



Republic of the Philippines
Department of Finance
Securities and Exchange Commission

OFFICE OF THE GENERAL COUNSEL

04 April 2017

SEC-OGC Opinion No. 17-03
Re: Foreign Corporation; Doing
business; Online Gaming

SYCIP, SALAZAR, HERNANDEZ & GATMAITAN

SycipLaw Center
105 Paseo de Roxas
Makati City 1226
Metro Manila, Philippines

Attention: Attys. Vida M. Panganiban-Alindogan,
Franco Noel A. Manaig,
Jenifer Jill I. Lim and
Maria Christina C. Ortua

Dear Mesdames and Messieurs:

This pertains to your Letter-request for opinion dated 25 July 2012 to confirm whether or not Sony Computer Entertainment Hong Kong (SCEH) will be required to obtain a license to do business in the Philippines.

By way of a background, you stated that SCEH is a company organized and existing under the laws of Hong Kong and operates Sony Entertainment Network (SEN) in Singapore, Indonesia, Taiwan, Malaysia, Thailand and Hong Kong. SEN is an online platform that offers various content and services such as an online community and an online gaming system, which requires a SEN account in order to participate. Since SEN is an internet-based system, persons in the Philippines can create a SEN account to participate in the online community and to purchase content from and/or use SEN's services even if the SCEH does not have a physical presence in the Philippines. A SEN account holder can buy content and services from SEN only by using funds from an associated SEN online wallet, which can be funded by using a credit or debit card or a prepaid card where available.

Finally, SEN employees are located in Hong Kong while SEN's servers are based in the United States.

SCEH is seeking confirmation that it is *not* engaged in doing business in the Philippines and will not be required to obtain a license for the following activities:

- 1) Offer and sale of SEN services on the internet without restricting **persons located in the Philippines** from availing of these services (Maintenance);
- 2) Assuming that Maintenance, by itself, is not considered doing business in the Philippines, accepting online payments for using SEN in any currency, including Philippine currency;
- 3) Marketing or advertising the SEN in the Philippines through (a) online and printed publications, and (b) television and radio commercials, which is based on the enumerated acts constituting not "doing business" provided in Section 1(f) of the Implementing Rules and Regulations (IRR) of the Foreign Investment Act of 1991 (FIA);¹ and
- 4) Further, as a form of expansion, hiring Independent Contractors for marketing or advertising of its products and the selling of prepaid cards in relation to its online gaming services.

Thereafter, Sony Philippines submitted a Letter dated 17 January 2017 addressed to the President of the Philippines, which was in turn referred to the Commission by the Office of the Executive Secretary. The letter mentioned that PlayStation VR is Sony's latest gaming technology which offers a variety of games that can enhance learning skills. However, Filipinos cannot avail of such service online because PlayStation Network is not yet available in the Philippines, since it lacked confirmation from the Commission whether SCEH can operate in the Philippines without obtaining a license to do business as a foreign corporation.

The basic question to be resolved is whether or not the above-enumerated activities of SCEH would be considered as "doing business" in the Philippines so as to require SCEH to obtain a license to do business from the Commission pursuant to Section 133 of the Corporation Code.²

In determining whether or not a foreign corporation is considered doing business, the facts are considered on a case to case basis.³

The facts, as deduced from your representations, are: (i) the SEN is available to persons in the Philippines; (ii) the SEN allows access to portions of its PlayStation games (and other digital content) to those with a SEN account or who create an existing account/ID; (iii) users in the Philippines may access the content and services offered by SEN provided they have or create a SEN user account; (iv) a SEN account holder can buy content and services from SEN by using funds from the associated SEN online wallet; (v) to put funds in the SEN online wallet, the user has to "top up" or load money into his/her SEN online wallet via credit or debit card or prepaid card

¹ Republic Act No. 7042 (1991).

² Batas Pambansa Blg. 68 (1980).

³ *Cargill, Inc. vs. Inter-Strata Assurance Corporation, Inc.*, G.R. No. 168266, March 15, 2010.

where available; (vi) SCEH does not have a physical office, physical properties (including its servers), nor domiciled employees in the Philippines; (vii) SCEH accepts online payments for using SEN in any currency, including Philippine currency; and (viii) SCEH may opt to market or advertise the SEN in the Philippines and sell pre-paid cards to fund the SEN online wallet.

