Republic of the Philippines
Department of Finance
Securities and Exchange Commission
SEC Building, EDSA, Greenhills, Mandaluyong City
Office of the General Counsel

15 February 2016

SEC Opinion No.16 - 03
Retail Trade Law; Exceptions

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Attention: **Attys. Jenny R. Santiago, Paul Cornelius T. Castillo, and Kriselle Samantha D. Sy**

Dear Attorneys:

This pertains to your letter dated 27 January 2015, seeking confirmation from the Commission that the activities of Kawasaki Motors (Phils) Corporation ('KMPC') fall outside the coverage of Republic Act No. 8762 or the Retail Trade Liberalization Act of 2000 ('Retail Trade Law').

You disclosed that KMPC maintains and operates (18) eighteen service centers located in different key cities in the Philippines including the one in its principal office in Muntinlupa City. In each service center, KMPC provides regular maintenance and/or repair services on motorbikes of its clients which incidentally include the sale of spare parts and other materials (such as oils, fluids, etc.) reasonably necessary for the performance of services, for the convenience of its clients. The spare parts and materials are sold only when needed to fully perform service done to the motorbikes, not as an independent business.

Further, you mentioned that KMPC is also planning to sell motorbikes to the general public by setting up a single sales outlet at the existing service center located in its principal office. The motorbikes are all assembled in its principal office and no sale shall be conducted in any other location or service center. Moreover, KMPC is likewise planning to sell motorbikes to the government and its agencies, as well as engage in wholesale to industrial users (fleet sales) that further use the motorbikes for their own services.

Finally, you disclosed that as part of the incentive package it offers to its employees, KMPC allows its qualified employees to purchase motorbikes at better prices and terms not offered to the general public, either directly or with the aid of employee's cooperative.

Thus, you ask if the Commission confirms the following positions:

1. The maintenance and repair services performed by KMPC in its service centers, including the incidental sale of spare parts and materials reasonably necessary for the services, does not amount to retail trade under the Retail Trade Law;

2. Sales of motorbikes assembled in KMPC's principal office through a single/solitary outlet in the service center of its principal office, is not tantamount to retail trade under the Retail Trade Law;

3. Sales of motorcycles to the government and its agencies as well as to industrial users (fleet sales) on wholesale basis, is not considered as retail trade;

4. The sale of KMPC of motorbikes to its qualified employees (directly or through a cooperative), at prices and terms not offered to the general public, is also not included under and not covered by the Retail Trade Law.

"Retail trade" is defined as any act, occupation or calling of habitually selling direct to the general public merchandise, commodities or goods for consumption. Thus, for sale transactions to be considered as "retail", the following elements should concur:

(1.) The seller should be *habitually engaged in selling*;
(2.) The sale must be *direct to the general public*;
(3.) The object of the *sale is limited to merchandise, commodities or goods for consumption.*[1] (Emphasis supplied.)

Having said the above-stated basic premise, we now proceed to answer your queries.

As to your first query, we reply in the affirmative. We had previously opined that:

> "xxx [A] firm engaged in the business of rendering services, in some occasions, may require certain materials in order that the service may be made. It may supply these materials for the convenience of the client or when the materials required are produced exclusively by the same firm. Of course, the client has to pay for the cost of these materials separately from the cost of the service. In the same vein, the activity of repair of motorcycle units may involve replacement of parts, which necessarily must be paid for by the owner of the motorcycle unit being repaired. Although this is a sale, *the same is incidental to the repair* and is not being pursued as an independent business. Thus, the *same is not considered retail trade.* (Emphasis supplied.)"[2]

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[1] SEC Opinion July 11, 1995, addressed to Mr. Moises Villanueva
[2] SEC-OGC Opinion No. 08-14 dated 19 May 2014 addressed to Aranas Law Office

Thus, the sale by KMPC of spare parts and other materials reasonably necessary (such as oils, fluids, etc.) for the performance of the services it renders in its service center is not considered as retail trade, being incidental and reasonably necessary to the maintenance and repair of the motorcycles.

As to your second query, we answer in the affirmative. In SEC-OGC Opinion No. 09-22 dated 19 August 2009[3], we had already settled that sales to the general public, through a single outlet owned by a manufacturer of products manufactured, processed or assembled in the Philippines irrespective of capitalization, is not considered as retail, pursuant to Section 3(d) of the Retail Trade Law[4] and Section 2(d) of its Implementing Rules and Regulations ('IRR')[5], to wit:

> "'Moreover, even if the Court considers PLI as engaging in the Retail Trade, the company would still not fall under R.A. No. 8762. Under Section 2 (d) of the Rules and Regulations implementing Republic Act No. 8762, it provides that sales to the general public, through a single outlet owned by a manufacturer of products manufactured, processed or assembled in the Philippines irrespective of the capitalization, is not considered as retail. It must be pointed out that as admitted by both parties, PLI does not maintain any other office or display and selling area except in its principal office in Bangkal, Makati. *Thus PLI, having a single outlet that manufactures, processes or assembles laminates in the Philippines is not considered as engaging in retail sales. It is therefore immaterial that the word retail is stated in the primary purpose of PLI since what will govern will be R.A. 8762.* (pp. 1129-1130, record, Vol. 2)'
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> Applying the foregoing in the case of YMPH, the contemplated 3S Shop falls within the exception of retail trade. xxx xxx xxx" (Emphasis supplied.)

