Securities and Exchange Commission PHILIPPINES

OFFICE OF THE GENERAL COUNSEL

SEC OGC Opinion No. 23-10
Re: Retail Trade Law; Exceptions

19 May 2023

TEKO SOLUTIONS ASIA, INC.
5F Asian Star Building
Asean Drive, Alabang, Muntinlupa

Attn: MR. RONALD THOMAS L. FERNANDO

Dear Mr. Fernando:

This pertains to your letter dated 17 February 2020[1] requesting for opinion from the Commission that the activities of Teko Solutions Asia, Inc. ("Teko") fall outside the coverage of Republic Act No. 8762, otherwise known as the "Retail Trade Liberalization Act of 2000" ("Retail Trade Law").

In your letter, you mentioned that: (a) Teko is a domestic corporation, the ownership of which is 75.50% Filipino and 24.50% foreign (American); and (b) Teko's primary purpose under its Articles of Incorporation is "[t]o engage in the business of providing information technology solutions, I.T. enabled services, e-commerce, web design and applications, to enterprise, consumers, business, institutions and other end users without engaging in mass media, advertising nor in telecommunication activities."

Further, you stated that Teko's current and primary business endeavor is "teko.ph"[2] which is a website for e-commerce of maintenance and repair services for personal mobile devices, air-conditioning, refrigeration equipment, and other household appliances (hereinafter, the "Services") to address the need for timely servicing by trustworthy technicians, and to provide independent technicians, who do business on freelance/independent contractor basis, a sophisticated platform to offer their services to customers.

Finally, you disclosed that on occasions where completion of the Services by the independent technicians requires parts or materials on hand, independent technicians are constrained to postpone the performance of the Services until the parts or materials have been acquired, sometimes causing the customer to seek solution elsewhere. To address this, Teko proposes to stock parts and other materials usually needed for the Services and which can be readily sold to the independent technicians. The expected result is quicker response time and being able to provide complete solutions to customers.

Considering that Teko has foreign equity, you now seek confirmation of your position that:

1. The sale of parts and other materials, as described, is incidental to e-commerce of maintenance and repair services and is included in the general powers of a corporation under Section 35(k) of the Revised Corporation Code of the Philippines ("RCC");[3] and

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[1] Received by this Office on 27 February 2020.
[2] Website at <https://teko.ph/>
[3] SEC. 35. Corporate Powers and Capacity. – Every corporation incorporated under this Code has the power and capacity: xxx
(k) To exercise such other powers as may be essential or necessary to carry out its purpose or purposes as stated in the articles of incorporation.

2. The sale of parts and other materials to independent technicians in its pool is not equivalent to retail trade as defined and contemplated in the Retail Trade Law.

As to your first query, it is well-settled that a corporation has only such 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 power.[4] In the determination of what businesses may be carried on by a corporation, reference must be had to its charter, and unless the power to carry on a particular business is either expressly or impliedly conferred thereby, it does not exist.[5]

In short, a corporation has both express and implied or incidental powers. Express powers are those which are enumerated in Section 36 of the Corporation Code, which is reproduced as Section 35 of the RCC, and those which are sanctioned by the State in the corporation's Articles of Incorporation. Implied or incidental powers, on the other hand, are the corporation's "powers, attributes and properties . . . incident to its existence,"[6] which may be "essential or necessary to carry out its purpose or purposes as stated in its Articles of Incorporation."[7]

Article II of Teko's Articles of Incorporation provides:

> **SECOND:** That the purpose for which the said Corporation was formed is:
>
> **PRIMARY PURPOSE**
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> To engage in the business of providing information technology solutions, I.T. enabled services, e-commerce, web design and applications, to enterprise, consumers, business, institutions and other end users without engaging in mass media, advertising nor in telecommunication activities.
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> x x x x x x x x x

A perusal of the Articles of Incorporation of Teko shows that the "sale of parts and other materials" is not among the corporation's authorized purposes or activities. ***Neither is said activity necessary or incidental in the furtherance of Teko's primary business endeavor, "teko.ph," which is intended "to provide independent technicians who do business on freelance/independent contractor basis, a sophisticated platform to offer their services to customers."*** It is worthy to stress that, unlike in previous opinions, Teko is not engaged in the repair business itself; neither does it employ the technicians, as in fact the latter are considered independent. It merely provides the platform wherein the technicians and customers transact. Hence, it would be a stretch to say that the provision of the platform includes the sale of parts and other materials.

