Securities and Exchange Commission PHILIPPINES

BAGONG PILIPINAS

OFFICE OF THE GENERAL COUNSEL

09 October 2024

SEC OGC Opinion No. 24-29
Re: Purpose Clause

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Dear Ms. Alayon:

This refers to your letters dated 20 November 2017 and 12 November 2018, requesting, on behalf of Alps Logistics, Co. Ltd. Philippines Representative Office (ALCL Philippines), for an opinion on the establishment of a one hundred percent (100%) foreign-owned domestic corporation (ALPS (PEZA)) primarily engaged in "warehousing & storage and inventory control and management which is to be registered with [Philippine Economic Zone Authority (PEZA)]."

In your letters, you stated the following:

a). ALCL Philippines was established "to undertake/conduct information and promotion of Alps Logistics Co. Ltd's [ALCL Japan] services." It was "given the task to do a feasibility study" on behalf of [ALCL Japan];

b). ALCL Japan has several types of business "such as trucking operation, warehousing, packaging-related business, import & export cargoes, customs brokerage, forwarding business, sales of resinous materials, electronic devises[,] and other parts & goods, collection, transportation[,] and disposal [of] industrial wastes and other businesses related to the mentioned.";

c). ALCL Japan intends to establish a 100% foreign-owned subsidiary in the form of ALPS (PEZA);

d). ALCL Japan wants "to ensure that from the importation, shipment[,] and transportation of the goods from the country of origin to port to [ALPS (PEZA)] warehouse and the transportation from [ALPS (PEZA)] warehouse to the customer's warehouse [and] vice versa be done as part of [ALPS (PEZA)'s] service.";

e). The primary purpose of ALPS (PEZA), as stated in your 12 November 2018 letter, is as follows:

1. To engage in business as Logistics Service Enterprise, which services shall include specialized storage and warehousing, inventory and material management and other on-time delivery and logistics services of parts, spare parts and components of customers;
2. [T]o act as consultant, manager or advisor on matters relative to warehousing/logistics service activities;
3. To offer delivery of customers' products though **outsourcing** from country of origin to our warehouse and/or customer's warehouse, from our warehouse to customer's warehouse or vice versa, from the customer's warehouse to another customer's warehouse using an [international freight forwarding (IFF)]/[domestic freight forwarding (DFF)] agent; [and]
4. To conclude agreement with IFF/DFF agents for the necessary logistics and delivery services required to fulfill the agreed contract with the customers[.]

d). The secondary purpose of ALPS (PEZA) is as follows:

1. To refer customers who require forwarding and trucking services to IFF/DFF agents and [to] collect a one-time referral fee from successful transactions[.]

You are now asking for an opinion on the following queries[1]:

1. Is ALPS (PEZA) allowed to subcontract or create a partnership with IFF, DFF[,] and local trucking service to complete the service cycle to the customer?;

   Since the company's primary purpose is only warehousing & storage and inventory management, does this not prohibit ALPS (PEZA) to subcontract the said services of an IFF or DFF agents by making a separate contract with the customer for the required delivery?;

2. There will be times that ALPS (PEZA) will not act as the direct importer, it will be the customer who shall process the importation application but the imported goods/parts/items will be directly transported to the ALPS (PEZA) warehouse and later be delivered to the customer's warehouse upon customer's instruction. Or in any other case, goods/parts/items will be transported back to ALPS (PEZA) warehouse for safekeeping using a trucking subcontractor. This means that ALPS (PEZA) will have a contract with the trucking subcontractor and will have a separate contract with customer for the required delivery. Is this allowable?;

3. ALPS (PEZA) shall act as a coordinator in the actual transportation process, wherein the goods shall be directly delivered to the customer's warehouse or from the customer's warehouse to [ALPS' (PEZA)] own warehouse located in a different place or to another customer's warehouse/ In the act as coordinator, [ALPS (PEZA)] shall charge fees on the said coordination. To illustrate, ALPS (PEZA) will have a contract with the customer for the delivery and have a separate contract with the IFF/DFF agents for the transfer/trucking services. Is this allowable?;

4. Can ALPS (PEZA) directly bill the shipper for the necessary incurred costs related to forwarding/trucking with inclusion of certain percentage of administrative fee and/or commission? To illustrate, the IFF/DFF agent shall bill ALPS (PEZA) directly then ALPS (PEZA) will bill the shipper.

