

Memorandum



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To: David Viviers

From: [s 9(2)(a)]

Date: 24 July 2014

File Ref: H2-100-QYE

Subject: Qing Ye and GMP Pharmaceuticals Limited – retrospective administrative penalties

For Your: Action

Introduction

1. This Memorandum considers whether the Regulator should require Qing Ye and/or GMP Pharmaceuticals Limited (together the "**Applicants**"), as applicants for retrospective consent for applications 201410049 and 201410050 (together the "**Applications**"), to pay the administrative penalty(s) before consent is granted.

Executive Summary

2. I have concluded that the Regulator should require that an administrative penalty be paid by the Applicants under section 53 of the Overseas Investment Act ("**Act**") before consent is granted to the Applications.
3. The amount of the administrative penalty, having regard to circumstances of the breach and regulation 32(2)(a) and (b) of the Overseas Investment Regulations 2005 ("**Regulations**"), should be set at \$10,000 for the Applications.
4. The proposed administrative penalty of \$10,000 is not unduly harsh and oppressive given the value of the relevant assets and the nature of, and the reasons for, the retrospective consents.

Factual Background

5. The Applicants are Qing Ye, an Australian citizen, and GMP Pharmaceuticals Limited, a company incorporated in New Zealand on 18 July 2001. The factual background to the Applications is as follows:

Pharmaceutical Land acquisition:

6. On 30 May 2002, Qing Ye acquired the property situated at 12 Averton Place, East Tamaki, Auckland, Certificate of Title NA60C/926 ("**Pharmaceutical Land**"). The Pharmaceutical Land was not sensitive pursuant to the Overseas Investment Act 1973 ("**1973 Act**") and therefore did not require consent under the 1973 Act.

Pharmaceutical Land business establishment:

7. From May 2002 to 2005, Qing Ye established a pharmaceutical business and constructed a pharmaceutical manufacturing facility on the Pharmaceutical Land. Qing Ye confirmed that the cost to establish the pharmaceutical business did not meet, or exceed, the threshold to trigger an overseas investment in significant business assets under the 1973 Act. Accordingly, consent under the 1973 Act is not, and was not, required.

Dairy Land acquisition:

8. Qing Ye entered into an agreement for sale and purchase, dated 29 August 2009, to acquire the land situated at 5-7 Averton Place, East Tamaki, Auckland, Certificate of Title NA53D/1046 ("**Dairy Land**") from Colin Bernard Flavell, Valerie Kay Flavell and Brian Anthony Teare ("**Dairy Land Agreement**"). The Dairy Land, which borders the west of the Pharmaceutical Land, is sensitive land under the Act and the Dairy Land Agreement was not conditional upon consent under the Act. The acquisition of the Dairy Land settled on 19 September 2009. Accordingly, Qing Ye requires retrospective consent under the Act for the acquisition of the Dairy Land.

Lease Arrangements:

9. From 2009 to 2012, Qing Ye, GMP Pharmaceuticals Limited and GMP Dairy entered into various leasing arrangements in relation to the Pharmaceutical Land and Dairy Land. However, even though these lease agreements were likely to be (either individually or collectively) acquisitions of leasehold interests in sensitive land, these lease transactions are exempt pursuant to Regulation 33(1)(a)(ii). Accordingly, these lease arrangements did not, and do not, require consent under the Act.

Dairy Land business establishment:

10. Following the settlement of the Dairy Land, Qing Ye invested in the construction of an advanced dairy processing facility and established a dairy business on the Dairy Land. The cost to establish the dairy business did not reach the threshold under the Act to constitute an overseas investment in significant business assets (s13(1)(b)). Consent is therefore not required for the establishment of the dairy business on the Dairy Land.

Proposed Purchase Land Acquisition:

11. GMP Pharmaceuticals Limited entered into an agreement for sale and purchase, dated 30 October 2013, to acquire the land situated at 10 Averton Place, East Tamaki, Auckland, Certificate of Title 531914 ("**Proposed Purchase Land**") from Murray Stewart Stringer ("**Proposed Purchase Land Agreement**"). The Proposed Purchase Land is sensitive land under the Act. The Proposed Purchase Land Agreement was not initially conditional upon consent under the Act. While a Variation to an Agreement for Sale and Purchase, dated 2 April 2014, was subsequently executed to include an Overseas Investment Act condition, this overseas investment has already been given effect. Accordingly, consent to acquire the Proposed Purchase Land (technically being a retrospective consent as this transaction has already been given effect) is required.

The Law

12. Section 53 of the Act provides:

The regulator may require the applicant for a retrospective consent to pay an administrative penalty before the consent is granted.

