Republic of the Philippines
Department of Finance
Securities and Exchange Commission

OFFICE OF THE GENERAL COUNSEL

03 November 2017

SEC-OGC Opinion No.17-13

Re: Applicability of Section 43 of the Corporation Code to Joint Venture Partnership

Isla Lipana & Co.
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1226 Makati City, Philippines

Attention: Mr. Harold S. Ocampo
Principal

Sir:

This refers to your letter dated 06 February 2017, requesting the Commission's opinion on whether or not Section 43 of the Corporation Code ("the Code") applies to Concepcion-Carrier Airconditioning Company ("CCAC"), a general partnership duly registered with the Securities and Exchange Commission ("SEC").

You stated in your letter that CCAC is a joint venture partnership between Concepcion Industrial Corporation ("CIC") and Carrier Air Conditioning Philippines, Inc. ("CACPI"). It is engaged in the manufacture, sale, distribution, installation and service of heating, ventilating, air conditioning and refrigeration ("HVACR") products and the provision of HVACR services.

You further stated that as a partnership, CCAC does not have a Board of Directors that has the exclusive power to control the assets of the corporation, or the absolute power to declare dividends out of the unrestricted retained earnings of the company. Further, unlike a corporation whose surplus profits or net earnings remain the property of the company until the same are declared as dividends, the net earnings of a taxable partnership such as that of CCAC belongs to its partners under Section 73(D) of the Tax Code.

Thus, it is your position that Section 43 of the Code does not apply to CCAC, on the grounds that:

- It is not a stock corporation
- It does not have the power to declare dividends out of its net profits.

- Its profits are deemed distributed to its partners at the end of the year without need of dividend declaration under Section 73 (D) of the Tax Code.
- Its partners are directly entitled to its net profits.

We confirm your position.

Section 43 of the Code states that:

> **Section 43.** ***Power to declare dividends.*** - The board of directors of a **stock corporation** may declare dividends out of the unrestricted retained earnings which shall be payable in cash, in property, or in stock to all stockholders on the basis of outstanding stock held by them: Provided, That any cash dividends due on delinquent stock shall first be applied to the unpaid balance on the subscription plus costs and expenses, while stock dividends shall be withheld from the delinquent stockholder until his unpaid subscription is fully paid: Provided, further, That no stock dividend shall be issued without the approval of stockholders representing not less than two-thirds (2/3) of the outstanding capital stock at a regular or special meeting duly called for the purpose. (16a)
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> **Stock corporations** are prohibited from retaining surplus profits in excess of one hundred (100%) percent of their paid-in capital stock, except: (1) when justified by definite corporate expansion projects or programs approved by the board of directors; or (2) when the corporation is prohibited under any loan agreement with any financial institution or creditor, whether local or foreign, from declaring dividends without its/his consent, and such consent has not yet been secured; or (3) when it can be clearly shown that such retention is necessary under special circumstances obtaining in the corporation, such as when there is need for special reserve for probable contingencies. (n)

One of the primary and basic rules in statutory construction is that where the words of a statute are clear, plain, and free from ambiguity, it must be given its literal meaning and applied without attempted interpretation. *Verba legis non est recedendum* – from the words of a statute there should be no departure.[1]

It is clear from the aforestated provision that the same applies only to stock corporations. A partnership has neither shares of stocks or capital stock, nor does it have a board of directors that can declare dividends out of its unrestricted retained earnings. Furthermore, dividends are property of the corporation and is payable only when the board of directors declare them as dividends even if there are existing profits of the corporation.[2] On the other hand, in partnership, profits are already due to the partners during the life of the partnership/joint venture in proportion to their interest as set forth in their agreement[3], and are deemed to have been actually or constructively received in the same taxable year.[4]

Therefore, CCAC, being a joint venture partnership, is not governed by Section 43 of the Code but by the pertinent provisions of the Civil Code on Partnerships.[5]

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[1] *Francisco I. Chavez vs. Judicial and Bar Council, Sen. Francis Joseph G. Escudero and Rep. Niel C. Tupas Jr.*, G.R. No. 202242, July 17, 2012.

[2] SEC-OGC Opinion No. 06-35 addressed to Ms. Danielle Maria L. Sales-Tort, dated 07 September 2006.

[3] Hector S. De Leon & Hector M. De Leon Jr., Comments and Cases on Partnership, Agency and Trust 157 (8th ed. 2010).

[4] Section 73(D) of The National Internal Revenue Code of the Philippines (RA No. 8424).

[5] *Worlgang Aurbach et al. v. Sanitary Wares Manufacturing Corporation*, G.R. No. 75875, December 15, 1989.

It shall be understood that the foregoing opinion is rendered based solely on the facts and circumstances disclosed and relevant solely to the particular issue 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 similar or dissimilar circumstances. If, upon further inquiry and investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered void.[6]

Please be guided accordingly.

CAMILO S. CORREA
General Counsel

[6] SEC Memorandum Circular No.15, Series of 2003