Republic of the Philippines
Department of Finance
Securities and Exchange Commission

OFFICE OF THE GENERAL COUNSEL

24 August 2018

SEC-OGC Opinion No: 18-14
Re: Retail Trade

Tokyo Consulting Firm- Philippine Branch
Unit 14B Chatham House, Valero cor. Rufino Sts.,
Salcedo Village, Makati City, 1227

ATTENTION: KENTA TANABE
General Manager

Dear Sir:

This refers to your letter dated 14 February 2017 requesting for an opinion regarding a possible joint venture between a foreign corporation and a Filipino company investing in a restaurant business in the Philippines.

In your letter, you stated that Ringer Hut Co., Ltd. ("Ringer Hut") is a corporation duly organized and existing under the laws of Japan, and is engaged mainly in restaurant businesses in the said country. You further stated that Ringer Hut intends to do business in the Philippines by entering into a joint venture agreement with Filipino individuals and companies wherein Ringer Hut owns 40% interest, and the rest of the shares (60%) are owned by Filipinos.

Hence, you raised these several queries:

1. Whether a 40% foreign-60% Filipino company may invest in a restaurant business legally?
2. Whether a 40% foreign-60% Filipino company is considered a Filipino company, hence, is not required to comply with the USD2,500,000 minimum paid-up capital of foreign retail company?
3. Whether we need to comply with the US$ 830,000 investments per store in case the Ringer Hut decides to set up a foreign retail company?
4. Whether or not the said US$830,000 investments per store may be reduced?

FIRST QUERY

Pertinent to your first query is the Retail Trade Liberalization Act of 2000(RTLA)[1], Section 3 which defines retail trade as any act, occupation or calling of habitually selling direct to the general public merchandise, commodities or good for consumption.

For sales transaction to be considered as "retail" the following elements should concur:

1. The seller should be *habitually engaged in selling*;
2. The sale must be *direct to the general public*;
3. The object of the *sale is limited to merchandise, commodities or goods for consumption.*[2]

One of the elements of a retail sale is that the products sold are consumer goods. Consumer goods, as defined by the Supreme Court, are goods which are used or brought for use primarily for personal, family or household purposes. Such goods are not intended for resale or further use in the production of other products.[3]

Section 4(q) of Republic Act No. 7394, otherwise known as, The Consumer Act of the Philippines, further defines *consumer products [and services]* as goods, services and credits, debts or obligations which are primarily for personal, family, household or agricultural purposes, which shall include but not limited to **food**, drugs, cosmetics, and devices.

In a restaurant business operation, the eating of food by customer, in the regular course of business, involves a sale of the food eaten.[4] Thus, considering that the operation of a restaurant business falls within the definition of retail trade, restaurant operation is an operation of retail trade, except, however, if the restaurant is incidental to the hotel business[5].

Section 5 of the RTLA further provides:

> **Section 5.** *Foreign Equity Participation.* - Foreign-owned partnerships, associations and corporation formed and organized under the laws of the Philippines may, upon registration with the Securities and Exchange Commission (SEC) and the Department of Trade and Industry (DTI), or in case of foreign owned single proprietorships, with the DTI, engage or invest in the retail trade business, subject to the following categories.
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> **Category A** – Enterprises with paid-up capital of the equivalent in Philippine Peso of less than Two million five hundred thousand US dollars (US$2,500,000.00) shall be

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[1] Republic Act No. 8762.
[2] SEC-OGC Opinion No.18-10 dated 04 June 2018 addressed to First Associated Medical Distribution Co., Inc.,
[3] Ibid.
[4] Department of Justice Opinion No. 248, s. 1954 dated 22 September 1954.
[5] Section 3 of the RTLA, and Section 2(e), Rule I, of its Implementing Rules and Regulations.

reserved exclusively for Filipino citizens and corporations wholly owned by Filipino citizens.

Category B – Enterprises with a minimum paid-up capital of the equivalent in Philippine Pesos of two million five hundred thousand US dollar (US$2,500,000.00) but less than Seven million five hundred thousand US dollars (US$7,500,000.00) may be wholly owned by foreigners except for the first two (2) years after the effectivity of this Act wherein foreign participation shall be limited to not more than sixty percent (60%) of total equity.

