



Republic of the Philippines
Department of Finance
Securities and Exchange Commission
SEC Bldg. EDSA, Greenhills, Mandaluyong City



23 January 2008
SEC Opinion No. 08-06
Re: Application of the Retail Trade
Liberalization Act to a PEZA-Registered
Enterprise, and Other Matters

MS. REGINA S. PERALTA
604 Aguho Street, Juna Subd.,
Matina, Davao City

Madam:

This refers to your letter dated 5 November 2007 requesting opinion on the application of Republic Act No. 8762, otherwise known as the Retail Trade Liberalization Act of 2000 ("RTLA", for brevity), to an enterprise registered with the Philippine Economic Zone Authority ("PEZA"), as well as on related matters.

You made reference to Bentley House Furniture Company Incorporated ("Bentley"), a PEZA-registered corporation engaged in trading, both wholesale and retail. Its 2006 General Information Sheet ("GIS") reflects Jonathan Bentley Stevens, an Australian national, as its majority stockholder owning 60% of its outstanding capital stock. Said GIS further states that Bentley's authorized capital stock of Php 20,000,000.00 has been fully subscribed and paid, prior to which the subscribed capital was only Php 5,000,000.00.

You also mentioned that there were two (2) GIS submitted in 2007. The first one was submitted on 6 June 2007 wherein: (a) Jonathan Bentley Stevens appears as Chairman of the Board, Assistant Corporate Secretary and Treasurer of Bentley; and (b) James Boyd Sukroo and Richard John Stevens, also Australians, are reflected as directors but not stockholders. The Amended GIS was filed in October, now reporting the other two (2) Australians as stockholders and directors of Bentley.

The following questions were then posed:

"1. May a PEZA-registered entity engaged in retail trade subsequently admit foreigners and be exempted from complying with the Retail Trade Liberalization Act of 2000 (RA 8762) on the prescribed qualifications and qualifications of foreign retailers?

2. When a PEZA-registered entity admits a foreign stockholder and allows the latter to own more than 40% of its outstanding capital

stock, is it not required to register under the Foreign Investments Act ("FIA")?

3. May the SEC compel the above-named corporation to report the unaccounted issuance of its shares worth Php 15,000,000.00, considering that Jonathan Bentley Stevens had no actual cash payments?
4. If he claims that his payment was other than cash, is it not required that an Application for Confirmation of Exemption (Form 10-1) under the Securities Regulation Code be filed for approval by the SEC?
5. May a foreigner act as Chairman of the Board, Assistant Corporate Secretary and Treasurer at the same time?
6. If the above-named corporation has violated the foregoing laws and rules implemented by SEC, what is now its status?
7. Should we go back to the time prior to the occurrence of the illegal transactions, and consider the stockholders and directors then to be the present stockholders and directors?

Section 7 of Republic Act No. 7916, otherwise known as The Special Economic Zone Act of 1995 ("PEZA Law"), as amended, states that:

"Section 7. ECOZONE to be a Decentralized Agro-Industrial, Industrial, Commercial/Trading, Tourist, Investment and Financial Community.

xxx

xxx

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: xxx."**

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.

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 RTLA¹, 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. For this reason, it may be well to emphasize pertinent provisions of said laws.

Section 8 of the FIA, as amended, mandates the formulation of a Regular Foreign Investment Negative List ("Negative List") covering areas/activities which may be opened to foreign investors and/or reserved to Filipino nationals.

Pursuant to Section 5 of the RTLA, List A of the current 7th Negative List includes a retail trade enterprise having a paid-up capital of less than US\$ 2,500,000.00 as one of the entities prohibited from having any foreign equity. Corollary thereto, if the paid-up capital is equal to or more than the said amount, foreign participation is allowed. Full foreign participation is even warranted if the retail enterprise is: (a) with paid-up capital of US\$ 2,500,000.00 or more provided that investments for establishing a store is not less than US\$ 830,000.00; or (b) specializing in high end or luxury products, provided that the paid-up capital per store is not less than US\$ 250,000.00.²

It thus appears that the answers to your first and second queries are in the negative and affirmative, respectively.

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

¹ See Section 3 of the RTLA which provides for the instances when the restrictions of the law shall not apply.

² Section 5, RTLA; List A, 7th Negative List.

with it.³ The PEZA is the primary government agency tasked to register, regulate and supervise the enterprises in the Ecozone in an efficient and decentralized manner.⁴ Necessarily, its functions would include overseeing compliance with its rules and regulations implementing the provisions of the PEZA Law, which is a special law.

With regard to your third query, it bears stressing that subject to well-defined exemptions under Section 10.1 of the Securities Regulation Code ("SRC"), securities shall not be sold or offered for sale or distribution within the Philippines without a registration statement duly filed with and approved by the Commission.

Whether or not you are exempt from the registration requirement cannot be conclusively established from your letter, given that there is no full disclosure of facts therein. More specifically, your case would be exempted under Section 10.1(k)⁵ of the SRC, provided you could clearly show that the issuance to one Jonathan Bentley Stevens of the Php 15,000,000.00-worth of shares from the unissued portion of the authorized capital stock was made within the required twelve-month period.