5. Can ALPS (PEZA) add a secondary purpose[i.e.,] a referral engagement with the customer? For instance, [ALPS (PEZA)] refer[s] [its] customers who require forwarding and trucking services to IFF/DFF agents and if the transactions push through, [ALPS (PEZA) will] collect a referral fee/commission from the said transaction/s. The IFF/DFF agent shall make a contract with the customer directly. If both agree, [ALPS (PEZA) shall charge a one-time commission/referral fee to the customer. [Is ALPS (PEZA)] no prohibited to do this transaction?

6. Is ALPS (PEZA) allowed to dispatch their employees to the customer's warehouse and render the warehousing and inventory controls services including the implementation of the original inventory management software to the customer (ELSE) by binding a service contract between ALPS (PEZA) and the customer (ELSE)?

7. Is ALPS (PEZA) allowed to sub-lease warehouse space to another ELSE and bind separate contracts for sub-lease and inventory management services? Both warehouse storage sub-leasing and inventory management contracts will be bound between ALPS (PEZA) and the customer (ELSE). On the other hand, actual inventory control and management service will be rendered by a Non-PEZA registered ALPS domestic corporation through a service contract bound between ALPS (PEZA) and the latter, This Non-PEZA registered ALPS domestic corporation which primary purpose is warehousing, storage, inventory control and management, will be formally established by ALPS.

Section 5 of Republic Act (R.A.) No. 7042 or the Foreign Investments Act (FIA), as amended by R.A. No. 11647,[2] provides the rule on registration of investments of non-Philippine nationals, *viz.*:

> ***SEC. 5. Registration of Investments of Non-Philippine Nationals.*** — Without need of prior approval, **a non-Philippine national**, as that term is defined in Section 3(a), **and not otherwise disqualified by law** may, **upon registration with the Securities and Exchange Commission (SEC)**, or the DTI in the case of single proprietorships, do business as defined in Section 3(d) of this Act or invest in a domestic enterprise up to one hundred percent (100%) of its capital, **unless participation of non-Philippine nationals in the enterprise is prohibited or limited to a smaller percentage by existing law and/or under the provisions of this Act.** The SEC or the DTI, as the case may be, shall not impose any limitations on the extent of foreign ownership in an enterprise additional to those provided in this Act xxxx (Emphasis and underscoring supplied)

It is clear that for a non-Philippine national to do business in the Philippines or make such investment in a domestic enterprise, the proposed activity ***must not be reserved to Filipinos*** as enumerated under Executive Order (E.O.) No. 175, Series of 2022 or the 12th Foreign Investment Negative List (FINL)[3] and the non-Philippine national must not otherwise be disqualified by law.

Considering that ALPS (PEZA) would be a PEZA-registered enterprise, it is necessary to determine whether R.A. No. 7916, as amended,[4] provides disqualifications, including nationality restrictions, if any.

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[1] Lifted from your 12 November 2018 letter.
[2] Section 5, Republic Act (R.A.) No. 7042, as amended, or the *Foreign Investments Act* (FIA), 13 July 1991.
[3] Executive Order (E.O.) No. 175, Series of 2022, *Promulgating the Twelfth Regular Foreign Investment Negative List (12th FINL)*, 27 June 2022.
[4] R.A. No. 7916, *The Special Economic Zone Act of 1995*, 24 February 1995.