13. Regulation 32 of the Regulations provides:

"For the purposes of section 53 of the Act, the administrative penalty that the regulator may require an applicant for a retrospective consent to pay is an amount that is not more than \$20,000.

In determining the amount of the administrative penalty under subclause (1), the regulator must consider whether requiring the applicant to pay that amount would be unduly harsh and oppressive, given –

- a. the value of the consideration for the assets that was acquired under the relevant overseas investment transaction; or*
- b. the nature, or the reasons for, the retrospective consent."*

Analysis

Should the regulator require the Applicants to pay an administrative penalty?

14. The purpose of administrative penalties is to deter companies and individuals from circumventing the Act and acquiring an interest in sensitive New Zealand assets without consent. Administrative penalties may also discourage investors from applying for consent only when they are found to have breached the Act.
15. In these circumstances, an administrative penalty should be imposed to ensure that the Applicants are aware that breaches of the Act will result in the Overseas Investment Office ("OIO") taking action. Administrative penalties should be levied to discourage applicants from such actions and to take more notice of the need to seek Overseas Investment Act consent.
16. There is no evidence to support a decision not to impose an administrative penalty.

Value of the consideration of the assets acquired:

17. The consideration specified in the Dairy Land Agreement is [s 9(2)(b)(ii)] and the consideration specified in the Proposed Purchase Land Agreement is [s 9(2)(b)(ii)]

Sensitivities of the Dairy Land and Proposed Purchase Land:

18. The Dairy Land and Proposed Purchase Land are sensitive land under the Act. The Pharmaceutical Land was not sensitive under the 1973 Act.

The nature of, and reasons for, the retrospective consents:

19. The Applicants submit the following:
 - (a) prior to Qing Ye's acquisition of the Dairy Land, he engaged professional legal advisors and purchased the property through a real estate agent. Qing Ye has submitted that when the Dairy Land Agreement was provided to him from the real estate agent, it indicated that consent under the Act was not required. Further, Qing Ye thinks that he would have passed the unsigned Dairy Land Agreement to Mr Bong (Qing Ye's solicitor) and asked Mr Bong to advise on any matters that Mr Bong thought applicable before Mr Ye signed the Dairy Land Agreement. As neither advisor informed him of the requirements of the Act, Qing Ye proceeded with the acquisition;
 - (b) further, Qing Ye was under the mistaken impression that Australian citizens are automatically treated as New Zealanders once they arrive into New Zealand (that is, Qing Ye was unaware of the difference between being entitled to be resident, in terms of immigration law, and the requirement to be a citizen of, or ordinarily resident in, New Zealand, under the Act); and
 - (c) it was also under these mistaken impressions that resulted in GMP Pharmaceuticals Limited, to which Qing Ye is the director and sole shareholder, to enter into the Proposed Purchase Land Agreement.
20. It seems that Qing Ye was unaware that he required consent under the Act to acquire the Dairy Land and Proposed Purchase Land. Therefore, it does not appear that there was any intention to circumvent the Act or otherwise not comply with the legal requirements of the Act. While ignorance of the law is no defence, this case must be differentiated from someone who knowingly breaches the Act.
21. In mitigation, the OIO notes that Qing Ye has taken steps to alleviate the breach of the Act in relation to the Proposed Purchase Land (such breach being that Qing Ye gave effect to the transaction prior to obtaining consent under the Act) by amending the Proposed Purchase Land Agreement to include an Overseas Investment Act condition. Accordingly, when Qing Ye became aware of his obligations under the Act, he has not taken steps to progress the transaction.

22. Further, the Applicants brought the matter to the OIO's attention and have generally co-operated with the application process.

What amount should the administrative penalty be?

23. Taking into account:

- (a) the value and features of the Dairy Land and the Proposed Purchase Land (which places its sensitivity at the lower end of the spectrum);
- (b) the Applicants have taken steps to alleviate the breaches, by amending the Proposed Purchase Land Agreement to include an Overseas Investment Act condition;
- (c) the Applicants brought the matter to the attention of the OIO; and
- (d) the failure to obtain consent being the result of ignorance of the law rather than wilful circumvention of the Act;

a penalty of \$10,000 should be imposed. This penalty is not unduly harsh or oppressive but recognises the breach of the Act by the Applicants and will act as a deterrent.

Recommendations

24. I recommend that you agree that:

- (a) an administrative penalty be paid by the Applicants before the consent is granted;
- (b) an amount of \$10,000 for the Application is not "unduly harsh and oppressive" having regard to the value of the property, or the nature of, and the reasons for, the retrospective consents; and
- (c) the amount of the administrative penalty be set at \$10,000 for the Applications.

David Viviers
Team Manager, Overseas Investment Office

Agree:

Disagree:

Date:

Released under the Official Information Act 1982