Under the **twin characterization** test laid out by the Supreme Court in the landmark case of *Mentholatum Co., Inc. vs. Mangiliman*,⁴ a foreign corporation is considered "doing business" in the Philippines when:

- a) The foreign corporation is continuing the body or substance of the business or enterprise for which it was organized or whether it has substantially retired from it and turned it over to another; and
- b) The foreign corporation is engaged in activities which implies a continuity of commercial dealings and arrangements, and contemplates, 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, the purpose and object of its organization.

The traditional case law definition has metamorphosed into a statutory definition, having been adopted with some qualifications in various pieces of legislation in our jurisdiction.⁵ For instance, Republic Act No. 7042, otherwise known as the "Foreign Investment Act of 1991," defines "doing business" as follows:

"d) The phrase 'doing business' shall 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 totalling one hundred eight(y) (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; Provided, however, That the phrase 'doing business' shall not be deemed to include mere investment as a shareholder by a foreign entity in domestic corporations duly registered to do business, and/or the exercise of rights as such investor, nor having a nominee director or officer to represent its interests in such corporation, nor appointing a representative or distributor domiciled in the Philippines which transacts business in its own name and for its own account." (Emphasis supplied)

⁴ 72 Phil 524, 1941.

⁵ *MR Holdings, Ltd. v. Bajar, et al.*, G.R. No. 138104, 11 April 2002.

Likewise, Section 1 of Republic Act No. 5455,⁶ provides that:

"SECTION. 1. Definition and scope of this Act. - (1) x x x the phrase 'doing business' shall include soliciting orders, purchases, service contracts, opening offices, whether called 'liaison' offices or branches; appointing representatives or distributors who are domiciled in the Philippines or who in any calendar year stay in the Philippines for a period or periods totaling one hundred eighty 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."

There are other statutes⁷ defining the term "doing business" in the same tenor as those above-quoted, and as may be observed, one common denominator among them all is the concept of "continuity."⁸

The above-mentioned **twin-characterization test** (i.e. transactions must be for the pursuit of the main business, and with intent to continue the same for sometime) have since become the hallmark of what constitutes doing business in the Philippines."⁹ **"The fact that it derives income from its activities should also be considered."**¹⁰ Moreover, what is determinative of 'doing business' is not really the number or the quantity of the transactions, but more importantly, **the intention of an entity to continue the body of its business in the country.** The number and quantity are merely evidence of such intention."¹¹ Each case must be judged in the

⁶ An Act to Require that the Making of Investments and the Doing of Business Within the Philippines by Foreigners or Business Organizations Owned in Whole or in Part by Foreigners Should Contribute to the Sound and Balanced Development of the National Economy on a Self-Sustaining Basis, and for Other Purposes, Enacted Without executive approval, September 30, 1968 (65 O.G. No. 29, p. 7410).

⁷ Article 65 of Presidential Decree No. 1789 ("A Decree to Revise, Amend, and Codify the Investment, Agricultural and Export Incentives Acts to be Known as the Omnibus Investment Code"), which took effect on January 16, 1981, defines "doing business" to include soliciting orders, purchases, service contracts, opening offices, whether called "liaison" offices or branches; appointing representatives or distributors who are domiciled in the Philippines or who in any calendar year stay in the Philippines 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.**

⁸ *MR Holdings, Ltd. v. Bajar, et al.*

⁹ C. Villanueva, *Philippine Corporate Law (2010 ed.)*, 986.

¹⁰ See: *Cargill, supra*, note 3.

¹¹ *Id.*, 989, citing: *Eriks Pte. Ltd. v. Court of Appeals*, 267 SCRA 567 (1997).

light of its own environmental circumstances,¹² and, as above stated, the facts are considered on a **case to case basis**.¹³

You stated that there is no reason to consider that SCEH will be doing business in the Philippines since the activities of SCEH are carried outside of the Philippines, considering that its employees are in Hong Kong, that its property is outside the Philippines, and that the SEN servers are in the United States.