In this relation, ***SEC-OGC Opinion No. 08-06***[5] provides a discussion on the effect of being a PEZA-registered retail enterprise on foreign equity restrictions, *viz.*:

> Section 7 of [R.A.] 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.*
> >
> > xxx
> >
> > **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, That the ECOZONE through the PEZA may require a minimum investment for any ECOZONE enterprise in freely convertible currencies.**
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> 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:
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> > *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.**
> >
> > 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, [FIA], and other existing laws and regulations**.
>
> Thus, unless your case falls within any of the exceptions enumerated in Section 3 of the RTLA, ***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-a-vis the FIA***. xxx (Emphasis and underscoring supplied)

As such, PEZA-registration, in itself, does not automatically exempt a corporation from observing the foreign equity restrictions as may be provided in the Constitution and other laws. This point was further emphasized in ***SEC-OGC Opinion No. 19-21***[6] where the Commission opined that ***an exemption for an enterprise localized in an ecozone from the nationality requirements depends on the provisions of the laws governing the ecozone and the rules issued by its implementing authority***.

For instance, **Logistics and Warehousing Services** is one of the eligible activities listed in the PEZA website,[7] to wit:

> 7. LOGISTICS AND WAREHOUSING SERVICES -
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> (a) operation of a warehouse facility for the storage, deposit, safekeeping of goods for PEZA-registered Economic Zone Export Manufacturing Enterprises; and/or
> (b) importation or local sourcing of raw materials, semi-finished goods for resale to - or for packing/covering (including marking/labeling) cutting or altering to customers' specification, mounting and/or packaging into kits or marketable lots for subsequent sale to - PEZA-registered Export Manufacturing Enterprises for use in their export manufacturing activities, or for direct export, or for consignment to PEZA-registered Export Manufacturing Enterprises and eventual export. Eligible firms shall qualify for registration as "Economic Zone Logistics Services Enterprise."

In this case, you specifically mentioned that ALPS (PEZA) would be registered with PEZA, which is the primary government agency tasked to register, regulate and supervise the enterprises in the ecozone in an efficient and decentralized manner. Necessarily, PEZA would be vested with authority to oversee compliance with its rules and regulations implementing the provisions of the PEZA Law, including its rules on nationality restrictions.

All the above notwithstanding, it is worth noting that under Section 4 of RA No. 11659,[8] and Sections 3, 4 and 6 of its IRR, as amended,[9] the relevant administrative agency shall have jurisdiction and

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[5] SEC-OGC Opinion No. 08-06 addressed to Ms. Regina Peralta, 23 January 2008.
[6] SEC-OGC Opinion No. 19-21 addressed to Clark Development Corporation dated 29 May 2019.
[7] Retrieved from https://www.peza.gov.ph/elligible-activities-and-incentives-category/eligible-activities accessed on 04 October 2024.
[8] R.A. No. 11659, Amendment to C.A. No. 146, the Public Service Act PSA), 21 March 2022.
[9] Implementing Rules and Regulations (IRR) of R.A. No. 11659, 20 March 2023.

exercise supervision over the respective relevant public services or public utilities, as the case may be. By reason of the foregoing, you might consider securing comments from the National Economic Development Authority (NEDA) or the Land Transportation Franchising and Regulatory Board (LTFRB) to determine whether or not the activities or part of the activities of ALPS (PEZA) as a Logistics Service Enterprise, i.e. "to engage in business as Logistics Service Enterprise which services shall include xxxxx other on-time delivery and logistics services of parts, spare parts, and components of customers"[10] and "to offer delivery of customers' products through outsourcing from country of origin to [ALPS (PEZA)'s] warehouse and/or customer's warehouse, from [ALPS (PEZA)'s] warehouse to customer's warehouse or vice versa, from customer's warehouse to another customer's warehouse using an IFF/DFF,"[11] would fall under the definition of public utility vehicle (PUV).

First and Fifth Queries

As to your ***first and fifth queries,*** they deal with the extent of activities which may be undertaken by a corporation vis-à-vis its purpose clause.

In this relation, ***SEC-OGC Opinion No. 08-06***[12] is instructive as to the nature of a corporation's purpose clause, to wit:

> It is the corporation's purpose clause which confers, as well as limits, the powers which a corporation may exercise and the character of a corporation is usually determined by the objects of its formation and the nature of its business. The primary purpose of the corporation, as stated in its AOI, is the first business to be undertaken by the corporation. Hence, the primary purpose determines its classification.
>
> Outside of the primary purpose, the secondary purposes might determine a corporation's classification on the condition that the corporation is actually engaged in the business stated therein.

