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

In the matter of:
YORK FIDELITY LTD.,
GREGORY KENNEDY and
CHRISTINE PAMELA KENNEDY

SEAWALL REALTY SERVICES, INC. (formerly SEAWALL SERVICES, INC.), Represented by its Authorized Representative, MR. ROBERT PATRICK STARADUB,
Complainant-Appellant,

- Versus -

SEC En Banc Case No. 09-10-214

ATTY. HUBERT DOMINIC B. GUEVARA, In his capacity as Director of the ENFORCEMENT AND PROSECUTION DEPARTMENT,
Public-Appellee.

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DECISION

Before the Commission *En Banc* is an *Appeal*[1] filed on 09 September 2010 by SEAWALL REALTY SERVICES, INC. (**Seawall**) seeking to reverse and set aside the ENFORCEMENT AND PROSECUTION DEPARTMENT's, presently the ENFORCEMENT AND INVESTOR PROTECTION DEPARTMENT(**EIPD**), *Letter-Decision* dated 18 May 2010 (**Assailed Order**) which dismissed the former's complaint against YORK FIDELITY LTD. (**York Fidelity**).

Seawall is a domestic corporation registered with the Commission on 24 February 2006 under SEC Registration No. CS200303896[2]. Its primary purpose is "*to buy, sell, deal in lease, hold, improve, subdivide, and otherwise dispose of lands, houses and buildings or any interest therein, and to construct on land owned by the corporation, houses, buildings, roads, bridges, alleys and all kinds of improvements.*[3]"

York Fidelity is a foreign corporation duly organized and existing under the laws of Bermuda with business address at 63 Market Street #20-04 Singapore 04

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[1] Dated 09 April 2010.
[2] Annex "B" of the Memorandum of Appeal.
[3] Paragraph 1.02 of the Memorandum of Appeal.

8942[4]. York Fidelity owns 999,997 shares of 2,500,000 outstanding capital stock of York Fidelity (Philippines) Corporation (**York Phil**)[5].

Facts of the Case

On 30 January 2008, Seawall and York Fidelity entered into a "*Share Sale and Purchase Agreement*" for the sale of Seawall's shares (115,830) shares; representing approximately Fifty-Eight percent (58%) in Lexus Landholdings Group, Inc. (**Lexus Inc.**)[6], in the amount of Four Hundred Forty Five Thousand Dollars ($445,000.00). Lexus Inc. is the developer of "The Lexus Hotel" (**Lexus Hotel**) project located in Angeles City, Pampanga. However, as claimed by Seawall, York Fidelity was not able to pay the remaining balance of One Hundred Forty Five Thousand Dollars ($145,000.00). On 12 March 2009, Seawall filed a complaint for *Sum of Money and Damages with application of a Writ of Preliminary Attachment* against York Fidelity[7].

On 23 July 2009, Seawall[8] filed a complaint with EIPD against York Fidelity for "*doing business*" in the Philippines without a license from the Commission. Seawall claims that York Fidelity is the "seed capital investor" in Lexus Hotel. Seawall also alleges that York Fidelity has Forty percent (40%) shareholdings in York Phil and has two (2) nominee-directors to represent its interest in the said corporation. Thus, Seawall claims that York Fidelity is "*doing business*" in the Philippines, hence, it should be investigated and penalized for violation of the Corporation Code, Foreign Investment Act and the Implementing Rules and Regulations issued by the National Economic Development Authority (NEDA)[9].

Thereafter, EIPD conducted an investigation based on Seawall's complaint. It created an investigating team and conducted conferences with Seawall. It required Seawall to submit additional evidence to support its complaint. Subsequently, EIPD in its Assailed Order ruled that:

> "**The Commission, in deciding cases involving its jurisdiction, maintained consistently that it can only act on complaints against entities issued registration, licenses or permits by the Commission**. For this reason, **the Commission is bereft of any authority over York Fidelity** and hence, **cannot summon and much less, penalize the same.**
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> Lastly, the pendency of an action for Collection of Sum of Money, filed by Seawall against York Fidelity, is an indication that this administrative complaint was brought about by an intra-corporate dispute and that the resolution of such dispute lies with the regular courts.

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[4] Paragraph 3 of the Memorandum of Appeal.

[5] Annex "E" and "E-1" of the Memorandum of Appeal.

[6] A domestic corporation with SEC Registration No. CS200616087; Lexus' primary purpose is "*to buy, sell, deal in, lease, hold, improve, subdivide, and otherwise dispose of lands, houses and buildings or any interest therein, and to construct on land owned by the corporation, houses, buildings, roads, bridges, alleys and all kinds of improvements x x x*"

[7] Annex "K-1" and "K-2" of the Memorandum of Appeal.

[8] Represented by its President, Sarah Jane Natividad, Annex "D" of the Memorandum of Appeal.

[9] Seawall's Complaint, Annex "D" of the Memorandum of Appeal.

> In view of the foregoing, we are constrained to **dismiss the case for lack of jurisdiction**. Should any of the parties require an opinion on the matter of doing business or on any corporate issue, the Office of the General Counsel of the SEC is tasked with the duty to render such opinion."

