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REPORT OF CASES

DETERMINED IN THE

SUPREME COURT OF THE PHILIPPINES

FIRST DIVISION

[G.R. No. 182375. December 2, 2015]

HADJI RAWIYA SUIB,* *petitioner, vs.* **EMONG EBBAH and the HONORABLE COURT OF APPEALS, 22ND DIVISION, MINDANAO STATION, CAGAYAN DE ORO CITY,** *respondents.*

SYLLABUS

1. REMEDIAL LAW; SPECIAL CIVIL ACTIONS; *CERTIORARI*; AN ORIGINAL OR INDEPENDENT ACTION BASED ON GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION AND WILL LIE ONLY IF THERE IS NO APPEAL OR ANY OTHER PLAIN, SPEEDY, AND ADEQUATE REMEDY IN THE ORDINARY COURSE OF LAW AND IT CANNOT BE A SUBSTITUTE FOR A LOST APPEAL.— Suib availed of the wrong remedy by filing the present special civil action for *certiorari* under Rule 65 of the Rules of Court to assail a final judgment of the Court of Appeals. Suib should have filed a petition for review under Rule 45 of the Rules of Court. A special civil action for *certiorari* under Rule 65 is an original or independent action based on grave abuse of discretion amounting to lack or excess of jurisdiction and it will lie only if there is no appeal or any other plain, speedy, and adequate

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* Hadji Rawiya Suib should be stated as Hadja Rawiya Suib.

remedy in the ordinary course of law; it cannot be a substitute for a lost appeal. In the case at bar, Suib is not without any plain, speedy, and adequate remedy as the remedy of an appeal is still available. Hence, the present petition for *certiorari* will not prosper even if the ground is grave abuse of discretion.

2. ID.; ID.; ID.; IN CASES WHERE THE PARTY AVAILED OF THE WRONG REMEDY, THE COURT, IN THE SPIRIT OF LIBERALITY AND IN THE INTEREST OF SUBSTANTIAL JUSTICE, HAS THE RIGHT TO TREAT THE PETITION AS A PETITION FOR REVIEW, IF THE PETITION FOR *CERTIORARI* WAS FILED WITHIN THE REGLEMENTARY PERIOD WITHIN WHICH TO FILE A PETITION FOR REVIEW ON *CERTIORARI,* WHEN ERRORS OF JUDGMENT ARE AVERRED, AND WHEN THERE IS SUFFICIENT REASON TO JUSTIFY THE RELAXATION OF THE RULES.— In cases where the petitioner availed of the wrong remedy, the Court, in the spirit of liberality and in the interest of substantial justice, has the right to treat the petition as a petition for review: (1) if the petition for *certiorari* was filed within the reglementary period within which to file a petition for review on *certiorari*; (2) when errors of judgment are averred; and (3) when there is sufficient reason to justify the relaxation of the rules. Consulting the records, we find that the present petition was filed within the reglementary period within which to file a petition for review under Rule 45, which also raised errors of judgment. In detail, after receipt of the assailed Resolution dated 26 February 2008, Suib filed a Motion for Extension of Time to File Petition (with Motion for Leave) on 3 April 2008, requesting for an additional thirty (30) days or until 3 May 2008 within which to file a petition for review under Rule 45 of the Rules of Court. However, on 2 May 2008, Suib filed a Petition for *Certiorari* under Rule 65, well within the reglementary period within which to file a petition for review under Rule 45, which was until 3 May 2008. Therefore, the Court deems it proper and justified to relax the rules and, thus, treat the instant petition for *certiorari* as a petition for review.

