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

January 21, 2009

Atty. M. Jasmine S. Oporto
Mr. Joseph Trillana T. Gonzales
Ms. Amy Rose A. Soler- Rellin
c/o Aboitiz and Company, Inc.
110 Legazpi St. Legazpi Village
Makati City

SEC Opinion No. 09-03
Anti-Dummy Law:
Foreign Manager/Director

Mesdames/Sir:

This refers to your letter dated July 25, 2008 requesting an opinion on the queries posed therein, viz:

a. Are the restrictions in Section 2-A of the Anti-Durmmy Law inapplicable to Scanasia?

b. Can a foreign national who holds in his name one nominee share in a domestic corporation that is not engaged in nationalized activity be elected as one of its directors and as its President?

c. Can a foreign national be appointed as the Sales and Marketing Director of a domestic corporation that is not engaged in any nationalized activity?

d. Can the above-mentioned opinions dated May 8, 1986, March 25, 1987, July 12, 1996, and September 28, 2001 be applied by analogy to Scanasia?

Records disclose that there are three corporations involved in the case under consideration.

Scanasia Overseas, Inc ("Scanasia" for brevity) is a domestic corporation duly incorporated under Philippine laws with SEC Registration No. 127028. Its principal office is located in Makati City. Its primary purpose reads:

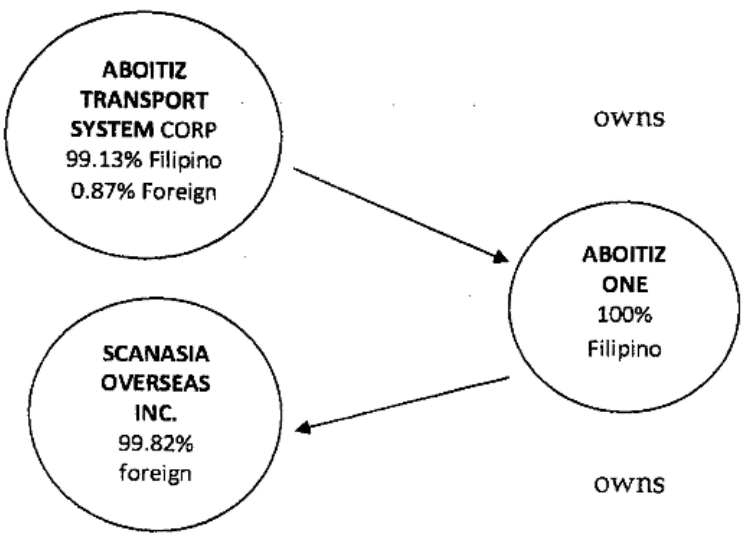
"To engage in, operate , conduct and maintain the business of manufacturing, importing, bartering and otherwise dealing in all kinds of goods, commodities, merchandise and wares which are the lawful objects of commerce, including foods, drugs, and cosmetics, except nationalized products, to carry on the business of exporters and importers, as principal, agent, or commission merchants in respect to buying, selling at wholesale, trading or dealing in any kind of goods, wares, merchandise, except nationalized products, including the importation of fish and fishery/aquatic products for canning, processing and/or distribution, to institutional entities and all channel of trade, and generally to do brokerage commission, indenting, import, forwarding, and export business. xxx"

The corporation is also authorized to purchase, acquire, own, hold, lease real property in the Philippines. [1]

It is alleged in subject letter that on June 18, 2008, Mr. Carsten Pedersen, a Danish national and Chairman of Scanasia, sold to Aboitiz One all of Scanasia's issued and outstanding capital. Scanasia (formerly 99.82% foreign and 0.18% Filipino) is now a **wholly owned** subsidiary of Aboitiz One by virtue of said sale.

On the other hand, Aboitiz One (a wholly owned subsidiary of Aboitiz Transport System Corporation) is also a domestic corporation with SEC Registration No. 81206.

