Republic of the Philippines
Department of Finance
Securities and Exchange Commission

OFFICE OF THE GENERAL COUNSEL

31 January 2019

SEC-OGC Opinion No. 19-01
Re: Assignment of All or Substantially All of the Assets of a Corporation

JOSELITO P. GALICIA
Director, Wisecable
Purok Galingan, Mankilam, Tagum City

Gentlemen:

This is in response to your letter dated 1 December 2018 requesting an opinion regarding a proposed assignment by a corporation ("Corporation A") of the assets of one of its branches to another entity.

You stated in your letter that Corporation A is a domestic corporation registered with this Commission whose primary purpose is to provide cable TV services. Corporation A maintains five (5) branches in different areas of the Philippines. It intends to assign all assets of one of its branches (Davao del Norte) to a single proprietorship. The assets of the five branches are more or less about the same size, subscriber base and cable set up.

Thus, you are requesting for an opinion on whether the proposed assignment is considered a sale of all or substantially all of the assets of Corporation A that would require stockholders' approval.

Section 40 of the Corporation Code ("Code") provides:

> "Section 40. Sale or other disposition of assets. - Subject to the provisions of existing laws on illegal combinations and monopolies, a corporation may, **by a majority vote of its board of directors or trustees, sell, lease, exchange, mortgage, pledge or otherwise dispose of all or substantially all of its property and assets**, including its goodwill, upon such terms and conditions and for such consideration, which may be money, stocks, bonds or other instruments for the payment of money or other property or consideration, **as its board of directors or trustees may deem expedient, when authorized by the vote of the stockholders**

> **representing at least two-thirds (2/3) of the outstanding capital stock**, or in case of non-stock corporation, by the vote of at least two-thirds (2/3) of the members, in a stockholders' or members' meeting duly called for the purpose. x x x
>
> A **sale or other disposition shall be deemed to cover substantially all the corporate property and assets if thereby the corporation would be rendered incapable of continuing the business or accomplishing the purpose for which it was incorporated**. x x x" (Emphasis ours)

Section 40 of the Code defines the term 'sale or disposition of all or substantially all the assets' as one which will render the corporation incapable of continuing the business or accomplishing the purposes for which it was incorporated. Any disposition short of this will not need stockholders' action.[1] Thus, the litmus test to determine the applicability of Section 40 would be the capacity of the corporation to continue its business after the sale of all or substantially all its assets.[2]

Same Section provides:

> "x x x
>
> Nothing in this section is intended to restrict the power of any corporation, without the authorization by the stockholders or members, to **sell, lease, exchange, mortgage, pledge or otherwise dispose of any of its property and assets if the same is necessary in the usual and regular course of business of said corporation or if the proceeds of the sale or other disposition of such property and assets be appropriated for the conduct of its remaining business**." (Emphasis ours)

Thus, if the property to be sold constitutes merely a part of the assets and the sale thereof will not render the corporation incapable of continuing its business or if the disposition is necessary in the usual and regular course of business, the Board of Directors as it may deem expedient and in good faith, may dispose the same without the approval of the stockholders.[3] To determine if the sale is made in the ordinary course of business, the test is not the amount involved but the nature of the transaction.[4]

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[1] SEC Opinion dated December 4, 1990, Dr. Raul D. Jara, M.D. citing Campos, Corporation Code, Comments, Notes and Selected Cases, 1981 Ed)
[2] Y-I Leisure Philippines, INC., YATS International Ltd. AND Y-I Clubs and Resorts, Inc., v. James Yu, G.R. No. 207161, September 08, 2015
[3] SEC Opinion dated August 21, 1995, RP Enterprises, Inc.
[4] SEC-OGC Opinion No. 13-13, Mr. Jeric Hechanova

You wrote in your letter:

> "Considering that Corporation A will dispose the assets pertaining to only one (1) of its branch offices with roughly less than a third or even a quarter of its total assets, the same constitute sale, disposition or assignment of only a part of Corporation's assets which only requires approval of the majority of the Board because it will not render Corporation A incapable of continuing its business or accomplishing the purpose for which it was incorporated."

Accordingly, in the absence of any self-imposed condition as contained in an agreement[5] or in the by-laws or other documents, the proposed assignment can be made by a mere majority vote of its Board of Directors.

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. 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.[6] 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.

CAMILO S. CORREA
General Counsel

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[5] SEC Opinion dated March 14, 1991, Mr. Rodolfo B. Valdez, Wack Wack Golf and Country Club
[6] SEC Memorandum Circular 2003-15, No.7