3. ID.; APPEALS; FAILURE TO ATTACH THE REQUIRED COPY OF THE APPEALED DARAB DECISION IS A SUFFICIENT GROUND FOR THE DISMISSAL OF THE APPEAL; SUITORS DO NOT HAVE THE LUXURY OF

FILING A PLEADING WITHOUT THE NECESSARY ATTACHMENTS; OTHERWISE, THE COURT SHALL CONSIDER THE SAME AS A MERE SCRAP OF PAPER AND MAY DISMISS THE SAME OUTRIGHT.— On 10 May 2006, the Court of Appeals ordered Suib, among others, to submit a legible copy of the DARAB Decision pursuant to Section 7, Rule 43 in relation to Section 1(g), Rule 50 of the Rules of Court. However, Suib was able to submit a copy of the DARAB Decision to the Court of Appeals only after filing two (2) Compliances or only after almost two (2) months since Suib filed the petition. The pertinent Rules read: Section 1(g), Rule 50: Section 1. *Grounds for dismissal of appeal*. — An appeal may be dismissed by the Court of Appeals, on its own motion or on that of the appellee, on the following grounds: x x x x (g) Failure of the appellant to take the necessary steps for the correction or completion of the record within the time limited by the court in its order; x x x x Section 7, Rule 43: **Section 7.** *Effect of failure to comply with requirements*. — The failure of the petitioner to comply with any of the foregoing requirements regarding the xxx contents of and the documents which should accompany the petition **shall be sufficient ground for the dismissal thereof**. (n) A reading of the aforesaid provisions reveals that the requirement in Section 1, Rule 50 in relation to Section 7, Rule 43 of the Rules of Court is mandatory and jurisdictional. Thus, Suib's failure to attach the required copy of the appealed DARAB Decision is a sufficient ground for the dismissal of her appeal. A litigant, before filing a pleading to the courts, must first prepare all the necessary attachments to his/her pleading. As it stands, suitors do not have the luxury of filing a pleading without the necessary attachments; otherwise, the court shall consider the same as a mere scrap of paper and may dismiss the same outright.

4. ID.; ID.; SHOULD BE FILED WITHIN FIFTEEN DAYS FROM THE NOTICE OF JUDGMENT; THE PRESENT PETITION FOR REVIEW ASSAILING THE DECISION AND RESOLUTION OF THE DARAB WAS FILED BEYOND THE REGLEMENTARY PERIOD.— One glaring fact that cannot escape us is that the petition for review filed before the Court of Appeals, which assailed the Decision and Resolution of the DARAB, was filed beyond the reglementary period. As borne by the records, Suib received a copy of the DARAB Decision and Resolution on 5 June 1998 and 21

December 1998, respectively, and it was only after eight (8) long years since the assailed DARAB Decision and Resolution were received when Suib filed an appeal to the Court of Appeals on 7 April 2006. Without doubt, eight (8) years is beyond the reglementary period within which to file an appeal from a decision of the DARAB to the Court of Appeals as provided in Rule 43, Section 4 of the Rules of Court, which mandates that appeals should be filed within fifteen (15) days from notice of the judgment: x x x. Considering the period of eight (8) years between the receipt of the questioned Decision and the filing of the appeal with the Court of Appeals, it cannot be said that Suib was not given an ample time to prepare and request for a copy of the assailed Decision from the DARAB. Indeed, Suib was given more than enough time to secure a copy of the Decision.

5. ID.; ID.; THE RIGHT TO APPEAL IS NOT A NATURAL RIGHT OR A PART OF DUE PROCESS BUT IT IS MERELY A STATUTORY PRIVILEGE WHICH MUST BE EXERCISED ONLY IN THE MANNER AND IN ACCORDANCE WITH THE PROVISIONS OF THE LAW.— [T]he right to appeal is not a natural right and is not part of due process. It is merely a statutory privilege and must be exercised in accordance with the law. This doctrine has been reiterated in *Spouses Ortiz v. Court of Appeals*, where the Court held that: x x x [T]he right to appeal is not a natural right or a part of due process; it is merely a statutory privilege, and may be exercised only in the manner and in accordance with the provisions of the law. **The party who seeks to avail of the same must comply with the requirements of the Rules, Failing [sic] to do so, the right to appeal is lost. Rules of Procedure are required to be followed.** xxx. As the appeal is procedurally infirm, it is within the discretion of the appellate court to dismiss the same. As long as the lower court acts judiciously and within the bounds of the law, the Court has no discretion to question the lower court's judgment in dismissing the appeal.

