Republic of the Philippines
Department of Finance
Securities and Exchange Commission

OFFICE OF THE GENERAL COUNSEL

29 May 2019

SEC-OGC Opinion No. 19-21
Re: Application of the Retail Trade Liberalization Act to Clark Freeport Zone

CLARK DEVELOPMENT CORPORATION
2/F Bldg. 2125 C.P. Garcia corner
E. Quirino Avenue, Clark Freeport Philippines

ATTENTION: MS. THELMA C. OCAMPO
Assistant Vice President
Business Development Department I

Dear Ms. Ocampo,

This refers to your letter dated 16 January 2017 requesting for an opinion on whether a foreign national planning to incorporate a 100% foreign corporation, the primary business of which is a restaurant, and is planning to locate within Clark Freeport Zone (CFZ), an economic zone, is exempt from the requirements of Republic Act (RA) No. 8762 or Retail Trade Liberalization Act of 2000 (RTLA) and RA No. 7042 or Foreign Investment Acts (FIA).

You stated that CFZ is the former Clark Air Base proper which was created pursuant to the Bases Conversion and Development Act (BCD Act) or RA No. 7227, as amended by RA Nos. 7917 and 9400, and Proclamation No. 163, series of 1993. Further, you disclosed that CFZ is being managed by Clark Development Corporation (CDC), a government owned and controlled corporation established by virtue of Executive Order No. 80, series of 1993 as the implementing arm of the Bases Conversion Development Authority (BCDA) to manage Clark Special Economic Zone which includes CFZ.

You averred that pursuant to Section 15 of RA No. 9400, the CDC shall have the powers and functions exercised by the Export Processing Zone Authority (EPZA) as provided in Presidential Decree No. 66, as amended (PD No. 66)

Section 16 of PD No. 66 provides the EPZA (now PEZA, by virtue of RA No. 7916 or the PEZA Law, as amended) the following power, to wit:

> "**Section 16.** *Foreign Enterprises.* The provisions of law to the contrary notwithstanding, the Authority may authorize an alien or an association, partnership, corporation or any other form of business organization formed, organized, chartered or existing under any law other than those of the Philippines,

or which is not a Philippine national, or the working capital of which is fully owned or controlled by aliens to do business or engaged in an industry inside the zone.

xxx".

In this regard, you now inquire whether a corporation engaged in the restaurant business can be located in the CFZ and be exempt from the requirements of the RTLA and the FIA.

In SEC Opinion No. 08-06,[1] the Commission was presented with an issue on whether an enterprise registered with the Philippine Economic Zone Authority (PEZA) is exempted from the application of the RTLA. To answer the query, the Commission looked into the provisions of RA No. 7916 or the Special Economic Act of 1995 (PEZA Law) and its Implementing Rules and Regulations (IRR), to wit:

> Section 7 of the Republic Act No. 7916, otherwise known as the Special Economic Zone Act of 1995 (PEZA Law), as amended, states that:
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> > Section 7. ECOZONE to be a Decentralized Agro-Industrial, Industrial, Commercial/Trading, Tourist, Investment and Financial Community. – Within the framework of the Constitution, the interest of national sovereignty and territorial integrity of the Republic, ECOZONE shall be developed, as much as possible, into a decentralized, self-reliant and self-sustaining industrial, commercial/trading, agro-industrial, tourist, banking, financial and investment center with minimum government intervention. Each ECOZONE shall be provided with transportation, telecommunications, and other facilities needed to generate linkage with industries and employment opportunities for its own inhabitants and those nearby towns and cities.
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> > **Foreign citizens and companies owned by non-Filipinos in whatever proportion may set up enterprises in the ECOZONE, either by themselves or in joint venture with Filipinos in any sector of industry, international trade and commerce within the ECOZONE.** Their assets, profits and other legitimate interests shall be protected: Provided,
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> > **That the ECOZONE through the PEZA may require a minimum investment for any ECOZONE enterprise in freely convertible currencies:** Provided, further, That the new investment shall fall under the priorities, thrusts and **limits** provided for in this Act.

