Republic of the Philippines
Department of Finance
SECURITIES AND EXCHANGE COMMISSION
SEC Bldg. EDSA, Greenhills, Mandaluyong City

July 18, 2007

ROMULO MABANTA BUENAVENTURA SAYOC & DE LOS ANGELES (RMBSA)
30th Floor, Citibank Tower, 8741 Paseo de Roxas, Makati City, Philippines

SEC OGC Opinion No. 07-14
Re: Manufacturing is not incidental to the business of selling

Attention: Aileen Sarah T. Lerma

Gentlemen:

This refers to your letter dated February 22, 2007 requesting opinion on whether the manufacture of fire fighting apparel or gears by your client, 911 Alarm, Inc. is covered by the purpose in its articles of incorporation, as amended, to wit:

> "To engage in, conduct, and carry on the business of buying, selling, distributing, marketing at wholesale and retail insofar as may be permitted by law, all kinds of goods, commodities, wares and merchandise of every kind and description; to enter into all kinds of contracts for the export, import, purchase, acquisition, sale at wholesale or retail and other disposition for its own account as principal or in a representative capacity as manufacturer's representative, merchandise broker, indentor, commission merchant, factors or agents, upon consignment of all goods, wares, merchandise or products, whether natural or artificial."

The most important clause of the Articles of Incorporation is the statement of the purpose(s) or objects of the proposed corporation or the nature of the business sought to be transacted.

The significance of the purpose clause in the articles of incorporation is that it confers, as well as limits, the powers which a corporation may exercise.[1]

[1] Villanueva, Philippine Corporate Law, p. 197.

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Thus, the Corporation Code directs that a corporation can only have such powers as are expressly granted to it by law and by its articles of incorporation, those which may be incidental to such conferred powers, those reasonably necessary to accomplish its purposes and those which may be incidental to its exercise (Sec. 25, Corporation Code).

For that matter, the SEC has consistently ruled in a string of opinions that a corporation cannot engage in business if it is not expressly authorized in its articles of incorporation. The SEC has ruled that the rules governing the construction of charters of corporation are, for the most part, the same as those which govern the construction and interpretation of statutes, contracts and other written instruments.[2]

The SEC held that it is a general rule that when the charter of a corporation confers certain enumerated powers on the corporation, it is to be construed as including incidental powers reasonably necessary to the proper exercise of the enumerated powers and as excluding all other non-enumerated powers; and that if the powers are expressly enumerated in details, "such specification by implication excludes all other powers or rights except such incidental or subordinate rights and powers as may be necessary to an exercise of the powers and rights expressly given." The specification of certain powers operates as a limitation on such objects as are embodied therein and is an implied prohibition of the exercise of other distinct powers. Furthermore, express powers cannot be enlarged by implication; thus, it was held that the general language of a charter following a recitation of specific power is construed and confined within the limitations of the specific power named.[3]

In the situation before us, the issue is whether or not manufacturing is incidental to or in furtherance of the business of selling.

The answer is in the negative. Whereas marketing and selling are logically inferable from the business of manufacturing considering that there must be an end-user for the goods or products manufactured, the same could not be said for the business of selling as covering the business of manufacturing. The underlying reason for this is that it is not necessary or indispensable that a trader or dealer of goods must also be the manufacturer or producer of the goods it sells.

The fundamental difference in the nature of business of a manufacturer from that of a seller or dealer of goods could be inferred from a reading of the

[2] SEC Opinion, January 26, 1994
[3] Villanueva, Philippine Corporate Law, p. 201.

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Retail Trade Liberalization Act of 2000 which excludes from the coverage of "retail trade" (described as an act, occupation or calling or habitually selling direct to the general public merchandise, commodities or goods for consumption) the sale made by a "manufacturer or processor of the products manufactured, processed or produced by him if his capital does not exceed P100,00.00."

If manufacturing is incidental to the business of trading or selling, there would have been no need for the distinction under the law since it could be assumed that selling necessarily entails manufacturing the goods being traded or sold.

In fact, in the Opinion of the Department of Justice dated November 24, 1983 (Opinion No, 178, s. 1983) interpreting the provisions of the Retail Trade Nationalization Act (RA 1180), As Amended by PD No. 714, it was held that:

> "While it is true that the nature of Westchem Marketing's business, which is, that it sells its merchandise to customers who either re-sell them or utilize or process them in connection with their own business of rendering service or manufacturing, would appear to make it fall within the purview of the third exception quoted above, it is to be noted that the said exception explicitly refers only to a "manufacturer" or a "processor", and does not include a mere importer or trader. It is settled in statutory construction that exceptions in a statute are to be strictly construed."

The Department of Justice went further by declaring that:

> "Since Westchem Marketing is admittedly not a manufacturer or processor of the imported products that it resells to dealers or industrial companies, it does not satisfy the requirements of the third exception. Despite the broad intent in P.D. 714 to exempt sales made to industrial or commercial users or consumers (2nd "Whereas" clauses). The element of being a manufacturer or processor cannot be waived in the construction of paragraph (c) without violating its literal import, and without undue or warranted implications on the exception contained in paragraph (a)."

It is therefore clear from a reading of the above opinion that being a seller, trader, dealer or importer of goods does not automatically classify one as a

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manufacturer because manufacturing is not fairly and reasonably necessary or incidental to the business of selling.

Therefore, unless the articles of incorporation of 911 Alarm, Inc. is amended to include the purpose of manufacturing fire fighting apparels or gears, the corporation may not legally undertake the same. The fact that the corporation has in its secondary purposes the all-embracing proviso that it can "conduct and transact any and all business," the same cannot be stretched and interpreted in such a way as to include purposes not incidental, implied or necessary for the furtherance of the purposes stated in the Articles of Incorporation of the subject corporation.

For your information and guidance.

VERNETTE G. UMALI-PACO
General Counsel

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