6. ID.; SPECIAL CIVIL ACTIONS; *CERTIORARI*; LIMITED TO CORRECTION OF ERRORS OF JURISDICTION OR GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION; MERE ABUSE OF DISCRETION IS NOT ENOUGH.— A petition for

certiorari under Rule 65 of the Rules of Court is limited to correction of errors of jurisdiction or grave abuse of discretion amounting to lack or excess of jurisdiction. In order to constitute grave abuse of discretion, Suib must prove that the lower court acted in a capricious and whimsical exercise of judgment tantamount to lack of jurisdiction. "Mere abuse of discretion is not enough. It must be *grave* abuse of discretion as when the power is exercised in an arbitrary or despotic manner by reason of passion or personal hostility, and must be so patent and so gross as to amount to an evasion of a positive duty or to a virtual refusal to perform the duty enjoined or to act at all in contemplation of law." Evidently, the Court of Appeals acted within the bounds of law as the dismissal of the appeal was based on Section 1(g), Rule 50 in relation to Section 7, Rule 43 of the Rules of Court. Although the decision of the Court of Appeals, which dismissed the petition, did not mention Suib's failure to file the present petition within the reglementary period pursuant to Rule 43, Section 4 of the Rules of Court, still, the Court of Appeals was correct in dismissing the same based on Section 1(g), Rule 50 in relation to Section 7, Rule 43 of the same Rule. Far from it, the dismissal of Suib's appeal was neither arbitrary nor despotic.

7. ID.; RULES OF PROCEDURE; THE COURT SHALL NOT DEPART FROM RULES OF PROCEDURE ONLY IN THE GUISE OF LIBERAL CONSTRUCTION, WHICH WOULD RENDER NUGATORY ITS NOBLE PURPOSE OF ORDERLY AND SPEEDY ADMINISTRATION OF JUSTICE.— The rules of procedure serve a noble purpose of orderly and speedy administration of justice. Suib's attempt to persuade this Court to liberally interpret the technical rules must fail. This Court shall not depart from rules of procedure only in the guise of liberal construction, which would render such noble purpose nugatory.

APPEARANCES OF COUNSEL

Jamerlan Law Office for petitioner.
Arcilla Law Office for private respondent.

D E C I S I O N

PEREZ, *J.*:

Before us is a Petition for *Certiorari* under Rule 65 of the Rules of Court assailing the Court of Appeals Resolutions[1] dated 9 October 2007 and 26 February 2008, in CA-G.R. SP No. 00985-MIN, for having been issued with grave abuse of discretion amounting to lack or excess of jurisdiction.

The facts as culled from the records are as follows:

Petitioner Hadja Rawiya Suib's (Suib) husband, Saab Hadji Suib (deceased), was the owner of a parcel of land with a total area of 12.6220 hectares, located in Sapu Masla, Malapatan, Sarangani Province, covered by OCT No. P-19714, which he acquired through a duly notarized Deed of Absolute Sale from Sagap Hadji Taib on 14 December 1981.

Due to alleged illegal harvesting of coconuts from the subject property, Suib, in March 1990, filed a criminal case of qualified theft against respondent Emong Ebbah (Ebbah) before the Regional Trial Court (RTC), Branch 22 of General Santos City, docketed as Criminal Case No. 6385, which was re-raffled to the RTC, Branch 38 of Alabel, Sarangani Province.

As defense, Ebbah claimed that he has a right to harvest coconuts from the subject property because he was instituted as a tenant by Suib's deceased husband and has been such tenant since 1963. On the other hand, Suib claimed that it was impossible for her husband to institute tenancy in favor of Ebbah in 1963 because her husband acquired the subject property only in 1981.

The RTC dismissed the case on the ground of *res judicata* or bar by former judgment.[2] It turned out that it was not the first time that Suib filed a criminal case of qualified theft against

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[1] CA *rollo*, pp. 176-177 and 220-221; penned by Associate Justice Elihu A. Ybañez, with Associate Justices Romulo V. Borja and Mario V. Lopez, concurring.