Be that as it may, please be reminded that no notice of exemption shall be required for any transaction covered by Section 10.1 of the SRC, except those covered by subparagraphs (k) and (l). In short, for Section 10.1 (k) and (l), notice of exemption on SEC Form 10-1 should be filed.⁶

Relative to your fourth query, where the consideration for the subscription is other than actual cash, or consists of intangible property such as patents or copyrights, the valuation thereof shall initially be determined by the incorporators or the board of directors, **subject to approval by the Securities and Exchange Commission.**⁷

The Commission has to approve the valuation of the consideration other than cash in order to prevent watering of stocks⁸. The request for such approval, however, is not through SEC Form 10-1 but by way of an application for such purpose with the Commission's Company Registration and Monitoring Department.

With regard to your fifth query, as long as the circumstances of the corporation does not fall within the ambit of the Anti-Dummy Law, a foreigner may act as Chairman and Treasurer at the same time, unless such concurrence of positions is so prohibited in

³ Paragraph 5.6 of SEC Memorandum Circular No. 15, Series of 2003 states that as a matter of policy, the Commission refrains from rendering opinion on requests 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.

⁴ Section 13, PEZA Law.

⁵ Sale of securities by an issuer to fewer than twenty (20) persons in the Philippines during any twelve-month period.

⁶ SRC Rule 10.1.

⁷ Section 62, Corporation Code.

⁸ Watering of stocks is a situation wherein the consideration for subscription is not at a fair valuation equal to the par or issued value of the stock issued, contrary to Section 62, in relation to Section 65, of the Corporation Code.

the By-Laws.⁹ However, such foreigner cannot, in addition, be the Assistant Corporate Secretary since this would be tantamount to a circumvention of the imperative under Section 25 of the Corporation Code that a Corporate Secretary must be a citizen of the Philippines.

Given that the business at issue is retail, we might find instructive Section 2-A of the Anti-Dummy Law which specifically bans foreigners from being elected or appointed to management positions, e.g. as president, vice-president, secretary, treasurer and the like, where there is a constitutional or statutory provision imposing a specific nationality requirement as a requisite for the exercise or enjoyment of a right, franchise or privilege.¹⁰

A corporation engaged in retail with less than full foreign equity participation must have the required minimum paid-up capitalization of US\$ 2,500,000.00; otherwise, it remains a nationalized business, and hence, subject to the afore-quoted provision of the Anti-Dummy Law.¹¹

The Department of Justice, however, had several occasions to opine that when there is a special law likewise authorizing the employment of foreign personnel in certain areas of nationalized activities, the special law is deemed to supersede the provisions of the Anti-Dummy Law.¹²

With the same caveat we made in our answers to the first and second queries, we quote hereunder Sections 1 and 2, Rule XVIII of the PEZA Law's IRR:

"Section 1. Entitlement. Pursuant to section 10 of the Act, **Ecozone Enterprises may employ foreign nationals in executive, supervisory, technical and advisory positions: Provided, That executive positions shall pertain only to the president, vice-president, treasurer and general manager, or their equivalents:** Provided, further, That the total number of foreign nationals employed by an Ecozone Enterprise in supervisory, technical or advisory positions shall not at any time exceed five percent (5%) of its workforce unless expressly authorized by the Secretary of Labor and Employment: Provided finally, That foreign nationals may be employed in supervisory, technical or advisory positions only if its is certified by the Department of Labor and Employment that no Filipino within the Ecozone possesses the technical skills required therefor.

⁹ Section 47 of the Corporation Code allows a corporation to provide in its by-laws the qualifications (corollarily, disqualifications), duties and compensation of directors or trustees, officers and employees.

¹⁰ SEC Opinion No. 16, Series of 2003 (Addressed to De Borja Medialdea Bello Guevarra & Gerodias).

¹¹ See SEC Opinion 04-8 dated 11 March 2004 addressed to Attys. Ariben C. Sebastian and Jemilyn S. Camania.

¹² DOJ Opinion No. 113, s. 1981; DOJ Opinion dated 26 May 1976; and DOJ Opinion No. 218, s. 1976.

Section 2. Length of Employment. An Ecozone Enterprise may employ foreign nationals for a period not exceeding five (5) years from its registration, extendible within limited periods depending upon the need of the Ecozone Enterprise as determined by PEZA: Provided, That the Ecozone Enterprise seeking such extension must have satisfactorily complied with the training program required under this section: *Provided, however, That when the majority of the capital stock of an Ecozone Enterprise is owned by foreign nationals, the positions of president, treasurer and general manager or their equivalents may be retained by foreign nationals.*"

As to your sixth query, records on file with the Commission indicate that Bentley is still active. To have it dissolved or revoked, a petition for such purpose must be filed with the Commission, citing the grounds therefor.¹³

Considering that your last query involves the status of persons as stockholders and directors, the Commission cannot answer the same. As a matter of policy, the Commission likewise refrains from rendering opinions on litigious matters, that is, matters which involve the substantive 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, or matters involving disputes which are intra-corporate in nature.¹⁴

The entire opinion is based solely on the facts disclosed in the queries and relevant solely to the particular issues raised therein. It shall likewise be understood that the foregoing shall not be used in the nature of a standing rule binding upon the Commission in other cases.¹⁵

Please be guided accordingly.

By Authority of the Commission:

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VERNETT

Gen.

Office of the General Counsel
Securities and Exchange Commission

9/F SEC Building, EDSA Greenhills, Mandaluyong City

SEC OPINION NO. 08-06

LETTER DATED 1-23-08

MS. PERALTA

Jan. 27/08

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