



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

Office of the General Counsel

February 21, 2014

SEC OGC Opinion No. 14-01
Doing Business; Foreign Corporation
Investing in a Consortium

QUISUMBING TORRES
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Attention: Atty. Dennis A. Quintero

Gentlemen:

We received your letter, dated January 31, 2013, requesting for our confirmation on your position that a foreign corporation¹ is not required to obtain a license to transact business in the Philippines, if such member of the consortium is not the operator thereof, and such foreign corporation will hold a minority and non-controlling interest in the consortium.

You also stated in your letter that said consortium has an unincorporated joint venture structure. Instead of shares of stock, a member of a petroleum consortium would hold a participating percentage interest, which pertains to the percentage that a member of the consortium will contribute to the joint venture for exploration, drilling and production costs. Such percentage interest is also the share that the consortium member would be participating in profits from petroleum production.

In support of your position, you enumerated the relevant provisions of the Consortium Agreement and cited this Commission's Opinion dated August 6, 1998.

We wish to inform you that, based on the facts stated in your letter-request, we cannot agree with your position. It is our opinion that the subject foreign corporation still needs to

¹ a member of a consortium that enters into a petroleum Service Contract with the Philippine Government under Presidential Decree No. 87, otherwise known as "The Oil Exploration and Development Act of 1972" (PD 87),

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obtain a license to do business in the Philippines under the Foreign Investment Act of 1991² (FIA) notwithstanding the fact that it holds a minority and non-controlling interest in the consortium.

At the outset, it must be stressed that the subject foreign corporation, your client, will invest in a consortium or joint venture, which, as you stated and to which we agree, is a form of partnership in this jurisdiction and should be governed by our laws on partnerships. The question now is whether your client's act of investing in said joint venture constitutes doing business in the Philippines.

Section 3(d) of the FIA describes the phrase "doing business" as, among others, participating in the management, supervision or control of any domestic business, firm, entity or corporation, thus:

"include soliciting orders, service contracts, opening offices, whether called *"liaison"* offices or branches; appointing representatives or distributors domiciled in the Philippines or who in any calendar year stay in the country for a period or periods totaling one hundred eighty [180] days or more; participating in the management, supervision or control of any domestic business, firm, entity or corporation in the Philippines; and any other act or acts that imply a continuity of commercial dealings or arrangements and contemplate to that extent the performance of acts or works, or the exercise of some of the functions normally incident to, and in progressive prosecution of commercial gain or of the purpose and object of the business organization: xxx."³

For a foreign corporation to be exempted from obtaining a license to do business in the Philippines, it must prove that it merely invested as a shareholder in a domestic corporation. Indeed, paragraph 2, Section 1(f), Rule I, of the Rules and Regulations to Implement the FIA (FIA-IRR) enumerated the acts which shall not be deemed as "doing business" in the Philippines, to wit:

- "1. Mere investment as a shareholder by a foreign entity in domestic corporation duly registered to do business, and/or the exercise of rights as such investor;
2. Having a nominee director or officer to represent its interest in **such corporation**; xxx"

It is true that the Commission, in its Opinion⁴ dated August 6, 1998, interpreted the exemption to the term "doing business" to include an investment of a foreign corporation as a "limited partner" in a Philippine Limited Partnership because such investment is similar to that of an investment of a foreign stockholder in a Philippine domestic corporation. However, said Opinion should be strictly construed and should be applied only when the exact attendant circumstances therein are present. In short, not every investment in a partnership is akin to an

² Republic Act No. 7042.

³ Emphasis supplied.

⁴ Addressed to Attys. Rolando V. Medalla & Angel M. Salita, Jr.



investment in a domestic corporation so as to make it an exemption from the definition of “doing business”.

It is settled that exemptions from the general rule are strictly construed against those invoking the exemption⁵. Considering that the exemption from the doing business rule pertains only to investment in a corporation, investment in any other business organization, firm or entity (e.g. partnership) would not automatically constitute an exemption. In this connection, “participating in the management, supervision or control of any domestic business, firm, entity or corporation in the Philippines” is considered doing business. Consequently, following the strict interpretation rule, the only automatically exempt “management, supervision or control” is that of a corporation (i.e. “having a nominee director or office to represent its interests in **such corporation**”) and not of any other entity, such as a partnership.

The differing treatment of investment in a corporation and investment in a partnership is based on a substantial distinction between the said two forms of organization. In a corporate setting, the stockholders, save in specified rare instances when their concurrence is necessary, do not manage the affairs of the corporation, a function which belongs to the Board of Directors/Trustees⁶. In contrast, all the partners in a partnership have an equal right in the management of the business, each of them being considered as agent who could bind the partnership⁷, except when the manner of management has been set in the Articles of Partnership or in the case of a limited partnership. Thus, investment in a partnership does not necessarily mean exemption from doing business since being a partner generally entails management, supervision, or control of the partnership.

