



**Republic of the Philippines
Department of Finance
Securities and Exchange Commission
OFFICE OF THE GENERAL COUNSEL**

26 November 2019

SEC-OGC Opinion No. 19-57
Wholly or Partly Nationalized
Activity; Anti-Dummy Law

ATTY. GENER C. SANSAET
LEGAL COUNSEL

Ambicare Pharmaceuticals, Inc.
#9 Amsterdam Extension, Merville Park Subd.,
Paranaque City, Metro Manila

Dear Atty. Sansaet:

This refers to your letter dated 02 October 2019 requesting the Commission's opinion on whether Ambicare Pharmaceuticals, Inc. ("Ambicare") is an enterprise engaged in a wholly or partially nationalized activity under existing laws.

In your letter, you stated that Ambicare is a corporation primarily engaged in the importation and trading of pharmaceutical, cosmetic and food products having a paid-up capital of ₱14,000,000.00. You further disclosed that Ambicare is engaged in the distribution, marketing and wholesaling (except retailing) of branded generic pharmaceutical, nutraceutical and cosmetic products.

You also described Ambicare's business model as follows: (1) Business Development (Product Sourcing); (2) Purchasing and Importation; (3) Quality Control; (4) Warehousing/Storage; (5) Sales and Marketing; (6) Distribution and Logistics; and (7) Channels (Customers) – Distributors, Chain Drugstores, Hospitals, Wholesalers, Independent Drugstores, and Private and Government Institutions.

Hence, the instant query.

To determine whether Ambicare is engaged in a wholly or partly nationalized activity, the primary purpose of the corporation must be examined. The primary purpose of Ambicare as indicated in its Amended Articles of Incorporation, as found in our records¹, is as follows:

¹ Ambicare's Amended Articles of Incorporation dated 04 October 2018.

"That the primary purpose of this corporation is to engage in the business of **wholesale trading of various goods and import and export activities for products such as but not limited to pharmaceutical, food, cosmetic products, consumer goods, medical device, molecular diagnostic household products and other items related thereon** and in furtherance of the above purposes, the corporation shall have the authority and power to acquire, hold, lease, use or dispose in any manner real properties, including the improvements thereon, for the accomplishment and attainment of any one or more of the Corporation's purposes, all subject to the limitations established by law." (Emphasis ours)

Pertinent to the above primary purpose, Republic Act (R.A.) No. 8762, otherwise known as the Retail Trade Liberalization Act of 2000, prohibits foreign enterprises with a paid-up capital of less than US\$2,500,000.00 from engaging in the retail trade business as it is reserved exclusively for Filipino citizens and corporations wholly owned by Filipino citizens.² Concomitantly, R.A. 8762, defines retail trade, to wit:

"Retail Trade" shall mean any act, occupation or calling of habitually **selling direct to the general public** merchandise, commodities or goods for consumption x x x."³ (Emphasis supplied)

Moreover, for sales transactions to be considered as "retail", the following elements must 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 sale is limited to merchandise, commodities or goods for consumption."⁴

Furthermore, the Implementing Rules and Regulations ("IRR") of R.A. 8762 enumerates sale transactions which are not considered as retail, thus:

"Section 2. Sales not Considered as Retail – the following sales are not considered as retail:

x x x

(e) Sales to industrial and commercial 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; or

(f) Sales to the government and/or its agencies and government-owned and controlled corporations."

In a previous Opinion, we opined that one of the elements of a retail sale is that the products sold are consumer goods. Consumer goods, as defined by the Supreme Court, are goods which are used or brought 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.⁵

² Section 5, R.A. 8762.

³ Section 3 (1), R.A. 8762.

⁴ SEC-OGC Opinion No. 19-46 dated 07 October 2019.

⁵ SEC-OGC Opinion No. 18-14 dated 24 August 2018.

In another Opinion, the Commission clarified that R.A. 8762 covers only the sale of goods for consumption of the general public as an end-user.⁶ Consequently, distributorship agreements with independent corporations who will sell such products to other corporate end-users is not considered retail sale.⁷ In addition, the items sold must be the final and end (uses) of a product which directly satisfies human wants and needs for home and daily life.⁸

An examination of the primary purpose clause of Ambicare as well as its declared business model shows that its activities do not fall within the purview of R.A. 8762 considering that it engages in wholesale trading, thus, its sales are not to the general public as end-users. Indeed, the customers of Ambicare procures the latter's products with the view of reselling them (i.e. drugstores, pharmaceutical companies, wholesalers) or using these products in the delivery of services (i.e. hospitals, private and government institutions, etc.).

Furthermore, Ambicare is not subject to the foreign equity restriction imposed on domestic market enterprises⁹ since its paid-up capital amounting to ₱14,000,000.00 is more than the equivalent of US\$200,000.00.

Consequently, since Ambicare is not engaged in a wholly or partly nationalized activity, the Anti-Dummy Law does not apply.

It shall be understood that the 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 standing rule binding upon the Commission in other cases or upon the courts whether of similar or dissimilar circumstances.¹⁰ 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.


ROMUALD C. PADILLA
Officer-in-Charge

⁶ SEC-OGC Opinion No. 14-12 dated 2 June 2014.

⁷ SEC-OGC Opinion 6-32 dated 2 August 2006.

⁸ Ibid.

⁹ Foreign Investment Act, Section 8. List of Investment Areas Reserved to Philippine Nationals (Foreign Investment Negative List). – x x x **Small and medium-sized domestic market enterprises with paid-in equity capital less than the equivalent of two hundred thousand US dollars (US\$200,000) are reserved to Philippine nationals,** x x x (Emphasis ours)

¹⁰ SEC Memorandum Circular No. 15, Series of 2003.