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

OFFICE OF THE GENERAL COUNSEL

29 May 2009

SEC-OGC Opinion No. 09-12
For: Concept of "doing business"

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Attention: Atty. Gwen Grecia-De Vera &
Atty. Anna Bianca L. Torres

Gentlemen:

This refers to your request for clarification on whether IPC Network Services Asia Limited's ("IPC") intended expansion of operations by allowing entities located in the Philippines to avail of its services would constitute doing business in the Philippines.

As stated in your letter dated 13 June 2008, the pertinent facts are as follows:

1. Your client, IPC, is a foreign company engaged in providing dedicated private voice network to financial institutions for the purpose of facilitating the trade of financial instruments;

2. With its present operations, IPC renders services to customers located outside the Philippines. IPC, however, is considering making its services available to entities located in the Philippines;

3. IPC proposes to do this by performing the activity outside the Philippines. Said activity consists of design and management of the private voice network, installation and maintenance of equipment, standard circuit maintenance, and customer service desk support;

4. To enable connectivity from local companies to entities outside of the Philippines within the private voice network, IPC may resort to engaging local telecommunications entities for the provision of local loop and co-location services, and/or value added service providers, such as ISPs for internet connection;

5. Payment for the service may be remitted by the local client to IPC abroad.

Based on the above narration, you now seek clarification on whether the contemplated transaction would be considered as doing or transacting business, which would necessitate applying for a license to do business from this Commission.

A license is necessary if a foreign corporation is "transacting" or "doing business" in the country. The Corporation Code provides:

> "Sec.133. Doing business without a license.- No foreign corporation transacting in the Philippines without a license, or its successor 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 under Philippine law."

Relevant also to your query is the provision of Section 3(d) of Republic Act No. 7042, as amended, and its Implementing Rules and Regulations, enumerating activities that would constitute "doing business," to wit:

> "xxx 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 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 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, 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; xxx"

The foregoing is in no way an exclusive enumeration of what would constitute "doing business." It must also be borne in mind that there is no general rule or governing principle as to what constitutes "doing" or "transacting" business.[1]

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1 AGPALO, RUBEN. COMMENTS ON THE CORPORATION CODE OF THE PHILIPPINES, 462 (2001).

To be considered as "transacting" or "doing" business, there must be continuity of conduct and intention to establish a continuous business.[2] Even the Corporation Code is silent as to what constitutes doing or transacting business in the Philippines.

In the case of *Mentholatum vs. Mangaliman*[3], the Supreme Court laid down the test to determine whether a foreign corporation can be considered as "doing business" in the Philippines. The first is the substance test, thus:

> "The true test [for doing business], however, seems to be whether the foreign corporation is continuing the body of the business or enterprise for which it was organized or whether it has substantially retired from it and turned it over to another.
>
> The second test is the 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 the progressive prosecution of, the purpose and object of its organization."

Further, an essential condition to be considered as "doing business" in the Philippines is the actual performance of specific commercial acts within the territory of the Philippines for the plain reason that the Philippines has no jurisdiction over commercial acts performed in foreign territories.[4] Here, there were indications that IPC will enter into a series of transactions implying a continuity of commercial dealings; the perfection and consummation of these transactions were done within the Philippines.

IPC would make its services available to entities located in the Philippines. In the case of time division multiplexing (TDM), a local entity (telco) will render services to IPC by installing and maintaining co-location services for equipment and international and domestic lease lines to local customers. In turn, the customers will remit their payment to IPC abroad. As for private dedicated voice network via Voice over Internet Protocol ("VOIP") technology, there would be equipment, such as routers and firewall, that would be installed at customer premises by the customer, either under IPC's supervision remotely or IPC's engineers/contractors on site. In effect, IPC would make its services available here in the Philippines. It would render service within the premises of its clients through its own engineers or remote supervision. The contracts between IPC and its local customers are continuous commercial dealings in the country. These commercial transactions are in pursuit of the purpose and object of IPC, that is, engaging in providing a dedicated private voice network to financial institutions for the purpose of facilitating the trade of financial instruments.

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2 Ibid, citing Commissioner of Internal Revenue v. British Overseas Airways Corp., 149 SCRA 395 (1987); Commissioner of Internal Revenue v. Japan Air Lines, Inc., 202 SCRA 450 (1991).

3 G.R. No. 47701, 27 June 1941 (72 Phil 524) as cited in Agilent Technologies Singapore Pte Ltd. vs. Integrated Silicon Technology Philippines Corporation, et al. G.R. No. 154618, 14 April 2004.

4 B. Van Zuiden Bros. Ltd. vs. GTVL Manufacturing Industries, Inc., G.R. No. 147905, 28 May 2007.

In support of your request for clarification, you cite Ruling No. 009-05 dated 02 August 2005 of the Bureau of Internal Revenue ("BIR"). However, the same is useful in determining tax status of the corporation but not necessarily binding in determining whether a foreign corporation needs to secure a license from this Commission. There, the BIR held that a foreign company engaged in the business of performing PH domain names outside of the Philippines for PH domain name holders located within, as well as, outside the Philippines, through PH domain name servers/web servers, also located outside the Philippines, is considered non-resident foreign corporation. The BIR likewise ruled that the corporation engaged in the business of collecting PH domain name service fees in the Philippines as agent, for and in behalf of DPI resellers located outside of the Philippines, who in turn collect PH domain name service fees from PH domain name holders located outside of, as well as within the Philippines, for domain name services performed outside of the Philippines by the foreign corporation is not subject to Philippine taxation on fees collected by such agent.

The BIR ruling finds no application insofar as securing a license to do business is concerned since what is considered in the latter case is the continuity of commercial dealing in the country and the foreign corporation's intent to prosecute its business in the Philippines. With that, a foreign corporation is required to first secure a license from this Commission.

Based on the foregoing authorities and disclosed facts, this Office opines that the contemplated expansion of operations of IPC involving Philippine companies constitutes "doing business" in the Philippines.

It shall be understood 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 whether of similar or dissimilar circumstances.[5] If, upon investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered null and void.

Very truly yours,

VERNETTE G. UMALI-PACO
General Counsel

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5 S.E.C Memorandum Circular No. 15 dated 16 December 2003.