Accordingly, the Commission’s Opinion categorically declares that the limited partner should in no case take part in the management and control of the business operation of the partnership, thus:

“This refers to your letter dated July 21, 1998 requesting opinion on whether or not a “foreign corporation”, which will invest as a “**limited partner**” in a **Philippine limited partnership**, is required to obtain a license to transact business in the Philippines.

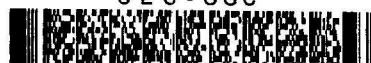
It is your position that such foreign investor will not be doing business in the Philippines as it will not take part in the management of the partnership. You also believe that its investment in the partnership is similar to that of an investment of a foreign stockholder in a Philippine domestic corporation, which under the Foreign Investment Act of 1991 shall not be deemed “doing business” in the Philippines, and hence, does not need to obtain a license to do business in the Philippines.

Please be advised that we are inclined to adopt your opinion on the matter, subject however to the following conditions:

⁵The Commission on Internal Revenue vs. The Court of Appeals, et al., G.R. No. 107135 February 23, 1999

⁶Section 23, Corporation Code.

⁷Article 1803 and 1810(3), New Civil Code.



- “(1)The entry of the foreign corporation in the partnership is merely for investment purposes;
(2) In no case shall it take part in the management and control of the business operation of the partnership; and
(3) The investment is allowed by, and complies with the Foreign Investment Act of 1991.”

In other words, investment in a partnership will only be akin to an investment in a corporation that is exempt from the doing business rule only when the foreign corporation is exclusively a limited partner and takes no part in the management and control of the business operation of the limited partnership. Such opinion is consistent with Article 1848 of the Civil Code which provides:

“ART. 1848. A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, **he takes part in the control of the business.**”⁸

The word “control” in Article 1848 has been explained, thus:

“It would seem that such control contemplates active participation in the management of the partnership business and does not comprehend the mere giving of advice to general partners as to specific matters which the latter may follow or not. Being also interested in the success of the partnership business, a limited partner does not thereby forfeit his right to make suggestions or express opinions as to the advisability of certain transactions. (Silvola vs. Reulett, 272 P.d. 287.)

The limited partner takes part in the management of the business and is liable generally for the firm’s obligations where:

- (1) The business of the partnership is in fact carried on by a board of directors chosen by the limited partners;
(2) By the terms of the contract between the parties, an appointee of the limited partner becomes the directing manager of the firm; xxx.”⁹

This is because the right of a limited partner is restricted only to the following:

“Art. 1851. A limited partner shall have the same rights as a general partner to:

- (1) Have the partnership books kept at the principal place of business of the partnership, and at a reasonable hour to inspect and copy any of them;

⁸ Emphasis supplied.

⁹ Page 309, Comments and Cases on Partnership, Agency and Trust by Hector S. De Leon, Fifth Edition, 1999 Copyright.



- (2) Have on demand true and full information of all things affecting the partnership, and a formal account of partnership affairs whenever circumstances render it just and reasonable; and
- (3) Have dissolution and winding up by decree of court.

A limited partner shall have the right to receive a share of the profits or other compensation by way of income, and to the return of his contribution as provided in Articles 1856 and 1857.”

Having stated the foregoing, we now refer you to the following stipulations in the Consortium Agreement which you cited in your letter-request:

“The Operator

- 1. The members of the consortium would choose one of them to be the operator with the right and duties set out below (Operator).
- 2. The rights and duties of the Operator would be as follows:

- a. The right and obligation to conduct operations (for exploration, drilling and production) by itself, its affiliates, its agents or its contractors under the overall supervision and control of an Operating Committee. xxx
- b. Subject to the overall supervision of the Operating Committee, the responsibilities of the Operator, shall include, but not limited to:
 - (i) The preparation of programs and budgets for expenditures;
 - (ii) The implementation of such programs and budgets as approved by the Operating Committee;

xxx-----xxx-----xxx

- (x) **The conduct of such other activities as the Operating Committee shall decide as appropriate for the proper and efficient carrying out of the operations.**

xxx-----xxx-----xxx

- d. **Unless otherwise directed by the Operating Committee, the Operator shall represent the consortium members regarding any matters or dealings with the DOE and other governmental authorities or third parties insofar as the same relate to Operations, provided that there is reserved to each Party the unfettered right to deal with the DOE or any other governmental authorities in respect of matters solely relating to its own Percentage Interest;**



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f. the Operator shall:

- (i) provide each consortium member with daily drilling reports and monthly activity reports and monthly production reports and such other reports **as the Operating Committee may decide** and, at the sole cost of the party requesting the same, such additional reports as such party may reasonably request; and

g. The operator shall consult with the parties and keep them informed of non-routine matters concerning the operation; xxx

- (i) inform each Party of all logging, coring, testing and such other operations **as the Operating Committee may decide** with such advance notice as is practicable in the circumstances, so that each party may have one or more representatives present on location during the conduct of such operations; and
- (ii) Provide each party with copies of all well logs and core analyses and such engineering, geological, technical and other data and information relating to operations **as the Operating Committee may decide** and, at the sole cost of the party requesting same, such additional data and information as such party may reasonably request.

The Operating Committee

The Operating Committee **shall exercise overall supervision and control of all matters pertaining to the operations.** In the exercise of such supervision and control, **each consortium member shall act solely on its own behalf in the capacity of an individual party and not on behalf of the consortium members, collectively.**

Powers and Duties

The powers and duties of the Operating Committee shall include:

1. **The consideration and determination of all matters relating to general policies, procedures and methods of operation hereunder;**
2. **The consideration, revision and approval or disapproval, of all proposed programs, budgets and expenditures prepared and submitted to it;**
3. The determination of the timing, location and depth of all wells drilled under operations and any change in the use or status of a well;
4. The consideration and, if so required, **the determination of any other matter relating to the operations which may be referred to it by the parties or any of them.**



The proposed development programme and budget that the Operator submitted shall be subject to consideration, revision and approval or rejection by the Operating Committee.

Representations in the Operating Committee

The Operating Committee shall consist of one representative appointed by each of the consortium members provided always that more than one of the consortium members may appoint the same representative who shall represent them separately. The representative of a Party or, in the absence of the representative, his alternate, shall be deemed authorized to represent and bind such Party with respect to any matters which is within the powers of the Operating Committee.

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Voting Procedure

Unless otherwise provided in the consortium agreement, each consortium member shall have a voting interest equal to its Percentage Interest.

Unless otherwise provided in the consortium agreement, all decisions of the Operating Committee shall be made by the affirmative vote of at least two consortium members having in aggregate a Percentage Interest of not less than seventy percent (70%).

All decisions of the Operating Committee relating to the relinquishment of any part or all of a permit shall require the unanimous approval of all the consortium members.

The quorum required for any meeting of the Operating Committee to decide matters shall be at least two Parties having in aggregate a Percentage Interest of not less than seventy per cent (70%).

All the consortium members shall be bound by each decision of the Operating Committee duly made in accordance with the provisions of the consortium agreement."¹⁰

We also noticed from the provisions of the Service Agreement forwarded to this Office that the foreign corporation cannot definitely be considered as a limited partner in the Consortium. A limited partner is not personally liable for partnership obligations beyond his capital contributions.¹¹ On the other hand, a general partner is personally liable for contractual obligations of the partnership.¹² In the instant case, the subject foreign corporation appears to be a general partner of the Consortium as the Service Agreement clearly provides that the first party (Government's Petroleum Board) shall have the right to require performance of any and all of the obligations under the contract from the second parties (consortium members), thus:

¹⁰ Emphasis supplied.

¹¹ Articles 1848, 1853 and 1856, Civil Code of the Philippines.

¹² Article 1816, Civil Code of the Philippines.



“SECTION I
SCOPE

XXX-----XXX-----XXX

- 1.2 Contractor shall be responsible to the Petroleum Board for the execution of such Operations in accordance with the provisions of this Contract, and is hereby appointed and constituted the exclusive party to conduct the Petroleum Operations. The Petroleum Board shall have the right to require performance of any or all obligations under this Contract against any or all of the second parties. xxx”

From the foregoing, it is clear that the subject foreign corporation, being a member of the Operating Committee, takes active part in the management and control of the business operation of the partnership. Indeed, the Consortium Agreement positively stipulates that the Operating Committee shall exercise overall supervision and control of all matters pertaining to the operations, and has the specific power to determine all matters relating to general policies, procedures and methods of operation of the business. Finally, the Service Agreement shows that the Government’s Petroleum Board can require the subject foreign corporation to perform any or all obligations of the partnership under the Contract.

Accordingly, the subject foreign corporation is doing business in the Philippines as provided in Section 3(d) of the FIA and hence, it must secure a license to do business in the Philippines.

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 whether of similar or dissimilar circumstances.¹³ If, upon investigation, it is disclosed that the facts relied upon are different, this opinion shall be rendered void.

Very truly yours,


CAMILLO S. CORREA
General Counsel

¹³ SEC Memorandum Circular No. 15, Series of 2003