Hence, this *Appeal*.

In Seawall's *Appeal*, it argued, among others, and assigned the following errors:

1. That EIPD erred in holding that York Fidelity is not deemed doing business in the Philippines without the requisite license from the Commission because the subject corporation embarked on a deliberate and conscious effort to engage in "commercial dealings and arrangements" on a continuing or progressive basis, through its seed capital investment in Lexus Hotel located in Angeles City, Pampanga[10];
2. That EIPD erred in claiming that the Angeles City Regional Trial Court, Branch 60 (**Angeles RTC**) in its *Orders* dated 27 October 2009 and 25 February 2009, merely resolved the procedural issue on the propriety of service of summons upon the Chair of the Commission, in the absence of a resident agent in the Philippines because the mere fact Angeles RTC caused the service of summons, it is considered that the subject corporation is transacting business in the Philippines[11] ;
3. That EIPD erred in dismissing Seawall's complaint for lack of jurisdiction when York Fidelity has been found by Angeles City RTC to be doing business in the Philippines without the requisite license because the Commission has implied or necessary or incidental powers to regulate, investigate or supervise the activities of persons to ensure compliance with the corporate laws of the Philippines[12].

Seawall prays to reverse and set aside EIPD's *Letter-Decision* and to reinstate the former's complaint in order to proceed with the investigation against York Fidelity.

On 02 November 2010, EIPD filed its *Reply Memorandum*, arguing among others, the following:

1. EIPD pointed out in its Assailed Order that the corporate acts of York Fidelity do not constitute "*doing business*" since its only recorded activities are investment in York Phil and having two (2) nominee directors to represent its interest in the same corporation.

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[10] Pages 9-11 of the *Memorandum of Appeal*.
[11] Pages 11-12 of the *Memorandum of Appeal*.
[12] Pages 12-16 of the *Memorandum of Appeal*.

There is no evidence that would support an investigation on the matter of doing business and acquisition of license to do business[13];

2. There is no provision of law or jurisprudence to show the difference between a seed capital investment and a mere investment as provided under the Foreign Investment Act. Thus, the seed capital aspect was treated as any investment, which taken alone, would not constitute "*doing business*"[14];
3. EIPD simply complied with its mandate as provided under Section 3-7 of the 2006 SEC Rules of Procedure (**2006 Rules**) which states that the Director of the Operating Department has the duty to dismiss the complaint if he finds it to be insufficient in form and substance;
4. Also, the Angeles RTC issued *Orders* dated 27 October 2009 and 25 February 2010 that merely resolved the procedural aspect concerning the service of summons to a foreign corporation who has no resident agent. It did not resolve if York Fidelity is doing business in the Philippines[15];
5. There is a pending case of *Collection of Sum of Money* filed by Seawall against York Fidelity. Hence, EIPD could not take cognizance of the instant case because the controversy involved is an intra-corporate issue which the regular courts has jurisdiction[16].
6. EIPD prays for the denial of the instant *Appeal* for lack of merit.

Issue/s

The issues raised are the following: 1.) Whether or not the acts of York Fidelity in subscribing to Fifty Eight percent (58%) of Lexus Landholding, Inc.; and owning Forty percent (40%) of York Phil and having two (2) nominal directors to represent its interest constitute "*doing business*"; 2.) Whether or not the Commission has jurisdiction over foreign corporations doing business in the Philippines, though not registered.

Ruling

The instant *Appeal* is bereft of merit.

FOREIGN CORPORATION CONSIDERED "*DOING BUSINESS*"

Section 3(d) of Republic Act No. 7042 or the "Foreign Investments Act of 1991 (FIA)" provides the definition of what constitutes "*doing business*" in the Philippines, to wit:

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[13] Paragraphs 7-10 of the *Reply Memorandum*.
[14] Paragraph 11-12 of the *Reply Memorandum*.
[15] Paragraphs 14-25 of the *Reply Memorandum*.
[16] Paragraph 26 of the *Reply Memorandum*.

> "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 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: 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;"

Section 1 (f), Rule I of the Implementing Rules and Regulations (IRR) of FIA provides further that:

> RULE I
> DEFINITIONS
> SECTION 1. Definition of Terms. - For the purpose of these Rules and Regulations: x x x
>
> f. "*Doing Business*" – x x x
> The following acts **shall NOT be deemed "*doing business*"** in the Philippines:
> 1. **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;**
> 2. **Having a nominee director or officer to represent its interest in such corporation**; x x x

No general rule or governing principles can be laid down as to what constitute "*doing*" or "*engaging in*" or "*transacting*" business. Each case must be judged in the light of its own peculiar circumstances[17]. Not every activity or transaction undertaken in the Philippines by a foreign corporation amounts to doing or transacting business (*i.e., presence*) as to require the foreign corporation to obtain such license[18].