[2] *Rollo*, p. 245.

Ebbah. Suib previously filed a criminal case of qualified theft against Ebbah before the Municipal Trial Court (MTC) of Malapatan, docketed as Criminal Case No. 1793-M, which the MTC dismissed.[3]

Ebbah then filed the present case against Suib before the Provincial Agrarian Reform Adjudication Board (PARAB) in Region XI, docketed as Case No. XI-0330-SC-90, on 31 January 1990. The case is for Immediate Reinstatement and Damages.

Finding the absence of a tenancy relationship between Suib and Ebbah, the PARAB, in a Decision[4] dated 10 September 1993, dismissed the case for lack of merit.

On appeal to the Department of Agrarian Reform Adjudication Board Central Office (DARAB), the DARAB[5] reversed the PARAB Decision. According to the DARAB, "[in] Republic Act No. 3844, [it] provides that in case there is doubt in the interpretation and enforcement of laws or acts relative to tenancy, it should be resolved in favor of the latter to protect him from unjust exploitation and arbitrary ejectment by unscrupulous landowners."[6] The DARAB also ruled that:

> An examination of the records reveal (sic) that Plaintiff-Appellant was on the land of Respondent-Appellee since 1963. It must be remembered that at the time Respondent-Appellee rejected Plaintiff-Appellant on 30 March 1990, the latter had already harvested thousands of coconuts and had already converted twenty-five (25) sacks of copra. There was also a sharing of the produce of the land between the parties. Undoubtedly, the requisites for the establishment of tenancy relation are present in this case. Moreover, the fact that they did not at all question his tenancy over the land in question for

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[3] *Id*. at 171.

[4] CA *rollo*, pp. 37-44; penned by Provincial Adjudicator Norberto P. Sinsona.

[5] *Id*. at 45-49; penned by Assistant Secretary Lorenzo R. Reyes with Secretary Ernesto D. Garilao, Undersecretary Artemio A. Adasa, Jr., Assistant Secretaries Sergio B. Serrano, Augusto P. Quijano and Clifford C. Burkley, concurring.

[6] *Id*. at 48. (Underscoring omitted).

quite several years, there is an implied recognition or consent to the establishment of a tenancy relationship between the parties.[7]

The dispositive portion of the DARAB Decision dated 5 June 1998 reads:

WHEREFORE, the decision appealed from is SET ASIDE and an (sic) new one entered:

1. Declaring Emong Ebbah a tenant of Hadji Rawiya Suib who is hereby ordered to respect and maintain Ebbah in the peaceful possession and cultivation of the subject landholding.

SO ORDERED.[8]

The motion for reconsideration was likewise denied in a Resolution[9] dated 21 December 1998.

To appeal the adverse Decision, Suib filed a Petition for Review under Rule 43 of the 1997 Rules of Civil Procedure before the Court of Appeals on 7 April 2006.[10] Without giving due course to the petition, the Court of Appeals issued a Resolution[11] dated 10 May 2006, with the following directives:

A) **REQUIRE** petitioner to **SUBMIT** a written explanation why copies of the petition were not personally served to the agency a quo and the adverse parties;
B) **REQUIRE** petitioner to **SUBMIT** a legible copy of the subject DARAB decision duly certified by the proper authority and therein clearly indicated the designation of office of the person certifying to its authenticity;
C) **REQUIRE** petitioner's counsel to **MANIFEST** in writing to this Court the place of issue of his IBP number;
D) **REQUIRE** petitioner to **REMIT**, within a non-extendible period of five (5) days from notice, the amount of ₱1180.00

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[7] *Id*. at 47-48.

[8] *Id*. at 48.

[9] *Id*. at 62.

[10] *Id*. at 7-34.