Aboitiz Transport System Corporation (ÄSTC") is a publicly listed domestic corporation with SEC Registration No. 4409. Ninety-nine (99.13%) of its issued and outstanding capital stock is owned by Philippine nationals.



[1] 4. To purchase, own, lease, occupy, use or hold such real and personal properties as may be convenient and proper to further the purpose of the corporation. (Scanasia Overseas, Inc., Amended Articles of Incorporation, April 2, 2008)

You disclose that the board of directors of Scanasia intends to elect at least one foreign national to its Board of Directors. After the election, the foreigner shall be appointed as its President. In addition, Aboitiz One proposes to appoint a foreign national as its Sales and Marketing Director compliant with the visa, immigration, and employment requirements of the Philippines.

The issues raised for resolution shall now be answered *in seriatim*.

On the *first issue*, the pertinent provision of the Anti-Dummy Law (C.A. 108) reads:

> *"Section 2-A. Any person, corporation, or association, having in its name or under its control, a right, franchise, privilege, property or business, the exercise or enjoyment of which is expressly reserved by the Constitution or the laws to citizens of the Philippines or of any other specific country, or to corporations or association at least sixty per centum of the capital of which is owned by such citizens, permits or allows the use, exploitation or enjoyment thereof by a person, corporation or association not possessing the requisites prescribed by the Constitution or the laws of the Philippines; xxx or in any manner permits or allows any person, not possessing the qualifications required by the Constitution or existing laws to acquire, use, exploit or enjoy a right, franchise, privilege, property or business, the exercise and enjoyment of which are expressly reserved by the Constitution or existing laws to citizens of the Philippines or of any other specific country, to intervene in the management, operation, administration or control thereof, whether as an officer, employee or laborer therein with or without remuneration except technical personnel whose employment may be specifically authorized by the Secretary of Justice, xxx and provided finally, That the election of aliens as members of the board of directors or governing body of the corporations or associations engaging in partially nationalized activities shall be allowed in proportion to their allowable participation or share in the capital of such entities.*

The above-cited provision is **inapplicable** to Scanasia considering that 1) it is engaged in the importation, distribution and wholesale of food products which is neither a nationalized or partly nationalized industry; and 2) it does not own real estate in the Philippines. It has been said, "the requirement under Section 2-A of Commonwealth Act No. 108, as amended by PD 715, otherwise known as the Anti-Dummy Law, specifically refers only to partially nationalized activities."[2]

On the *second issue*, well-settled is the rule that a director of a corporation duly incorporated in the Philippines must own at least one (1) share of the issued and

[2] SEC Opinion dtd. July 12, 1996, Quasha Ancheta Pena & Nolasco.

outstanding capital stock of the corporation. Sec. 23, Title III of the Corporation Code of the Philippines states thus:

> *xxx* *xxx* *xxx*
> *Every director must own at least one (1) share of the capital stock of the corporation of which he is a director, which share shall stand in his name on the books of the corporation. Any director who ceases to be the owner of at least one (1) share of the capital stock of the corporation of which he is a director shall thereby cease to be a director. x x x.*

Moreover, the President must always be a member of the board. Sec. 25 of the Corporation Code mandates that "[i]mmediately after their election, the directors of the corporation must formally organize by the election of a president, **who shall be a director**." x x x. In sum, the President must be a director. To qualify as a director of a domestic corporation, he should be a stockholder or should own at least one share of the capital of the corporation.

Regarding the *third issue*, there is no prohibition for a foreign national to assume managerial position in a corporation which does not engage in a partly nationalized or nationalized industry. Since Scanasia engages in business which falls under the category of aforestated industries, an alien may assume, subject to the existing laws, rules and regulations, the position of Marketing Director or a management position in a corporation or any corporation that is not engaged in nationalized or partly nationalized activity.

Relative to the *fourth issue*, the cited SEC Opinions[3] are applicable In so far as may be pertinent to similar factual scenario present in the instant queries.

