Republic of the Philippines
Department of Finance
Securities and Exchange Commission

OFFICE OF THE GENERAL COUNSEL

12 December 2019

SEC-OGC Opinion No. 19-58
RE: Foreign Equity Ownership

BULALACAO, SANCIO, and BULALACAO-SANCIO
LAW OFFICE
Room 203, STG Building,
190 P. Tuazon Blvd.,
Cubao, Quezon City

Attention: **Atty. Benjamin B. Bulalacao**

Atty. Bulalacao:

This refers to your letter dated 28 July 2018 requesting for an opinion on whether or not your client, "Media Gadgets International, Inc." (MGI), is compliant with the foreign equity limit provided for by our Constitution and other relevant laws.

A perusal of the Articles of Incorporation which you submitted shows that MGI is engaged *"in the business of importing, buying, selling, distributing, marketing at* ***wholesale*** *insofar as may be permitted by law, all kinds of goods such as audio, video component wares and merchandise of every kind and description, to enter into all kinds of contracts for the* ***export****, import, purchase, acquisition, sale at wholesale and other disposition for its own account as principal or in representative capacity or as agents, upon consignment of all kinds of goods, wares, merchandise, or products whether natural or artificial."*

In your letter, you stated that MGI has five (5) incorporators, four (4) of whom are Filipinos while the other one is a foreigner. Each Filipino incorporator owns fifteen percent (15%) shares of stocks of the company while the remaining forty percent (40%) is owned by the foreigner. You further stated that fifty percent (50%) of the total shares of MGI was subsequently assigned to a foreigner by virtue of a Deed of Assignment.

Thus, taking into account the whole context of your letter, you now ask the Commission's opinion on (1) whether or not the foreigner may own 50% of the total shares of MGI and (2) what legal action should be filed by the Filipino incorporator in case the foreigner is not allowed to own said shares.

FIRST QUERY

Of pertinence to your first query are Sections 6 and 7 of the Foreign Investments Act of 1991 (FIA)[1], to wit:

> "Section 6. Foreign Investments in Export Enterprises – Foreign investment in export enterprises whose products and services do not fall within Lists A and B of the Foreign Investment Negative List provided under Section 8 hereof is allowed up to one hundred percent (100%) ownership. *xxx*
>
> Section 7. Foreign Investments in Domestic Market Enterprises. – Non-Philippine nationals may own up to one hundred percent (100%) of domestic market enterprises unless foreign ownership therein is prohibited or limited by existing law or the Foreign Investment Negative List under Section 8 hereof. (As amended by RA 8179)"

In relation, the FIA defines export and domestic market enterprise, to wit:

> e. The term export enterprise shall mean an enterprise wherein a manufacturer, processor or service [including tourism] enterprise exports[2] sixty percent (60%) or more of its output[3], or wherein a trader purchases products domestically and exports sixty percent (60%) or more of such purchases;
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> f. The term "domestic market enterprise "shall mean an enterprise which produces goods for sale, or renders services to the domestic market entirely or if exporting a portion of its output fails to consistently export at least sixty percent (60%) thereof."

Based from the above definitions, we cannot conclude whether MGI is an export or a domestic market enterprise because your letter does not provide information as to whether it exports 60% or more of its output to fall under the definition of an export enterprise, or if it fails to consistently export at least 60% thereof in order to be considered as a domestic market enterprise.

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[1] RA No. 7042(As amended by R.A. 8179).

[2] Implementing Rules and Regulations of FIA, Section 1(h) - ***Exports*** shall mean the volume or the Philippine port F.O.B. peso value, determined from invoices, bills of lading, inward letters of credit, loading certificates, and other commercial documents, of products exported directly by an export enterprise or the value of services including tourism sold by service-oriented enterprises to non-resident foreigners or the net selling price of export products sold by an export enterprise to another export enterprise that subsequently exports the same; Provided, That sales of export products to another export enterprise shall only be deemed exports when actually exported by the latter, as evidenced by loading certificates or similar commercial documents; and Provided, finally, that without actual exportation, the following shall be considered constructively exported for purposes of the Act: (1) sales of products to bonded manufacturing warehouses of export enterprises; (2) sales of products to export processing zone enterprises; (3) sales of products to export enterprises operating bonded trading warehouses supplying raw materials used in the manufacture of export products; and (4) sales of products to foreign military bases, diplomatic missions and other agencies and/or instrumentalities granted tax immunities of locally manufactured, assembled or repacked products whether paid for in foreign currency or pesos funded from inwardly remitted foreign currency. xxx

[3] *Supra*, Section 1(i). -***Output*** shall refer to the export enterprise's total sales in a taxable year. The term sales shall refer to value in case of heterogeneous products and volume in case of homogenous products. xxx

IF MGI IS AN EXPORT ENTEPRISE

Assuming, however, that MGI is an export enterprise, it should not fall within Lists A and B of the Eleventh Foreign Investment Negative List (FINL-11)[4] in order for it to be 100% foreign-owned. MGI's business of wholesale, unlike retail, is not included in List A; nor is it covered by List B of the FINL-11. Consequently, MGI can be 100% foreign-owned allowing the foreigner to own 50% of its total shares.

IF MGI IS A DOMESTIC ENTERPRISE

On the other hand, assuming that MGI is a domestic market enterprise, the same rule applies; that is, it should not fall within Lists A and B of investment areas reserved to Philippine nationals. In relation, List B of the FINL-11 restricts foreign equity ownership to a maximum of 40% in small and medium-sized domestic market enterprises in cases where the paid-in capital is less than the equivalent of Two Hundred Thousand US Dollars (US$200,000)[5].

In your case, while the business of MGI does not fall under List A, your letter, however, failed to state the minimum paid-in capital of MGI; thus, we cannot determine whether it falls under List B.

From the foregoing, if the minimum paid-in capital of MGI is equivalent to at least US$200,000[6], it may be 100% foreign-owned, provided it does not own land. Consequently, the foreigner may own 50% of MGI's total shares. However, if MGI's minimum paid-in capital is less than the equivalent of US$200,000[7], its foreign participation is limited to 40%; hence, the foreigner's ownership of MGI's shares cannot be 50%.

That said, Section 14 of the Revised Corporation Code which prescribes the form of Articles of Incorporation, states that: *"No transfer of stock or interest which shall reduce the ownership of Filipino citizens to less than the required percentage of capital as provided by existing laws shall be allowed or permitted to be recorded in the proper books of the corporation, and this restriction shall be indicated in all stock certificates issued by the corporation."*[8]

SECOND QUERY

With regard to your second query, please be advised that the Commission does not render opinion on matters which are litigious in nature, and which involves the substantive

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[4] Executive Order No. 65, Series of 2018.

[5] As to domestic market enterprises which involve advanced technology or employ at least 50 direct employees, only a paid-in equity capital of less than the equivalent of One Hundred Thousand US Dollars (US$100,000) is required. (List B, Item7 of the FINL-11)

[6] *Supra.*

[7] See Note 5.

[8] Eleventh Item.

and contractual rights of private parties who would, in all probability, contest the same in court if the opinion turns out to be adverse to their interest.[9]

Your second query is litigious in nature involving as it does a contract, the Deed of Assignment, pursuant to which the private parties thereto have substantive and contractual rights. Any opinion that the Commission may issue that would be adverse to their respective interests may result to litigation in court. Thus, the Commission is enjoined to issue an opinion over the matter.

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. 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.[10] 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.

ROMUALD C. PADILLA
Officer-in-Charge

[9] SEC Memorandum No. 15, Series of 2003.
[10] SEC Memorandum Circular 2003-15, No.7.