No. 9728, otherwise known as the Freeport Area of Bataan (FAB) Act of 2009; Revenue Regulations No. 02-05; Implementing Rules and Regulations of Republic Act No. 9400, An Act Amending Republic Act No. 7227, As Amended, Otherwise Known As The Bases Conversion And Development Act Of 1992, And For Other Purposes; and, Commonwealth Act No. 466, An Act To Revise, Amend And Codify The Internal Revenue Laws Of The Philippines.

[17] Commissioner of Internal Revenue vs. Central Luzon Drug Corporation, G.R. No. 159647, April 15, 2005.

[18] Lopez, Rosario N. *The Corporation Code of the Philippines* (Pasig City: Integrated Publishing House, 1994) p. 1159, citing SEC Opinion dated 25 March 1986, Herber Raff.

[19] BPI Leasing Corporation vs. The Honorable Court of Appeals, et. al., G.R. No. 127624, November 18, 2003, citing Misamis Oriental Association of Coco Traders, Inc. *v.* Department of Finance Secretary, 238 SCRA 63 (1994).

[20] Commissioner of Internal Revenue vs. Azucena T. Reyes, G.R. No. 159694, January 27, 2006.

[21] Association of Southern Tagalog Electric Cooperatives, Inc., et. al. vs. Energy Regulatory Commission, G.R. No. 192117, September 18, 2012.

Clearly, the present appeal has no merit. The adoption of the Commission En Banc of the definition of Gross Income provided by the OGA need not be published nor filed with the UP Law Center for it to become effective. As a matter of fact, the reckoning date of effectivity of the interpretation given by the Commission En Banc to the term "Gross Income" under Section 126 of the Corporation Code is 01 May 1980, the effectivity date of the Corporation Code of the Philippines.

During the pendency of the present Appeal, SEC Memorandum Circular No. 2, Series of 2012 (**MC No. 2**), entitled GUIDELINES ON SECURITIES DEPOSIT OF BRANCH OFFICES OF FOREIGN CORPORATIONS, was issued. MC No. 2 allows certain deductions[22] that were actually incurred with foreign entities and foreign related parties. In order to avail of the deductions, a branch office must submit an Audited Special or Annual Income Statement showing separately the amounts of direct cost and expenses actually incurred with foreign entities and foreign related parties.[23] We emphasize, however, that the allowance of certain deductions does not in any way change the Commission's interpretation of "Gross Income" under Section 126 of the Corporation Code, and is, in fact, a manifestation of its faithful implementation of the primary intendment of the law, *i.e.*, the protection of the present and future creditors of foreign corporations in the Philippines.

WHEREFORE, premises considered, the *Memorandum of Appeal* is **DENIED** for lack of merit.

MARUBENI CORPORATION – MANILA BRANCH is hereby ORDERED to submit its Audited Special or Annual Income Statement for 2011 onwards showing separately the amounts of direct cost and expenses actually incurred with foreign entities and

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[22] SECTION 4. ITEMS DEDUCTIBLE FROM THE GROSS INCOME COMPUTATION OF CERTAIN TYPES OF BRANCH OFFICES
4.1 Sales Returns, Allowances and Discounts
A contra revenue account that reports (1) merchandise returned by a customer, and (2) the allowances granted to a customer because the seller shipped improper or defective merchandise. These will reduce the seller's accounts receivable and are subtracted from sales (along with sales discounts) to arrive at net sales.
4.2 Direct Costs and Expenses Incurred with Foreign Entities and Related Parties
The following direct costs and expenses incurred with foreign entities and related parties are allowable deductions from Gross Income:

a. Cost of sales incurred with foreign suppliers;
b. Direct costs of services attributable to related party transactions outside the Philippines;
c. Direct cost incurred attributable to foreign non-related party supplier;
d. Depreciation and amortization of tangible and intangible assets used directly for its manufacturing operations can deducted from Gross Income provided the following conditions are met:
    i. These expenses form part of the foreign corporation's direct costs or costs of sales;
    ii. These expenses relate to assets that were imported or purchased from foreign vendors;
    iii. These expenses relate to assets that had been paid in full by the foreign corporation; and
    iv. These expenses relate to assets that are not subject to any mortgage, lien, or encumbrance;
e. Other foreign related direct cost and expense items.

[23] Section 4.3, MC No. 2.

foreign related parties to **COMPANY REGISTRATION AND MONITORING DEPARTMENT (CRMD)** within 30 days from receipt of this Decision.

Further, the CRMD is hereby **DIRECTED** to compute the proper value of security to be deposited with dispatch.

SO ORDERED.

Pasay City, Philippines, 29 November 2016.

TERESITA J. HERBOSA
Chairperson

MANUEL HUBERTO B. GAITE
Commissioner

ANTONIETA F. IBE
Commissioner

EPHYRO LUIS B. AMATONG
Commissioner

BLAS JAMES G. VITERBO
Commissioner