[11] *Id*. at 97.

representing the balance in the payment of the docket fees for petitions with prayer for TRO and/or WPI;

E) **REQUIRE** DARAB to show proof that copy of its Resolution dated December 21, 1998 denying petitioner's Motion for Reconsideration in DARAB Case No. 5402 was sent to petitioner and/or counsel of record;

F) **REQUIRE** DARAB to **INFORM** this Court if any motion to withdraw as counsel has been filed by Atty. Marcelino Valdez, and if any corresponding entry of appearance has been filed by Atty. Jose Jerry Fulgar, both as counsels for petitioner in DARAB Case No. 5402;

G) Without necessarily giving due course to the petition, **DIRECT** respondent to file a comment thereon (not a motion to dismiss), within ten (10) days from notice, and to **SHOW CAUSE** therein why the prayer for the issuance of a temporary restraining order and/or preliminary injunction should not be **GRANTED**. Petitioner may file a Reply within five (5) days from receipt of the Comment. Said Comment may be treated as Answer of respondent in the event the petition is given due course.[12]

In partial compliance with the Resolution, Suib filed a Compliance[13] and Supplement to Compliance[14] dated 25 May 2006 and 29 May 2006, respectively, *sans* the DARAB Decision. Meanwhile, Suib sent a letter to DARAB-Koronadal City, requesting for a copy of the DARAB Decision.

Upon receipt of the DARAB Decision, Suib filed a 2nd Supplement to Compliance[15] dated 2 June 2006 with the DARAB Decision finally attached.

Acting on the various supplements filed by Suib, the Court of Appeals, in a Resolution[16] dated 9 October 2007, dismissed the petition for failure of Suib to submit the DARAB Decision

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[12] *Id*.

[13] *Id*. at 99-102.

[14] *Id*. at 146-150.

[15] *Id*. at 151-154.

[16] *Id*. at 197-198.

pursuant to Section 7, Rule 43 in relation to Section 1(g) of Rule 50 of the Rules of Court.

Suib's Motion for Reconsideration with Compliance[17] was likewise denied in a Resolution[18] dated 26 February 2008. The dispositive portion of the Resolution reads:

> On November 26, 2007, this Court issued a Resolution directing the private respondent to file a comment on the *Motion for Reconsideration with Compliance* filed by petitioner within a period of ten (10) days from receipt of notice of the said resolution. The same was received by the private respondent on November 8, 2007. On January 24, 2008, private respondent filed with this Court his Comment thru registered mail and a copy thereof was received by this Court on January 31, 2008.
>
> A perusal of petitioner's Motion for Reconsideration with Compliance reveals that the directive of this Court May 10, 2006 requiring her to submit the DARAB decision was not complied with.
>
> Accordingly, the Motion for Reconsideration with compliance is hereby denied.
>
> SO ORDERED.[19] (Citations omitted).

Hence, this petition accusing the Court of Appeals of grave abuse of discretion amounting to lack or excess of jurisdiction in dismissing Suib's appeal for failure to timely file a copy of the appealed DARAB Decision together with her petition.

The petition is devoid of merit.

Before proceeding to resolve the question on jurisdiction, the Court deems it proper to address the penultimate issue of procedural error which Suib committed.

Suib availed of the wrong remedy by filing the present special civil action for *certiorari* under Rule 65 of the Rules of Court to assail a final judgment of the Court of Appeals. Suib should

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[17] *Id*. at 178-182.

[18] *Id*. at 220-221.

[19] *Id*. at 220-221.

have filed a petition for review under Rule 45 of the Rules of Court.