[1] SEC Opinion No. 08-06, dated 23 January 2008, addressed to Ms. Regina S. Peralta

Giving flesh to the above provision is Section 1, Rule III, Part II of the Implementing Rules and Regulations (IRR) of the PEZA Law, which reads,

> **SECTION 1.** Qualification of Applicants – any person, firm, association, partnership, corporation, or any other form of business organization, regardless of nationality, control and/ or ownership of the working capital thereof may apply for registration as an Export or Free Trade Enterprise within the ECOZONE in any sector of industry, international trade and commerce, except duty-free retailing and wholesale trading of imported finished products for purposes of serving the domestic market. **Furthermore, if the area of investments of the said enterprises falls within Lists A and B of the Foreign Investments Act of 1991, then the applicable nationality, ownership or control requirements of the said law shall be observed.**
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> Applications for ECOZONE Developer / Operator, Domestic Market, Utilities, Facilities, Tourism or Service Enterprises **shall comply with the applicable nationality, control and / or ownership requirements of the working capital thereof in accordance with the pertinent provisions of the Philippine Constitution, Foreign Investments Act of 1991 and other existing laws and regulations.**

Thus, unless your case falls within any of the exceptions enumerated in Section 3 of the RTLA,[2] the fact that a retail enterprise is PEZA-registered does not mean that said business entity is exempt from the application of the RTLA vis-à-vis the FIA. For this reason, it may be well to emphasize pertinent provisions of said laws.

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However, please be advised that the foregoing does not preclude interpretation by the PEZA of the above-provisions of law as they relate to an enterprise registered with it. The PEZA is the primary government agency tasked to register, regulate and supervise the enterprises in the Ecozone in an efficient and decentralized manner. Necessarily, its functions would include overseeing compliance with its rules and regulations implementing the provisions of the PEZA Law, which is a special law.

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[2] Section 3. Definition. As used in this Act.
(1) "Retail Trade" shall mean any act, occupation or calling of habitually selling direct to the general public merchandise, commodities or good for consumption, but the restriction of this law shall not apply to the following:
(a) Sales by manufacturer, processor, labourer, or worker, to the general public the products manufactured, processed or products by him if his capital does not exceed One hundred thousand pesos (100,000.00);
(b) Sales by a farmer or agriculturist selling the products of his farm;
(c) Sales in restaurant operations by a hotel owner or inn-keeper irrespective of the amount capital: provided, that the restaurant is incidental to the hotel business; and
(d) Sales which are limited only to products manufactured, processed or assembled by a manufactured, processed or assembled by a manufacturer through a single outlet, irrespective of capitalization.

It can be gleaned from the foregoing Opinion that the answer to the query as to whether an enterprise located in an economic zone is exempt from nationality requirements, depends on the provisions of the laws governing the ecozone and the rules issued by its implementing authority.

In your case, it would appear that pursuant to the afore-quoted Section 16 of PD No. 66, in relation to Section 15 of RA No. 9400[3], the CDC has the power to authorize a corporation or any business organization formed under any foreign law or which is not a Philippines national to do business or engage in an industry inside the zone. Thus, the answer to your query would ultimately be based on your discretion as the promulgating agency competent to issue rules on the matter and to construe and implement the same by reason of your specialized knowledge and jurisdiction. [4]

It shall be understood, however, that the foregoing opinion is rendered based solely on the facts and circumstances disclosed and relevant solely to the particular issue raised therein. It shall not be used in the nature of a standing rule binding upon the Commission in other cases or upon the courts whether of similar or dissimilar circumstances.[5] If, upon further inquiry or investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered void.

Please be guided accordingly.

CAMILO S. CORREA
General Counsel

[3] The IRR of RA 9400(per DOF Department Order No. 3-08 dated 13 February 2008) provides for tax incentives only
[4] Item 5.6 of SEC Memorandum Circular No. 15, series of 2003
[5] *Ibid*, Item 7.