However, we opine that the activities SCEH proposes to undertake shall be considered as “doing business” in the Philippines since the **twin characterization** test is satisfied in this case. First, the following activities indicate that SCEH will be continuing the body or substance of the business of SCEH for which it was organized in the Philippines, to wit: (i) funding of the SEN online wallet; (ii) offering and selling SEN services; (iii) accepting online payments for using SEN in any currency, including Philippine currency; (iv) marketing or advertising; and (v) hiring Independent Contractors for marketing or advertising of its products and the selling of prepaid cards in relation to its online gaming services.

Second, the above-mentioned enumerated activities are transactions consummated within the Philippines although they are done in a virtual plane. The following salient points of the online commercial transactions, or e-commerce, will find themselves in the Philippines:

- (i) The creation of a new SEN account will take place in the Philippines in order to participate in SEN;
- (ii) The offering for sale and sale of online content and services of SEN will be made to the SEN account holder who is located in the Philippines;
- (iii) The funding of the SEN online wallet will take place in the Philippines as will be further discussed below;
- (iv) The payment of the sale of online content and services of SEN will be made from the Philippines by the SEN account holder; and
- (v) The delivery of the online content and services of SEN will be made in the Philippines.

The salient points above-mentioned are evidenced by the use of an IP address through a device (e.g. PlayStation 4, computer, HDTV or mobile device) used by the

¹² *Eriks Pte. Ltd. v. Court of Appeals*, 267 SCRA 567 (1997)

¹³ See: Cargill, *supra*, note 3.

SEN account holder. IP address is short for Internet Protocol (IP) address.¹⁴ The IP is the method or protocol by which data is sent from one computer to another on the Internet. Each computer (known as a host) on the Internet has at least one IP address that uniquely identifies it from all other computers on the Internet.¹⁵ An IP address consists of four numbers, each of which contains one to three digits, with a single dot (.) separating each number or set of digits (e.g., 78.125.0.209). Moreover, an IP address may reveal such information as the continent, country, region, and city in which a computer is located; the ISP (Internet Service Provider) that services that particular computer; and such technical information as the precise latitude and longitude of the country, as well as the locale, of the computer.¹⁶ The location of an IP address can be traced through the use of an IP geolocation service.¹⁷

Here, once the SEN account holder enters the SEN online store through his device, he may view the content or service which is offered to him for sale that is sent to his device in the Philippines. Thereafter, the SEN account holder may accept the offer of the content or service from the Philippines by clicking "*Confirm Purchase*". Once it is purchased, the acceptance of the offer is transmitted from his IP Address through his device in the Philippines to the virtual plane, and the content or service is delivered through said virtual plane to the account of the SEN account holder who is in the Philippines. The SEN account holder will then download the content or service through his device through his IP address located in the Philippines.¹⁸ Clearly, such transaction(s) will be consummated in the Philippines.

Furthermore, it must be remembered that the offering for sale and the sale of content and services, and the funding of the SEN online wallet, are intricately connected since the sale of the SEN content and services cannot be consummated without the funding of said SEN online wallet. Since the SEN online wallet may be funded by credit cards and debit cards, it, thus, logically and reasonably means that SCEH will likewise have arrangements with the credit card/debit card issuers here in the Philippines.

The permission to use and buy from the SEN online store through the funding of the SEN online wallet also clearly indicates that there is intent to continue the main business for a period of time. Once the SEN account holder puts funds in the SEN online wallet, he can resume transactions on the SEN while his account is still active (subject of course, to the SEN's rules on membership in the network), thereby maintaining a business relationship with the SCEH even if the transactions are intermittent and infrequent and even if the SEN user only purchases credit and uses them up at one time.

¹⁴ http://www.webopedia.com/TERM/I/IP_address.html, last accessed on 2 November 2016.

¹⁵ <http://searchunifiedcommunications.techtarget.com/definition/Internet-Protocol>, last accessed on 2 November 2016.

¹⁶ <http://whatismyipaddress.com/ip-address>, last accessed on 2 November 2016.

¹⁷ http://en.wikipedia.org/wiki/Geolocation#cite_note-2, last accessed on 2 November 2016.

¹⁸ <http://www.sonyentertainmentnetwork.com/home/>, last accessed on 2 November 2016.