Category C – Enterprises with a paid-up capital of the equivalent in Philippine Pesos of Seven million five hundred thousand US dollars (US$7,500,000.00), or more may be wholly owned by foreigners: Provided, however, That in no case shall the investments for establishing a store in Categories B and C be less than the equivalent in Philippine pesos of Eight hundred thirty thousand US dollars (US$830,000.00).

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In view of the foregoing, a "40% foreign-60% Filipino" company may invest in a restaurant business if it has at least the equivalent in Philippine Peso of US$2,500,000.00 as minimum paid-up capital.

SECOND QUERY

As to your second query, Section 3 of Republic Act (R.A.) 7042, otherwise known as the Foreign Investment Act (FIA), as amended by R.A. 8179, and its Implementing Rules and Regulations (IRR), define a Philippine National as:

> **Section 3.** (a) The term "Philippine national" shall mean a citizen of the Philippines or a domestic partnership or association wholly owned by citizens of the Philippines; or a corporation organized under the laws of the Philippines of which at least sixty percent (60%) of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines; or a trustee of funds for pension or other employee retirement or separation benefits, where the trustee is a Philippine national and at least sixty (60%) of the fund will accrue to the benefit of the Philippine nationals: Provided, That where a corporation and its non-Filipino stockholders own stocks in a Securities and Exchange Commission (SEC) registered enterprise, at least sixty percent (60%) of the capital stocks outstanding and entitled to vote of both corporations must be owned and held by citizens of the Philippines and at least sixty percent (60%) of the members of the Board of Directors of both corporations must be citizens of the Philippines, in order that the corporations shall be considered a Philippine national.

Applied to your case, assuming that 60% of the outstanding and voting capital stock of the proposed company is owned and held by Filipinos, such company is considered a Philippine National under the FIA. However, for corporations engaged in retail trade,

allowable foreign participation is dependent on the minimum paid-up capital of the corporation. Section 2 of the RTLA is clear in stating that: "Enterprises with paid-up capital of the equivalent in Philippine Peso of less than Two million five hundred thousand US dollars (US$2,500,000.00) shall be reserved **exclusively for Filipino citizens and corporations wholly owned by Filipino citizens**." Thus, List A of the Tenth Foreign Investment Negative List provides that no foreign equity is allowed in retail trade enterprises with paid-up capital of less than US$2,500,000.

Hence, a "40% foreign-60% Filipino" company must have a paid-up capital of not less than US$2,500,000 or its peso equivalent in order to validly engage in retail business.

THIRD QUERY

As to your third query, if Ringer Hut, being a foreign retailer[6], will, by itself, establish a domestic corporation engaged in retailing, and will subsequently put up a branch/store, it must comply with the required US$830,000 minimum investment per store.[7]

The same also holds true when Ringer Hut will open a branch/store without establishing a domestic corporation.[8]

FOURTH QUERY

As to your fourth query, a careful examination of the provisions of the RTLA and its IRR indicate that there is no provision which allows the US$830,000 investment per store requirement to be reduced.

It shall be understood 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 a standing rule binding upon the courts, or upon the Commission in other cases of similar or dissimilar circumstances. If upon investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered null and void.[9]

Please be guided accordingly.

CAMILO S. CORREA
General Counsel

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[6] **Section 1(d) of the RTLA IRR**- Foreign retailer, as used under Section 8 and 10 of the law, shall mean an individual who is not a Filipino citizen, or a corporation, partnership, association or entity that is not wholly-owned by Filipinos, engaged in retail trade. (Section 1(d) of the RTLA IRR)

[7] **Section 5 of the RTLA; and Section 2, Rule III of the RTLA IRR** - Opening of branches/stores by the registered foreign retailer shall be allowed, provided that the investments for each branch/store established by registered foreign retailers falling under Categories C and B must be no less than the equivalent in Philippine Pesos of Eight Hundred Thirty Thousand US Dollars (US$830,000.00).

[8] Ibid.

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