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[3] The Commission, on several occasions, has ruled that in firms engaged in wholly or partially nationalized activities, aliens are banned from being appointed to management positions as president, vice-president, treasurer, auditor, etc., of the same companies pursuant to the ruling of the Ministry of Justice, although they can be elected directors in proportion to their allowable participation or share in the capital of such activities in accordance with the Anti-Dummy Law, as amended by Presidential Decree No. 715.(SEC Opinion dated June 14, 1982; July 1, 1983; May 15, 1985; May 28, 1985). Accordingly, a foreigner cannot be elected as president of a domestic corporation engaged in nationalized or partially nationalized activities.

Conversely, 'where the existing law does not forbid any non-Philippine ownership in the enterprise or does not limit ownership of non-Philippine nationals to a certain proportion, such foreigner may be elected as president thereof, subject to the qualification provided for in Section 25 of the Corporation Code xxx. **(SEC Opinion dtd. May 8, 1986; Atty. Romeo J. Balili.)**

Thus, considering that the business of the company is neither nationalized nor partly nationalized activity your client can be elected as President. However, being a non- resident, he cannot be elected as Treasurer xxx.

Thus, while the Corporation Code does not impose a Philippine residency requirement of a treasurer, nevertheless, considering the nature of his functions as hereinabove set forth, good corporate practice dictates that the treasurer must be a resident of the Philippines. **(SEC Opinion dtd. March 25, 1987, Atty. Leonides S. Respicio)**

It shall be understood, however, that 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 standing rule binding upon the Commission in other cases whether of similar or dissimilar circumstances.

Very truly yours,

VERNETTE G. UMALI-PACO
General Counsel

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xxx. One of the prospective majority shareholders is a Filipino Corporation which intends to nominate a foreigner as director holding a nominal share to represent it in the Board. The proposed corporation will have a paid-in equity of US$500,000.00. You were informed that the present policy of the Commission is to apply the requirement, regardless of whether or not the corporation is engaged in partially nationalized activity. However, it is your view that the required proportionate foreign representation in the Board of Directors does not apply in the present case inasmuch as the requirement under Section 2-A of Commonwealth Act No. 108, as amended by PD 715, otherwise known as the Anti-Dummy Law, specifically refers only to 'partially nationalized activities.'

In this connection, please be advised that the Commission, in its meeting of July 11, 1996, resolved to reverse its previous policy, now limits the required proportionate representation in the Board of Directors to only partially nationalized corporations taking into consideration that Section 2-A of Commonwealth Act No. 108, as amended by PD 715, otherwise known as the Anti-Dummy Law, explicitly refers only to partially nationalized activities. Consequently, your view regarding this matter is upheld. **(SEC Opinion dtd. July 12, 1996, Quasha Ancheta Pena & Nolasco)**

Pursuant to the Anti-Dummy Law, in firms engaged in wholly or partly nationalized activities, aliens are banned from being appointed to management positions as president, vice-president, treasurer, auditor, etc. of said companies although they can be elected directors in proportion to their allowable participation or share in the capital of such activities. (SEC Opinion dtd. July 27, 1990, Phil. Association of Service Exporters, Inc.)

Hence, anent your first query, the answer is in the affirmative considering that the business purpose of subject corporation is not nationalized or partly-nationalized activity. It can be deduced from the law that the restrictions therein apply only to nationalized or partly nationalized business activities.

Accordingly, your second query and its subquestions are also answered in the affirmative provided that majority of the directors are resident of the Philippines as required by the Corporation Code. The business activity of Shangrila Plaza Corporation is neither a nationalized or partly nationalized activity and its paid-in equity capital is more than the equivalent of US$200,000. Thus, the limitation uner the anti-dummy law will not apply. Accordingly, the corporation may elect as many aliens as members of its board of directors. **(SEC Opinion dtd. September 28, 2001, Atty. Federico Noel, Myla Rae M. Santos).**