It is well-settled in corporate jurisprudence that a corporation only has the powers 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.* Only such powers as are reasonably necessary to enable corporations to carry out the express powers granted and the purposes of their creation are to be implied as are to be deemed incidental. Powers merely convenient or useful are not implied if they are not essential having in view the nature and object of incorporation. ***Thus, in the determination of what businesses may be carried on by a corporation, reference must be made to its articles of incorporation (AOI), and unless the power to carry a particular business is either expressly or impliedly conferred thereby, it cannot be undertaken by a corporation.***[13]

In ***SEC-OGC Opinion No. 19-39,***[14] the Commission discussed circumstances when the purpose clause can be legally "stretched" and when a proper amendment of the AOI is warranted, *viz.:*

> It is settled that it is only in the business/es, for which it was lawfully organized and which is stated in the [AOI], that a corporation should engage in. But if the business is ***necessary for the accomplishment of the purpose of the corporation or incident to it,*** the corporation may also engage in such business. As a matter of fact, it is even legal to "stretch" the meaning of the purpose clause to cover new and unexpected situations.
>
> There will always be instances when doubts may arise as to whether an act may be ***reasonably implied*** from the purposes of the corporation. These doubts will sometime be due to poor draftsmanship or lack of foresight on the part of the original incorporators or their legal counsel or, as is oftentimes the case, situations or circumstances may come up which could not have been foreseen at the time of the incorporation. Many times, the purpose clause can be reasonably 'stretched' as to impliedly cover these new and unexpected situations. But in those cases where it cannot, a proper amendment thereof would be necessary. (Emphasis and underscoring supplied)

Subject to the aforesaid evaluation by the PEZA and/or the comments of the NEDA and/or LTFRB, to answer your first and fifth queries, once expressly or impliedly set forth in the AOI as the primary purpose or secondary purpose, the subcontracting of trucking services to IFF/DFF and the power "to refer customers who require forwarding and trucking services to IFF/DFF agents and collect referral fees therefor," would generally be allowed.

Second, Third, Fourth, Sixth, and Seventh Queries

As to your ***first, second, third, fourth, sixth, and seventh queries***, they involve contractual arrangements, business operations, and/or factual matters which might necessitate consulting PEZA. In this regard, please be informed that as a matter of public policy, this Office refrains from rendering an

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[10] Item No. 1 of ALPS (PEZA)'s Primary Purpose as mentioned in your 12 November 2018 letter.
[11] Item No. 3, *ibid.*
[12] SEC-OGC Opinion No. 08-06 addressed to Philippine Stock Exchange Inc. dated 02 February 2006.
[13] SEC Opinion addressed to Atty. Reynauld Villafuerte dated 27 February 1996.
[14] SEC-OGC Opinion No. 19-39 addressed to Mr. Romualdo Katigbak dated 18 September 2019, citing SEC Opinion addressed to Mr. Armando Lansang Jr. dated 24 March 1982.

opinion on the following: (1) matters which involve interpretation of administrative rules and issuances of other government agencies considering that it is the promulgating agencies which are competent to undertake such construction by reason of their knowledge of the specific intent and extent of application of the subject issuances[15]; (2) matters which would require an examination and review of the acts and ruling of another government agency since Commission does not review acts and ruling of other government agencies[16]; and (3) matters which clearly involve the exercise of business discretion or judgment which properly falls within the competence of the management of the entities concerned.[17]

However, ***for purposes of information only***, we reiterate our discussion on the first and fifth queries.

It shall be understood that the 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 in other cases whether of similar or dissimilar circumstances.[18]

Please be guided accordingly.

Very truly yours,

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General Counsel

[15]Section 5.6, SEC Memorandum Circular (MC) No. 15, Series of 2003, 16 December 2003.
[16] Section 5.7, *ibid.*
[17] Section 5.9, *ibid.*
[18] Section 7, *ibid.*