Republic of the Philippines
SECURITIES AND EXCHANGE COMMISSION
SEC Bldg. EDSA, Greenhills, Mandaluyong City

OFFICE OF THE GENERAL COUNSEL

12 October 2011

SEC-OGC Opinion No. 11-42
Re: Determination of Nationality of a Corporation

JAMES B. YEE
Corporate Secretary
Generali Pilipinas Holding Company, Inc.
Gercon Plaza Building 7901
Makati Avenue, Makati City

Mr. James Yee:

This refers to your letter dated 03 June 2011 requesting opinion on the following queries, to wit:

1. Whether the incorporation test or the control test should be applied in determining the nationality of a corporation not engaged in nationalized or partially nationalized activities;

2. Whether the provisions of Republic Act No. 7042, as amended, otherwise known as the Foreign Investments Act ("**FIA**"), apply to corporations which are not engaged in nationalized or partly nationalized activities; and

3. Whether a corporation may be estopped from claiming that it is a domestic corporation incorporated under Philippine law, if it was inadvertently represented in the submissions of its subsidiaries with the Honorable Commission to be a foreign corporation.

As disclosed in your letter, the respective Articles of Incorporation ("**AOI**") of Generali Pilipinas Life Assurance Company ("**GPLAC**") and Generali Pilipinas Insurance Company, Inc. ("**GPIC**") erroneously stated that the nationality of their controlling stockholder, Generali Pilipinas Holding Company, Inc. ("**GPHC**"), is Dutch.

You further submitted that the statements in the AOI of GPLAC and GPIC were mere oversight and do not in any way alter the nationality of GPHC as a domestic corporation incorporated under the Philippine laws.

We will address the above queries in the foregoing sequence, thus:

1. Primarily, it is the incorporation test which should be applied in determining the nationality of a corporation. Thus:

> "Under Philippine jurisdiction, **the primary test is always the Place of Incorporation Test since we adhere to the doctrine that a corporation is a creature of the State whose laws it has been created.** A corporation organized under the laws of a foreign country, irrespective of the nationality of the persons who control it is necessarily a foreign corporation. **The control test and the principal place of business test (siege social), are merely adjunct tests, when the place of incorporation test indicates that the subject corporation is organized under Philippine laws.** (Villanueva, Philippine Corporate Law, p. 58)"[1] (Emphasis supplied)

However, based upon the foregoing, while the incorporation test serves as the primary test under Philippine jurisdiction, other tests such as the control test must be used for purposes of compliance with the provisions of the Constitution and of other laws on nationality requirements. Even if the corporation is a creature of the State, there is a need to further safeguard/regulate certain areas of investment and activities for the protection of the interests of Filipinos.[2] For instance, the control test is used to determine the eligibility of a corporation, which has foreign equity participation in its ownership structure, to engage in nationalized or partly nationalized activities.

2. The provisions of FIA on nationality restrictions apply only to nationalized or partly nationalized corporations, where the control test should be used to determine the nationality of such corporations.

FIA defines a "Philippine national" as, thus:

> "The term 'Philippine national' shall mean a citizen of the Philippines; of a domestic partnership or association wholly owned by citizens of the Philippines; or a corporation organized under the laws of the Philippines of which at least sixty percent (60%) of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines; or a corporation organized abroad and registered as doing business in the Philippines under the Corporation Code of which one hundred percent (100%) of the capital stock outstanding and entitled to vote is wholly owned by Filipinos or a trustee of funds

---

[1] SEC Opinion No. 14-04 addressed to Tan & Concepcion Law Firm, dated 03 March 2004.

[2] Cesar Lapuz Villanueva, Philippine Corporate Law, p. 47, 50, 53.

for pension or other employee retirement or separation benefits, where the trustee is a Philippine national and at least sixty percent (60%) of the fund will accrue to the benefit of Philippine nationals: Provided, That where a corporation and its non-Filipino stockholders own stocks in a Securities and Exchange Commission (SEC) registered enterprise, at least sixty percent (60%) of the capital stock outstanding and entitled to vote of each of both corporations must be owned and held by citizens of the Philippines and at least sixty percent (60%) of the members of the Board of Directors of each of both corporations must be citizens of the Philippines, in order that the corporation, shall be considered a 'Philippine national.'"