Furthermore, as stated in the Letter dated 17 January 2017 of Sony Philippines, there is an intent to make available in the Philippines the online gaming services provided by the PlayStation VR. In fact, pursuant to the second element of the **twin characterization** test, the previously enumerated activities that you stated imply the continuity of commercial dealings and arrangements, and contemplates the performance of acts incident to, and in the progressive prosecution of, the purpose of SCEH. Clearly, it appears that the SEN services will not be provided intermittently but for a long period of time in the Philippines.

In the United States, there is currently no statutory law which addresses this issue and no relevant case law has considered the question of whether owning or operating a website or online platform constitutes “doing business”.¹⁹ Numerous court opinions, however, address a similar issue: whether a corporation’s internet activities in a foreign state constitutes “doing business” sufficient to justify the court of that state in exercising “personal jurisdiction”²⁰ over the corporation. Exploring the issue of “jurisdiction” with regard to websites can be useful when trying to determine a corporation’s need to “qualify [or obtain a license] to do business”²¹ based on its website or online activities. One prerequisite for the court to obtain “personal jurisdiction” is that the corporation has “*minimum contacts*” with the foreign state, such that its ability to be sued there “does not offend the traditional notions of fair play and substance.”²²

Currently, most courts in the United States apply a **Sliding Scale Test** tailored to internet activities to determine the level or types of activities that will constitute “*minimum contacts*” for jurisdictional purposes.²³ This Sliding Scale Test is based on the premise that “the likelihood that ‘personal jurisdiction’ can be constitutionally exercised is directly proportionate to the nature and quantity of commercial activity that an entity conducts over the internet.” At one end of the scale are “passive” websites, which alone generally do not generate sufficient contacts with a foreign state to establish personal jurisdiction since they are only used to post information

¹⁹ <https://www.cscglobal.com/pdfs/50-State-Qualification-Handbook.pdf>, last accessed on 2 November 2016.

²⁰ *Personal Jurisdiction* is a complex legal principle that refers to a court’s authority to resolve a legal dispute and to render an enforceable decision as to the specific parties involved. (<https://www.cscglobal.com/pdfs/50-State-Qualification-Handbook.pdf>, last accessed on 2 November 2016.).

²¹ “Qualification” or registration is compliance with a statute requiring obtainment of a certificate of authority from a state officer to do business within its jurisdiction. (Robert V. Okulski, *Foreign Corporations: What Constitutes Doing Business Under New York’s Qualification Statute?*, 44 Fordham L. Rev. 1042 (1976) (<http://passthrough.fw-notify.net/download/223003/http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2215&context=flr>, last accessed on 7 December 2016).

²² See note 19, citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

²³ *Id.*, citing *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

therein.²⁴ At the other end of the scale are “active” websites, which generate sufficient business over the internet to establish personal jurisdiction.²⁵ “Interactive” websites fall in the center of the scale since they are hybrid sites that contain elements of both passive and active websites, and courts determine whether to exercise personal jurisdiction over the interactive website owner on a case-by-case basis.²⁶

Applying the *Sliding Scale Test*, the SCEH has “minimum contacts” with the Philippines. The SEN online platform cannot be considered as a “passive website” considering that there will be sufficient contacts with the SEN account users in the Philippines and such platform is not used to merely post information. In which case, the SEN online platform should be considered as an “active website” which, as above-stated, generates sufficient contacts and business over the internet since it offers for sale and is engaged in the selling of the SEN content and services to SEN account holders in the Philippines, and, in the process, allows the funding of the SEN online wallet by the SEN account holder who is located in the Philippines. Clearly, there exists in this case sufficient “minimum contacts” between the foreign corporation SCEH and the Philippines.

From the foregoing, we opine that the previously enumerated activities of SCEH would be considered as doing business in the Philippines.

Note that there are adverse consequences to an unregistered foreign corporation which is doing business in the Philippines, as provided in Section 133 of the Corporation Code, to wit:

“Section 133. Doing business without a license. – No foreign corporation transacting business in the Philippines without a license, or its successors or assigns, shall be permitted to maintain or intervene in any action, suit or proceeding in any court or administrative agency of the Philippines; but such corporation may be sued or proceeded against before Philippine courts or administrative tribunals on any valid cause of action recognized under Philippine laws.” (Emphasis ours)

²⁴ A **passive website** does not actively solicit orders for goods or services or support other commercial activities. Many courts have held that the fact that the site exists and can be viewed all over the world does not, by itself, amount to the “minimum contacts” sufficient to subject the website owner to jurisdiction in every state in which viewers can access the website. (See, e.g., *Nutrition Physiology Corp. v. Enviros Ltd.*, 87 F. Supp. 2d 648 [N.D. Tex. 2000]) (holding that websites that do not allow viewers to order products online are passive).