A special civil action for *certiorari* under Rule 65 is an original or independent action based on grave abuse of discretion amounting to lack or excess of jurisdiction and it will lie only if there is no appeal or any other plain, speedy, and adequate remedy in the ordinary course of law; it cannot be a substitute for a lost appeal.[20] In the case at bar, Suib is not without any plain, speedy, and adequate remedy as the remedy of an appeal is still available. Hence, the present petition for *certiorari* will not prosper even if the ground is grave abuse of discretion.[21]

In cases where the petitioner availed of the wrong remedy, the Court, in the spirit of liberality and in the interest of substantial justice, has the right to treat the petition as a petition for review: (1) if the petition for *certiorari* was filed within the reglementary period within which to file a petition for review on *certiorari*; (2) when errors of judgment are averred; and (3) when there is sufficient reason to justify the relaxation of the rules.[22]

Consulting the records, we find that the present petition was filed within the reglementary period within which to file a petition for review under Rule 45, which also raised errors of judgment. In detail, after receipt of the assailed Resolution dated 26 February 2008, Suib filed a Motion for Extension of Time to File Petition (with Motion for Leave) on 3 April 2008, requesting for an additional thirty (30) days or until 3 May 2008 within which to file a petition for review under Rule 45 of the Rules of Court. However, on 2 May 2008, Suib filed a Petition for *Certiorari* under Rule 65, well within the reglementary period within which to file a petition for review under Rule 45, which was until 3 May 2008.

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[20] *City of Manila v. Grecia-Cuerdo*, G.R. No. 175723, 4 February 2014, 715 SCRA 182, 194-195.

[21] *Leynes v. Former Tenth Division of the Court of Appeals*, G.R. No. 154462, 19 January 2011, 640 SCRA 25, 41.

[22] *Supra* note 20.

Therefore, the Court deems it proper and justified to relax the rules and, thus, treat the instant petition for *certiorari* as a petition for review.[23]

Suib averred that the Court of Appeals committed grave abuse of discretion amounting to lack or excess of jurisdiction when it dismissed the petition due to Suib's failure to attach a copy of the DARAB Decision with the petition within a reasonable period.

We rule in the negative.

On 10 May 2006, the Court of Appeals ordered Suib, among others, to submit a legible copy of the DARAB Decision pursuant to Section 7, Rule 43 in relation to Section 1(g), Rule 50 of the Rules of Court. However, Suib was able to submit a copy of the DARAB Decision to the Court of Appeals only after filing two (2) Compliances or only after almost two (2) months since Suib filed the petition. The pertinent Rules read:

Section 1(g), Rule 50:

> Section 1. *Grounds for dismissal of appeal*. — An appeal may be dismissed by the Court of Appeals, on its own motion or on that of the appellee, on the following grounds: x x x x
>
> (g) Failure of the appellant to take the necessary steps for the correction or completion of the record within the time limited by the court in its order; x x x

Section 7, Rule 43:

> **Section 7.** *Effect of failure to comply with requirements*. — The failure of the petitioner to comply with any of the foregoing requirements regarding the payment of the docket and other lawful fees, the deposit for costs, proof of service of the petition, and the contents of and the documents which should accompany the petition **shall be sufficient ground for the dismissal thereof**. (n) (Emphases supplied)

A reading of the aforesaid provisions reveals that the requirement in Section 1, Rule 50 in relation to Section 7, Rule 43

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[23] *Id*.

of the Rules of Court is mandatory and jurisdictional. Thus, Suib's failure to attach the required copy of the appealed DARAB Decision is a sufficient ground for the dismissal of her appeal.

A litigant, before filing a pleading to the courts, must first prepare all the necessary attachments to his/her pleading. As it stands, suitors do not have the luxury of filing a pleading without the necessary attachments; otherwise, the court shall consider the same as a mere scrap of paper and may dismiss the same outright.

One glaring fact that cannot escape us is that the petition for review filed before the Court of Appeals, which assailed the Decision and Resolution of the DARAB, was filed beyond the reglementary period. As borne by the records, Suib received a copy of the DARAB Decision and Resolution on 5 June 1998 and 21 December 1998, respectively, and it was only after eight (8) long years since the assailed DARAB Decision and Resolution were received when Suib filed an appeal to the Court of Appeals on 7 April 2006. Without doubt, eight (8) years is beyond the reglementary period within which to file an appeal from a decision of the DARAB to the Court of Appeals as provided in Rule 43, Section 4 of the Rules of Court, which mandates that appeals should be filed within fifteen (15) days from notice of the judgment:

> **Section 4.** *Period of appeal*. — The appeal shall be taken within fifteen (15) days from notice of the award, judgment, final order or resolution, or from the date of its last publication, if publication is required by law for its effectivity, or of the denial of petitioner's motion for new trial or reconsideration duly filed in accordance with the governing law of the court or agency *a quo*. Only one (1) motion for reconsideration shall be allowed. Upon proper motion and the payment of the full amount of the docket fee before the expiration of the reglementary period, the Court of Appeals may grant an additional period of fifteen (15) days only within which to file the petition for review. No further extension shall be granted except for the most compelling reason and in no case to exceed fifteen (15) days. (n)

Considering the period of eight (8) years between the receipt of the questioned Decision and the filing of the appeal with the

Court of Appeals, it cannot be said that Suib was not given an ample time to prepare and request for a copy of the assailed Decision from the DARAB. Indeed, Suib was given more than enough time to secure a copy of the Decision.

Upon receipt of the adverse DARAB Decision in 1998, it was incumbent upon Suib to exercise due diligence to keep or in case of loss, to secure another copy of the Decision from the DARAB. Time and again, this Court has reminded suitors to be diligent in record keeping. Thus, the DARAB cannot be faulted for Suib's negligence. For its part, DARAB served Suib a copy of its Decision long before Suib filed an appeal. As soon as a litigant receives a copy of an adverse decision, it is incumbent upon the losing litigant to request a copy from the court or tribunal should he/she lose a copy of the same. After all, losing litigants should be mindful of the legal remedies available to them.

Furthermore, the right to appeal is not a natural right and is not part of due process. It is merely a statutory privilege and must be exercised in accordance with the law. This doctrine has been reiterated in *Spouses Ortiz v. Court of Appeals*,[24] where the Court held that:

> x x x [T]he right to appeal is not a natural right or a part of due process; it is merely a statutory priv[i]lege, and may be exercised only in the manner and in accordance with the provisions of the law. **The party who seeks to avail of the same must comply with the requirements of the Rules, Failing [sic] to do so, the right to appeal is lost. Rules of Procedure are required to be followed.** x x x.[25] (Emphases and underscoring supplied)

As the appeal is procedurally infirm, it is within the discretion of the appellate court to dismiss the same. As long as the lower court acts judiciously and within the bounds of the law, the Court has no discretion to question the lower court's judgment in dismissing the appeal.

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[24] 360 Phil. 95 (1998).

[25] *Id*. at 100-101.

Once more we find occasion to reiterate this Court's pronouncement in *De Liano v. Court of Appeals*,[26] where we held:

> **Some may argue that adherence to these formal requirements serves but a meaningless purpose, that these may be ignored with little risk in the smug certainty that liberality in the application of procedural rules can always be relied upon to remedy the infirmities. This misses the point. We are not martinets; in appropriate instances, we are prepared to listen to reason, and to give relief as the circumstances may warrant. However, when the error relates to something so elementary as to be inexcusable, our discretion becomes nothing more than an exercise in frustration.** It comes as an unpleasant shock to us that the contents of an appellant's brief should still be raised as an issue now. There is nothing arcane or novel about the provisions of Section 13, Rule 44. The rule governing the contents of appellants' briefs has existed since the old Rules of Court, which took effect on July 1, 1940, as well as the Revised Rules of Court, which took effect on January 1, 1964, until they were superseded by the present 1997 Rules of Civil Procedure. The provisions were substantially preserved, with few revisions.[27] (Emphases and underscoring supplied)

And, even if we consider this petition as rightfully one under Rule 65, we say that is should likewise be dismissed as no grave abuse of discretion was shown.

A petition for *certiorari* under Rule 65 of the Rules of Court is limited to correction of errors of jurisdiction or grave abuse of discretion amounting to lack or excess of jurisdiction. In order to constitute grave abuse of discretion, Suib must prove that the lower court acted in a capricious and whimsical exercise of judgment tantamount to lack of jurisdiction. "Mere abuse of discretion is not enough. It must be *grave* abuse of discretion as when the power is exercised in an arbitrary or despotic manner by reason of passion or personal hostility, and must be so patent and so gross as to amount to an evasion of a positive duty or

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[26] 421 Phil. 1033 (2001).