Meanwhile, under Section 1, Rule 1 of the Implementing Rules and Regulations ("**IRR**") of the FIA, it is provided that:

> "b. *"Philippine national"* shall mean a citizen of the Philippines or a domestic partnership or association wholly owned by the citizens of the Philippines; or a corporation organized under the laws of the Philippines of which at least sixty percent [60%] of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines; or a trustee of funds for pension or other employee retirement or separation benefits, where the trustee is a Philippine national and at least sixty percent [60%] of the fund will accrue to the benefit of the Philippine nationals; *Provided,* that where a corporation its non-Filipino stockholders own stocks in a Securities and Exchange Commission [SEC] registered enterprise, at least sixty percent [60%] of the capital stock outstanding and entitled to vote of both corporations must be owned and held by citizens of the Philippines and at least sixty percent [60%] of the members of the Board of Directors of each of both corporation must be citizens of the Philippines, in order that the corporation shall be considered a Philippine national. **The *control test* shall be applied for this purpose.**
>
> Compliance with the required Filipino ownership of a corporation shall be determined on the basis of outstanding capital stock whether fully paid or not, but only such stocks which are generally entitled to vote are considered.
>
> For stocks to be deemed owned and held by Philippine citizens or Philippine nationals, mere legal title is not enough to meet the required Filipino equity. Full beneficial ownership of the stocks, coupled with appropriate voting rights is essential. Thus, stocks, the voting rights of which have been assigned or transferred to aliens cannot be considered held by Philippine citizens or Philippine nationals.
>
> **Individuals or juridical entities not meeting the aforementioned qualifications are considered as non-Philippine nationals.**" (Emphasis supplied)

3. A corporation may not be estopped from claiming that it is a domestic corporation incorporated under the Philippine law, even if it was inadvertently represented in the submissions of its subsidiaries with the Commission to be a foreign corporation.

The nationality of a corporation is determined by law and not by the corporation and/or its subsidiaries. It is the test or tests, as provided by law, that should prevail in determining the nationality of a corporation, and not its representations and/or those of its subsidiaries.

GPHC is a Filipino corporation under the place of incorporation test because it was incorporated by the Commission on 18 June 1999, pursuant to the Corporation Code. However, whether or not it is a Filipino national under nationality laws using the control test depends on whether it is nationalized or partly nationalized and covered by the Foreign Investment Negative List ("**FINL**")[3]. For this purpose, the following law provisions are pertinent, to wit:

1. Section 8 of RA 7042, as amended by Section 3 of Republic Act 8179 and List B of FINL provides that *"domestic market enterprises with paid-in equity capital of less than the equivalent of US$200,000"* is partially reserved to Philippine nationals and foreign equity participation is limited only up to forty percent (40%).[4]

2. List A of FINL provides for a forty percent (40%) foreign equity limitation involving ownership of private lands.[5] The same restriction is mandated by Section 7, Article XII of the Constitution[6]; and Section 22, Chapter IV of Commonwealth Act No. 141.[7]

---

[3] Executive Order No. 858, Eighth Regular Foreign Investment Negative List (FINL) dated 05 February 2010.

[4] SEC-OGC Opinion No. 30-09 addressed to Atty. Eduardo M. Pangan dated 23 November 2009, citing SEC Opinion dated 25 March 1997 addressed to Atty. Demosthenes B. Donato.

[5] Item #18, List A, Annex "A" of the Executive Order No. 858, Eighth Regular Foreign Investment Negative List dated 05 February 2010.

[6] "Section 7. Save in cases of hereditary succession, no private lands shall be transferred or conveyed except to individuals, corporations, or associations qualified to acquire or hold lands of the public domain."

[7] "Sec. 22. Any citizen of lawful age of the Philippines, and any such citizen not of lawful age who is a head of a family, and any corporation or association of which at least sixty per centum of the capital stock or of any interest in said capital stock belongs wholly to citizens of the Philippines, and which is organized and constituted under the laws of Philippines, and corporate bodies organized in the Philippines authorized under their charters to do so; may purchase any tract of public agricultural land disposable under this Act, not to exceed one hundred and forty-four hectares in the case of an individual and one thousand and twenty-four hectares in that of a corporation or association, by proceeding as prescribed in this chapter: Provided, That partnerships shall be entitled to purchase not to exceed one hundred

Article II of the GPHC's Articles of Incorporation reveals that its primary purpose is:

> "To **acquire** by purchase, exchange, assign, gift or otherwise, and to sell, assign, transfer, exchange, lease, let, develop, mortgage, pledge, deal, or otherwise operate, enjoy and dispose of **all properties** of every kind and description, **real**, personal or otherwise, and wherever situated, including but not limited to the acquisition of shares of stock, bonds, debentures, promissory notes, commercial interests, or other securities and obligations created, negotiated or issued by any corporation or other entity, domestic or foreign; and while the owner or holder thereof, to exercise all the rights, powers and privileges of ownership or interest therein, including the right to receive, collect and dispose of all income derived therefrom; *Provided, That,* the Corporation shall not engage in the business of investment company as defined in Republic Act No. 2629." (Emphasis supplied)

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 issues 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 of similar or dissimilar circumstances.[8] 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,

VESPER JULIUS B. GARCIA
Officer-In-Charge

---

and forty-four hectares for each member thereof. But the total area so purchased shall in no case exceed the one thousand and twenty-four hectares authorized in this section for associations and corporations."

[8] Paragraph 7, SEC Memorandum Circular No. 15, Series of 2003.