²⁵ An **active website** serves as a gateway for conducting business over the Internet between the website owner and residents of a particular state. Courts will exercise personal jurisdiction over a corporate website owner that knowingly and repeatedly transmits computer files over the internet to residents of a foreign state or repeatedly sells any products or services to residents of a specific state via its website. (See *Zippo Mfg Co.*, 952 F. Supp. 1119, at 1124 [citing *Compuserve, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996)]).

²⁶ An **interactive websites** allow users to exchange information with the website creator, order products, make reservations and conduct other business, often with a credit card.

In the Supreme Court case entitled *Global Business Holdings, Inc. v. Surecomp Software, B.V.*,²⁷ the court stated that a corporation has a legal status only within the state or territory in which it was organized. For this reason, a corporation organized in another country has no personality to file suits in the Philippines. In order to subject a foreign corporation doing business in the country to the jurisdiction of our courts, it must acquire a license from the Commission and appoint an agent for service of process. Without such license, it cannot institute a suit in the Philippines.

The Supreme Court, in another case entitled *Granger Associates v. Microwave Systems, et al.*,²⁸ stated that "the purpose of the rule requiring foreign corporations to secure a license to do business in the Philippines is to enable us to exercise jurisdiction over them for the regulation of their activities in this country. **If a foreign corporation operates in the Philippines without submitting to our laws, it is only just that it not be allowed to invoke them in our courts when it should need them later for its own protection.** While foreign investors are always welcome in this land to collaborate with us for our mutual benefit, they must be prepared as an indispensable condition to respect and be bound by Philippine law in proper cases, as in the one at bar."

As can be seen, if a foreign corporation doing business in the Philippines fails to obtain a license to do business from the Commission, it shall not be permitted to maintain a suit or action in any court or administrative agency. However, such foreign corporation may be sued or proceeded against before the Philippine courts or administrative tribunals on any valid cause of action under Philippine laws.

Lastly, the registration of a corporation in the Philippines is not an elaborate or burdensome process. Should SCEH desire to register its business in the Philippines, the requirements to obtain a license from the Commission essentially involve the submission of documents and payment of fees. The requirements are the following: (i) filling up the Cover Sheet, Name Verification Slip and Application Form²⁹; (ii) submitting an authenticated copy of the Board Resolution authorizing the establishment of the Branch/Representative Office in the Philippines and designating the Resident Agent to whom summons and other legal processes may be served in behalf of the foreign corporation; (iii) submitting an authenticated copy of the Articles of Incorporation / Partnership / Establishment; (iv) submitting Financial Statements;³⁰ (v) submitting Notarized Proof of Inward Remittance – For BSP Registration of Foreign Investment; (vi) Resident Agent's Acceptance of Appointment.

²⁷ G.R. No. 173463, 13 October 2010.

²⁸ G.R. No. 79986, 14 September 1990.

²⁹ F-103 for Stock Branch Office, F-104 for Stock Representative Office, F-108 for Non-Stock Branch and Representative Office

³⁰ Per SEC MC No. 11, series of 2013.

Further, SCEH will be required to show that it is solvent and in sound financial condition,³¹ and will be required to pay the filing fees/charges.³² Lastly, SCEH must thereafter submit its annual reports to the Commission such as the General Information Sheet and Annual Financial Statement.

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.³³ There was no discussion on whether or not the contemplated business activity is covered by any foreign ownership limitation as this was not posed as a query, nor were there sufficient facts presented in order to draw a conclusion. 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,


CAMILO S. CORREA
General Counsel

/crm/csc/bjgv/elba

³¹ Section 125 of the Corporation Code.

³² Pursuant to SEC MC No. 5, 2004

³³ Paragraph 7, SEC Memorandum Circular No. 15, Series of 2003.