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## **TOP OF MIND**

By **FATIMA VILLARIN CERO**

# Are you Filipino enough to own land?

The 1987 Constitution reserves ownership of Philippine lands to Filipinos, whether individuals or a juridical entities, such as corporations. In fact, Section 7, Article XII of the 1987 Constitution is clear in that generally, private lands shall be transferred only to individuals, corporations, or associations qualified to acquire or hold lands of public domain.



The determination of who can own land in the Philippines appears to be more straightforward for individuals as it simply requires that they be classified as citizens of the Philippines falling under the definition of the Constitution on citizenship.

The challenge might be more apparent when it comes to determining whether a juridical person, like a corporation, is considered a Philippine corporation qualified to own land in the Philippines. Section 22 of Commonwealth Act No. 141 is instructive in that only corporations of which at least 60 percent of the capital stock belongs wholly to citizens of the Philippines are qualified to own a land within the limits provided by the law.

In SEC-OGC Opinion No. 16-15 dated June 1, 2016, the Securities and Exchange Commission (SEC), through its Office of the General Counsel (OGC), had the opportunity to opine on whether a non-stock, non-profit, foreign corporation organized solely to conduct charitable activities ("Foundation") can acquire land in the Philippines. About 90 percent of the total initial capital of the Foundation is contributed by foreign nationals, while the remaining 10 percent is contributed by Filipinos. The Foundation has seven board members with four foreigners and three Filipinos. The Foundation seeks to expand the coverage of its activities which would, however, require it to acquire land in the Philippines.

In our jurisdiction, there are different tests being applied to determine the nationality of a corporation. Primarily, it is the place of incorporation test (or simply, incorporation test) which should be applied in determining the nationality of a corporation since the Philippines adhere to the doctrine that a corporation is a creature of the state whose laws it has been created. A corporation organized under the laws of a foreign

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country, irrespective of the nationality of the persons who control it is necessarily a foreign corporation. In fact, the incorporation test is enshrined under Section 123 of the Corporation Code of the Philippines ("Corporation Code") which states that a foreign corporation is one formed, organized or existing under any laws other than those of the Philippines, regardless of the nationality of the people comprising it. In other words, under the incorporation test, a corporation duly organized under Philippine laws is considered a Philippine corporation. Conversely, a corporation duly organized under the laws of a foreign country is considered a foreign corporation.

However, while the incorporation test serves as the primary test, other tests such as the control test must be used for purposes of compliance with the provisions of the Constitution and of other laws on nationality requirements. Even if the corporation is a creature of the state, there is a need to further safeguard and regulate certain areas of investment and activities for the protection and interests of Filipinos. The control test is used to determine the eligibility of a corporation, which has foreign equity participation in its ownership structure, to engage in nationalized or partly nationalized activities. Simply put, since owning a land in the Philippines is a partly nationalized activity, the control test will be applied in determining if the Foundation is qualified to own land.

The SEC-OGC Opinion provides for further guidelines to determine the nationality of the Foundation for purposes of compliance with the 1987 Constitution and Commonwealth Act No. 141 on the nationality requirements in owning a land in the Philippines.

First, the nationality of a non-stock corporation is computed on the basis of the nationality of its members and not premised on the membership contribution.

Second, the extent of voting power of the members should be taken into consideration, not only the number of members, because the power to vote determines control in a corporation. The opinion went further into the reason why the second guideline is important. To compute the required ratio merely on the basis of the number of members without taking into account the voting rights of the members may give rise to a possible situation where

although foreign interest is only 40 percent of the total number, all or majority of the voting powers would be held by them and none or less from the 60 percent Filipino members, so that the corporation would in effect be in alien control.

In this connection, Section 89 of the Corporation Code provides that the rights of the members of any class or classes to vote may be limited, broadened, or denied to the extent specified in the articles of incorporation or by-laws. Unless so limited, broadened, or denied, each member, regardless of class, shall be entitled to one vote.

In a non-stock corporation, the general rule is that each member shall be entitled to one vote, regardless of the amount of the contribution. The exception is when the right of members of any class to vote is limited, broadened, or denied to the extent specified in the articles of incorporation or the by-laws.

Assuming that all of the guidelines described above have been complied with and thus, the Foundation is qualified to own land in the Philippines, it is worthy to note that foreigners should not constitute more the 40 percent of the members of the board of trustees of the Foundation, pursuant to Section 2-A of the Anti-Dummy Law.

Establishing whether a corporation is qualified to own a land in the Philippines may require a multi-step process and strict compliance. However, we should be mindful that all these requirements are intended to ensure that the interests of the Filipino people are protected and the Constitutional limits on ownership of land are strictly imposed.

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