Hence, the plan of KMPC to set up a single sales outlet exclusively at the existing service center located in its principal office falls within the exception of retail trade.

As to your third query, we likewise reply in the affirmative.

With regard to KMPC's plan to sell motorbikes to industrial users (fleet sales) on wholesale basis, the same is not considered as retail trade because it involves producer goods, not consumer goods for household purposes.

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[3] Addressed to Aranas Consunji Barleta

[4] (d) Sales to the general public, through a single outlet owned by a manufacturer of products manufactured, processed or assembled in the Philippines, irrespective of capitalization.

[5] (d)Sales to the general public, through a single outlet owned by a manufacturer of products manufactured, processed or assembled in the Philippines, irrespective of capitalization.

Section 2(e) of the IRR of the Retail Trade Law provides that "*sales to industrial users or consumers who use the products bought by them to render service to the general public and/or produce or manufacture of goods which are in turn sold by them*" are not within the purview of the law. This is pursuant to the ruling of the Supreme Court in the case of *Marsman & Company, Inc. vs. First Coconut Central Company, Inc.*[6], to wit:

> "xxx xxx xxx The last element refers to the subject of the retailer's activities or what he is selling, i.e., consumption goods or consumers. *Consumer goods* may be defined as "goods" which are used or bought for use primarily for *personal, family, or household purposes.* Such goods are not intended for resale or further use in the production of other products.
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> *Producer goods* have been defined as "goods (as tools and raw materials) that are factors in the production of other goods and that satisfy wants only indirectly-called also auxiliary goods, instrumental goods, intermediate goods." They are by their very nature not sold to the public for consumption. As such, *the sale of producer goods used for industry or business is classified as a wholesale transaction.*
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> xxx xxx xxx
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> That the sales to industrial or commercial users do not fall within the scope of the Retail Trade Nationalization Law is further confirmed by Presidential Decree No. 714 promulgated on May 28, 1975 amending said law when the latter provided in its preamble that "*Whereas, it is believed to be not within the intendment of said nationalization law to include within its scope sales made to industrial or commercial user or consumers.*" (Emphasis supplied.)

Accordingly, the Commission had opined that the sale of "Network Box" to industrial and commercial users to provide computer network security for the said business firms and not for personal, family or household use, consumption and utilization is not embraced in the category of retail sale.[7] In another opinion, the Commission opined that the sale of chemical reagents, equipment and instruments directly to hospitals and laboratories cannot be considered as retail trade because it is not a sale of goods for consumption to the general public as end-user. The buyers (i.e., hospitals and laboratories) will use the products to render service to the general public.[8]

As to the sale by KMPC to the government, Section 2(f) of the IRR provides that "*sales to the government and/or its agencies and government-owned and controlled corporations*" are likewise not considered retail transactions.

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[6] G.R. No. L-39841, June 20, 1988,
[7] SEC-OGC Opinion No. 06-32, dated 2 August 2006 addressed to Cayetano Sebastian Ata Dado & Cruz.
[8] SEC-OGC Opinion No. 14-12, dated 2 June 2014 addressed to Reyes Esguerra Baluyut Benitez & Bongco Law Offices

As to your fourth query, you seek clarification whether KMPC will be engaging in retail if it allows KMPC's qualified employees to purchase motorbikes at better prices and terms not offered to the general public, either directly or with the aid of the employee's cooperative.

We answer in the affirmative. Such sale cannot be considered retail trade since the KMPC's goods are not sold to the general public but only to its qualified employees

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This position is supported by SEC-OGC Opinion 10-13[9], which provides:

> "In the case of the Company, auction of jewelry does not come within the ambit of retail business as defined by Republic Act No. 8762 since the Company's goods are not sold directly or readily available to the general public, but only to those who are invited to participate in a competitive bidding process. Further, the target clients of the Company need not be the final end user."

It shall be understood, however, that the foregoing opinion is rendered based solely on the facts and circumstances disclosed and relevant solely to the particular issue raised therein and 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 and investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered void.

Please be guided accordingly.

Very truly yours,

MANUEL HUBERTO B. GAITE
OGC Supervising Commissioner

[9] SEC-OGC Opinion 10-13, dated 30 March 2010 addressed to Del Rosario and Del Rosario
[10] Paragraph 7, SEC Memorandum Circular No.15, Series of 2003