As to your second query, Section 3 of the Retail Trade Law, as amended,[8] defines "retail trade" as "any act, occupation or calling of habitually selling direct to the general public merchandise, commodities or good for consumption." Under Section 1(e) of Rule IV of the Implementing Rules and Regulations (IRR)[9] of the Retail Trade Law, as amended, "*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*" is not considered as retail.

The Supreme Court, in *Marsman & Company, Inc. v. First Coconut Central Company, Inc.,*[10] ruled that for a sale 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; and
> 3) The object of the sale is *limited to merchandise, commodities or goods for consumption. (Emphasis supplied)*

In the aforecited *Marsman Case,* the Supreme Court defined consumption goods or consumer goods *vis-à-vis* producer goods, *viz:*

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[4] SEC Letter dated 20 June 1989 addressed to Mr. Philipps C. Comandante, citing 13 Am. Jur. Sec. 739.
[5] *Id., citing: Chiwakla Line v. Disnukes,* 87 Ala. 344, 650, 122, 5LRA 100, cited in Am. Jur. supra, Sec. 743.
[6] SEC-OGC Opinion No. 20-09 dated 04 August 2009, addressed to Atty. Erwin R. Orocio, citing Section 2 of the Corporation Code.
[7] Paragraphs (g) and (k) of Section 35 of the Revised Corporation Code.
[8] On 21 January 2022, R.A. No. 11595, otherwise known as "An Act Amending R.A. No. 8762 or the RTLA," took effect.
[9] IRR of the Retail Trade Laws, as amended by R.A. No. 11595, 09 March 2022.
[10] Hereafter, the "Marsman Case." G.R. No. L-39841, 20 June 1988.

> x x x The last element refers to the subject of the retailer's activities or what he is selling, *i.e., consumption goods or consumer goods.* 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."* In other words, *consumer goods are goods which by their very nature are ready for consumption.*
>
> *Producer goods have been defined as "goods (as tools and raw material) 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. x x x *(Emphasis supplied)*

The Commission opined that sale of cranes and water jet cutting tools to firms engaged in construction, mining, and similar activities does not constitute retail trade, *as the sale involves producer goods, not consumer goods, to be used for industry or business by industrial and commercial users, not the general public.*[11] In another opinion, the Commission ruled that highly advanced telecommunication and service processing equipment may *be considered as producers goods, not as consumer goods, inasmuch as they will be used for business purposes, not for household purposes.* Accordingly, the sale thereof is not considered as "retail transaction."[12] Similarly, the Commission ruled that the products to be sold subject of this opinion — *door control, automatic and revolving door, glass fittings and systems, room dividing systems, etc. — are producer goods which shall be used by the real estate developer in the construction of buildings and other infrastructure.* Hence, the sale of such are not considered retail.[13]

Applying the foregoing discussion to Teko based on the facts disclosed in your letter, it appears that Teko's sale of parts and other materials to the independent technicians in its pool involves sale of *producer goods* because said parts and materials will be used by the independent technicians in rendering their services. Said parts and other materials are not goods primarily for personal, family or household purposes that are ready for consumption.

Accordingly, we affirm your position that Teko's sale of parts and other materials to its independent technicians is not within the purview of the Retail Trade Law.

It shall be understood that the foregoing opinion is rendered solely on the basis of the facts, circumstances and documents disclosed/submitted, and relevant solely to the particular issue raised therein. It 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.[14] If, upon further inquiry or 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,

Romuald C Padilla
General Counsel

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[11] SEC-OGC Opinion No. 14-34 dated 18 November 2014, addressed to Atty. Erwin S. Herrera. Emphasis supplied.
[12] SEC Opinion dated 11 July 1995, addressed to Mr. Moises Villanueva. Emphasis supplied.
[13] SEC-OGC Opinion No. 07-13, 30 July 2013, addressed to Atty. Rosaria S. Bernaldo. Emphasis supplied.
[14] Paragraph 7, SEC Memorandum Circular No. 15, Series of 2003.

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