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

29 December 2010

SEC-OGC Opinion No. 10-35
Customs Brokerage service

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Madam:

This refers to your letter dated 1 June 2010 requesting an opinion on whether or not:

1. Kintetsu World Express ("KWE") can perform customs brokerage services as part of KWE's international freight forwarding services; that it can employ licensed customs brokers for this purpose; and that such customs brokerage services may be included in the invoice to KWE's clients for international freight forwarding services; and

2. KWE can engage in customs brokerage as a separate business activity.

KWE[1] was organized to "engage in and carry on the international freight forwarding and forwarding agents business as well as the business of pick up and consolidation, break-bulk and distribution of all goods, wares, merchandise and commodities transported by or conveyed on land, sea or air transport, international as well as domestic, including the storage, warehousing, brokerage, transportation and all allied facilities necessary, convenient or incidental to said business such as but not limited to the operation, maintenance, administration, management and supervision of packing, crating, storage and freight terminals, the ownership, lease operations and maintenance of transportation vehicles and/or services and facilities as may be necessary in the operation of said business, and relative thereto, to own, lease and operate warehouses for the storage of goods and cargoes; to engage in

[1] SEC Registration No. A-1998-05178.

the bonded warehouse business; to operate air terminals which shall serve as transfer points for cargoes and passengers between land and air transportation; to operate marine terminals which shall serve as transfer points for cargoes and passengers between land and water transportation; and to own and operate land terminals, container yard, container freight stations (CYOCFS), which shall serve as transfer points for cargoes and passengers between any and all forms and types of land transportation."[2]

Based on the latest[3] Articles of Incorporation of KWE, customs brokerage is not contemplated by the corporation's primary and secondary purposes.

The statement of the primary purpose is to protect shareholders so they will know the main path of business of the corporation and so that they may file derivative suits if the corporation deviates from its primary purpose.[4] It is well settled that a corporation has only such power as are expressly granted in its charter or in the statutes under which it is created or such powers as are necessary for the purpose of carrying out its express powers.[5] This is in consonance with Section 36 of the Corporation Code which provides:

> "SEC. 36. *Corporate powers and capacity.* Every corporation incorporated under this Code has the power and capacity:
>
> xxx xxx xxx
>
> 11. To exercise such other powers as may be essential or necessary to carry out its purpose or purposes as stated in its Articles of Incorporation."[6]

Furthermore, "express powers cannot be enlarged by implication; thus, it was held that the general language of a charter following a recitation of specific power is construed and confined within the limitations of the specific power named."[7]

Now, even assuming that KWE is authorized by its primary and secondary purpose to operate a customs brokerage, KWE must meet the requirements set forth by the 1987 Constitution, the Foreign Investments Act, and related laws and issuances.

Pursuant to the Foreign Investments Act of 1991,[8] a Foreign Investment Negative List ("FINL") is issued by the President setting forth the foreign equity requirements for select industries and professions. In particular, List "A" enumerates

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[2] Amended Articles of Incorporation, Second Article (As Amended on May 18, 1998),
[3] Certified machine copies of the Amended Articles of Incorporation dated 25 June 1998.
[4] *Uy Siuliong vs. Director of Commerce*, 40 Phil. 541 (1919).
[5] SEC Opinion dated 20 January 1999 addressed to Ms. Zenaida Cuison Maglaya citing 13 Am Jr. Sec. 740.
[6] Batas Pambansa Blg. 68 (1980).
[7] SEC Opinion, 26 January 1994, XXCIII SEC Quarterly Bulletin 46 (No. 2, June 1994) citing 7A Fletcher, Sec. 3640, and 6 Fletcher Cyc. Corp., Sec. 2483.
[8] Republic Act No. 7042, as amended.

the areas of activities reserved to Philippine nationals by mandate of the Constitution and specific laws.[9]

The Eighth Regular FINL[10] provides that only the investment areas and/or activities listed in its annexes shall be reserved to Philippine nationals to the extent of foreign equity participation in these areas.

Under List "A" (No Foreign Equity), customs brokerage is among those enumerated[11] under practice of professions solely reserved to Filipinos pursuant to Republic Act No. 9280, as amended.[12]

Under the said law, the scope of the practice of customs brokers "involves services consisting of consultation, preparation of customs requisite document for imports and exports, declaration of customs duties and taxes, preparation signing, filing, lodging and processing of import and export entries; representing importers and exporters before any government agency and private entities in cases related to valuation and classification of imported articles and rendering of other professional services in matters relating to customs and tariff laws, its procedures and practices."[13]

In addition, a customs broker shall be considered in the practice of the profession "if the nature and character of his/her employment in private enterprises requires professional knowledge in the field of customs and tariff administration. He/she is also deemed in the practice of custom broker profession if he/she teaches customs and tariff administration subjects in any university, college or school duly recognized by the government."[14]

It is true that Section 29 of the law has been amended to read:

> "The practice of customs broker is a professional service, admission to which shall be determined upon the basis of individual and personal qualifications. *However, nothing in this Act shall prevent a corporation from being registered for the purpose of engaging in the business of customs brokerage as long as the corporation shall engage or hire the services of at least one (1) customs broker.*
>
> For purposes of this Act, the phrase 'engaging in the business of customs brokerage' shall mean making representations in behalf of importer-clients in the Bureau of Customs (BOC) and other government agencies: *Provided,* That such corporations engaged in the business of customs brokering shall have a minimum paid-up capital of One million pesos

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[9] Foreign Investments Act of 1991, Section 8.
[10] Executive Order No. 858, promulgated 05 February 2010.
[11] Par 2(g) under List "A" of the Eighth Regular FINL.
[12] Customs Brokers Act of 2004.
[13] Republic Act No. 9280, Article II, Section 6.
[14] *Ibid.*

(PhP1,000,000.00) before they are accredited by the BOC." (emphasis supplied)

The said provision however, contemplates only domestic corporations in view of the Eighth FINL which expressly provides that no foreign equity shall be present in the practice of customs brokerage as a profession.

Based on the latest General Information Sheet[15] filed by KWE, the corporation is 100% foreign owned, and hence cannot be qualified to engage in customs brokerage whether as part of its international freight forwarding services or as a separate business activity.

The foregoing opinion rendered is 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 Commission whether of similar or dissimilar circumstances.[16] If, upon investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered void.

Please be guided accordingly.

VERNETTE G. UMALI-PACO
General Counsel

[15] Based on the records, the company submitted its GIS on September 16, 2009 for the period of April 24, 2009 and an Amended GIS filed on October 5, 2009 for the period July 31, 2009.
[16] SEC Memorandum Circular No. 15, series of 2003.