Seawall argues that York Fidelity is deemed to be "*doing business*" in the Philippines without a license for two reasons: 1.) York Fidelity has shareholdings with York Phil and is a "seed investor" in Lexus Hotel. 2.) York Fidelity is considered to be engaged in acts that imply continuity of commercial dealings or arrangements and

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[17] Top-Weld Manufacturing, Inc. vs. ECED, et. al., G.R. No. L-44944, 09 August 1985.
[18] Philippine Corporate Law, Cesar Villanueva, 2013, page 954.

progressively prosecuting for commercial gain when it made the two (2) investments and its two (2) officers are listed as subscriber-investor in York Phil.

We are not convinced. The definition of "*doing business*" is subject to several exceptions, one of which is that a **mere investment** by a foreign entity/corporation in a domestic corporation is **NOT** deemed to be "*doing business*", nor having a nominee director or officer to represent York Fidelity in York Phil.

Moreover, we agree with the EIPD that based on the evidence presented, York Fidelity is merely a shareholder/investor in York Phil and in Lexus. Seawall did not present concrete evidence showing that York Fidelity is engaged in acts or acts that imply continuity of commercial dealings or arrangements and "in progressive prosecution of commercial gain". In *LMR Holdings Ltd. vs. Bajar*, the Supreme Court ruled that:

> Indeed, the Court of Appeals' holding that petitioner was determined to be "doing business" in the Philippines is based mainly on conjectures and speculation. In concluding that the "unmistakable intention" of petitioner is to continue Marcopper's business, the Court of Appeals hangs on the wobbly premise that "there is no other way for petitioner to recover its huge financial investments which it poured into Marcopper's rehabilitation without it (petitioner) continuing Marcopper's business in the country." This is a mere presumption. Absent overt acts of petitioner from which we may directly infer its intention to continue Marcopper's business, we cannot give our concurrence. **Significantly, a view subscribed upon by many authorities is that the mere ownership by a foreign corporation of a property in a certain state, unaccompanied by its active use in furtherance of the business for which it was formed, is insufficient in itself to constitute doing business**. In Chittim vs. Belle Fourche Bentonite Products Co., it was held that even if a foreign corporation purchased and took conveyances of a mining claim, did some assessment work thereon, and endeavored to sell it, its acts will not constitute the doing of business so as to subject the corporation to the statutory requirements for the transacting of business. On the same vein, petitioner, a foreign corporation, which becomes the assignee of mining properties, facilities and equipment cannot be automatically considered as doing business, nor presumed to have the intention of engaging in mining business.

As clearly explained, it is erroneous to presume that mere ownership of a foreign corporation of shares in a domestic corporation constitutes "*doing business*" in the Philippines. There should be overt acts supported by concrete evidence showing that the said foreign corporation intends to engage or transact business in the Philippines. In the instant case, Seawall failed to do so and merely presented an unverified website print-out of York Fidelity. The said website print-out is inadequate to substantially prove the direct involvement of York Fidelity in Lexus' affairs and management that would be considered as "*doing business*". Seawall failed to meet the requirement for substantial evidence to support its claim against York Fidelity.

Additionally, the Angeles RTC did not categorically conclude that York Fidelity is deemed "*doing business*". It simply ruled on the propriety of the service of summons over the said corporation.

Hence, York Fidelity cannot be considered to be "*doing business*" in the Philippines and made liable for violations of the Corporation Code. It was proper for EIPD to dismiss the complaint because it has no cause of action.

COMMISSION'S JURISDICTION OVER UNLICENSED FOREIGN CORPORATIONS NOT "*DOING BUSINESS*" IN THE PHILIPPINES

However, as to the issue on jurisdiction, Section 133 of the Corporation Code (Code) provides that:

> "Sec. 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."

In *B. Van Zuiden Bros., LTD. vs. GTVL Manufacturing Industries, Inc.*[19], the Supreme Court interpreted the above-stated provision as:

> The law is clear. An unlicensed foreign corporation doing business in the Philippines cannot sue before Philippine courts. On the other hand, **an unlicensed foreign corporation not doing business in the Philippines can sue before Philippine courts**.

Thus, in the instant case, EIPD erred in dismissing the complaint on the ground that the Commission has no jurisdiction over unregistered foreign corporations. As enunciated by the Supreme Court, an unlicensed foreign corporation not doing business in the Philippines can sue and perforce be sued before the Philippine courts or administrative agencies.

However, though the Commission has jurisdiction over unlicensed foreign corporations considered not doing business in the Philippines as clearly provided under Section 133 of the Code, the present complaint should still be dismissed since there is no cause of action, in light of our ruling that mere investment of a foreign corporation in a domestic corporation shall not be deemed as "*doing business*" in the Philippines.

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[19] G.R. No. 147905, May 28, 2007.

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

SO ORDERED.

Mandaluyong City, Philippines; 24 September 2015.

TERESITA J. HERBOSA*
Chairperson

ANTONIETA F. IBE *
Commissioner

MANUEL HUBERTO B. GAITE
Commissioner

EPHYRO LUIS B. AMATONG
Commissioner

BLAS JAMES G. VITERBO
Commissioner

*on official business
* On Official Leave