



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

OFFICE OF THE GENERAL COUNSEL

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SEC OGC Opinion No. 08-11

*Power of the Board to Enter in Suretyship
Agreements and to Issue Corporate
Guarantees*

Dear Atty. Barot,

We reply to your letter dated February 26, 2008 requesting opinion on behalf of your clients Roxas Holdings, Inc. ("RHI") and CADP Group Corporation ("CADPGC"). Specifically, you seek confirmation that only board approval is required for RHI and CADPGC to validly enter into suretyship agreements and to issue corporate guarantees in order to secure the obligations of other corporations where they have interest, and that no stockholder approval is required therefor.

You stated that RHI and CADPGC are both listed holding companies and have investments in various operating companies engaged in sugar business. They are also affiliated with the Roxas Group of Companies which has interests in real estate.

In support of your position, you stated that in the by-laws of both corporations, particularly under their respective sections¹ on the Powers of the Board, the board members are expressly empowered, "*(t)o guarantee, for an in behalf of the Corporation, obligations of other corporations in which it has lawful interest.*"

Further, you stated that, "*the SEC has issued an opinion² that '[i]t is not xxx ultra vires for a corporation to enter into a contract of guarantee or suretyship where it does so in the legitimate furtherance of its purposes or business xxx.'* The SEC further held that the act is well within the broad authorization of the second paragraph of the secondary purposes of its articles of incorporation so the same cannot be considered an ultra vires act of the corporation."

We confirm your position in part.

Section 45 of the Corporation Code of the Philippines (the "Code") provides:

- 1 Article 18.0 sub-paragraph 12.0 of the Amended By-Laws of RHI and Article 3, Section 6, sub-paragraph 6.12 of the Amended By-Laws of CADPGC.
- 2 SEC Opinion dated July 30, 1987 addressed to Atty. Vicente Acsay citing 7RC page 604, cited in Lopez, The Corporation Code of the Philippines Annotated, Volume 2, page 631.

"Sec. 45. Ultra vires acts of corporations. - No corporation under this Code shall possess or exercise any corporate powers except those conferred by this Code or by its articles of incorporation and except such as are necessary or incidental to the exercise of the powers so conferred."

The issues that we need to address are whether or not the power to enter into a contract of guarantee or suretyship is expressly conferred by the amended articles of incorporation of RHI or CADPGC or whether such is necessary or incidental to the exercise of the powers so conferred.

In the case of CADPGC, we answer in the affirmative.

Article II, paragraph H of its Amended Articles of Incorporation which reads:

"That the purpose[s] for which this corporation has been formed are the following:

xxx

xxx

xxx

H – To make and alter all kinds of investments and make mortgage loans or with any kind of guarantee to make monetary investments; in whatever may be necessary or incidental to the business of the company, guarantee in behalf of the company, solely or jointly any debt, obligation or loan of any sister corporation or any other corporation or mortgage, pledge or encumber the properties and assets of the company for stated purposes."

expressly grants CADPGC the power to guarantee any obligation of its sister corporation or any other corporation.

However, the same is not true in the case of RHI.

A reading of its amended articles of incorporation reveals that there is nothing in the purpose clause which confers RHI the power to enter into a contract of guarantee or suretyship. Such power is also not conferred by the Code, particularly Sections 2, 36 and 45; neither can it be said that the power is necessary or incidental to the exercise of the powers conferred by the Code or by its amended articles of incorporation. The general rule is that no corporation has the power, by any form of contract or endorsement, to become a guarantor or surety or otherwise lend its credit to another person or corporation.³

Further, the SEC opinion that you cited wherein the Commission opined that the execution of a deed of mortgage covering the real property of Laperal Development Corporation ("LDC") to secure payment of the proposed loan of another corporation is not *ultra vires* is not in all fours with the matter before us. In that situation, it is indicated in the secondary purposes of the articles of incorporation of LDC that it is authorized to guarantee the performance of any undertaking or obligation of other firms, entities or persons and pursuant thereto, to mortgage its real estate and other properties. Such is not applicable in this case.

³ De Leon, The Corporation Code of the Philippines Annotated, 2002 Edition, page 334 citing Brinson vs. Mill Supply Co., Inc., 14 S.E. 2D 505.

What is applicable is SEC Opinion dated March 24, 1982 addressed to Mr. Amado J. Lansang, Jr. wherein the Commission opined that the powers conferred on Hydro-Pipes (Phils.) cannot be "stretched" to cover the contemplated contract of guaranty or suretyship without amending its articles of incorporation.

It is of no moment that the amended by-laws of subject corporations provide that the members of the board have the power to guarantee, for and in behalf of the corporation, obligations of other corporations in which it has lawful interest. Where the by-laws conflict with the articles of incorporation, the latter controls. By-laws are subordinate to the charter of the corporation. To be valid, it must be consistent with the terms and spirit of the charter of the corporation.⁴

Since there is nothing in its amended articles of incorporation which confers RHI the power to enter into a contract of guarantee or suretyship, it is deemed that RHI is not authorized to do so especially since such act could prove to be disadvantageous to the corporation. Entering into such contracts would be *ultra vires* which, according to the strict construction of the term, is an act not within the express, implied, and incidental powers of the corporation conferred by the Code or articles of incorporation. It is an act which is not positively forbidden, but impliedly forbidden because not expressly or impliedly authorized.⁵

The foregoing 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.

Very truly yours,



VERNETTE G. UMALI-PACO
General Counsel

4 SEC Opinion dated August 5, 2002 addressed to Atty. Annie Victoria G. Aguilar.

5 De Leon, The Corporation Code of the Philippines Annotated, 2002 Edition, page 432 *citing* 7 Fletcher, pagers 561 to 562.