[27] *Id*. at 1046-1047.

to a virtual refusal to perform the duty enjoined or to act at all in contemplation of law."[28] Evidently, the Court of Appeals acted within the bounds of law as the dismissal of the appeal was based on Section 1(g), Rule 50 in relation to Section 7, Rule 43 of the Rules of Court. Although the decision of the Court of Appeals, which dismissed the petition, did not mention Suib's failure to file the present petition within the reglementary period pursuant to Rule 43, Section 4 of the Rules of Court, still, the Court of Appeals was correct in dismissing the same based on Section 1(g), Rule 50 in relation to Section 7, Rule 43 of the same Rule. Far from it, the dismissal of Suib's appeal was neither arbitrary nor despotic.

The rules of procedure serve a noble purpose of orderly and speedy administration of justice. Suib's attempt to persuade this Court to liberally interpret the technical rules must fail. This Court shall not depart from rules of procedure only in the guise of liberal construction, which would render such noble purpose nugatory.[29]

WHEREFORE, the Petition is hereby **DENIED**.

SO ORDERED.

Sereno, C.J. (Chairperson), Leonardo-de Castro, Bersamin, and *Perlas-Bernabe, JJ.,* concur.

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[28] *Solvic Industrial Corporation v. NLRC*, 357 Phil. 430, 438 (1998); *Tomas Claudio Memorial College, Inc. v. Court of Appeals*, 374 Phil. 859, 864 (1999).

[29] *Lumbre, et al. v. Court of Appeals*, *et al.* 581 Phil. 390, 404 (2008).

THIRD DIVISION

[G.R. No. 192659. December 2, 2015]

PHILIPPINE RACE HORSE TRAINER'S ASSOCIATION, INC., *petitioner, vs.* **PIEDRAS NEGRAS CONSTRUCTION AND DEVELOPMENT CORPORATION,** *respondent*.

SYLLABUS

1. REMEDIAL LAW; APPEALS; FACTUAL FINDINGS OF CONSTRUCTION ARBITRATORS, WHEN ADEQUATELY SUPPORTED BY EVIDENCE, ARE FINAL AND CONCLUSIVE AND NOT REVIEWABLE BY THE COURT ON APPEAL.— The jurisdiction of the CIAC is derived from law. It is broad enough to cover any dispute arising from, or connected with construction contracts, whether these involve mere contractual money claims or execution of the works. x x x. The CA sustained the CIAC's computation and determination with respect to the issue of overpayment. The appellate court agreed that there was an extensive discussion of all the claims and counterclaims presented by both PRHTAI and PNCDC. The CIAC's findings were adequately supported by evidence that the CA found no cogent reason to disturb the same. After all, the CIAC possesses the required expertise in the field of construction arbitration. It is settled that findings of fact of quasi-judicial bodies, like the CIAC, which have acquired expertise because their jurisdiction is confined to specific matters, are generally accorded, not only respect, but also finality. In particular, factual findings of construction arbitrators are final and conclusive and not reviewable by the Court on appeal.

2. ID.; ID.; ID.; EXCEPTIONS; PRESENT.— Factual findings of construction arbitrators, however, may be reviewed by the Court when the petitioner proves that: (1) the award was procured by corruption, fraud or other undue means; (2) there was evident partiality or corruption of the arbitrators or any of them; (3) the arbitrators were guilty of misconduct in refusing to hear evidence pertinent and material to the controversy; (4) one or more of the arbitrators were disqualified to act as

such under Section 9 of Republic Act No. 876 and willfully refrained from disclosing such disqualifications or of any other misbehavior by which the rights of any party have been materially prejudiced; or (5) the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award upon the subject matter submitted to them was not made. Also considered as an exception is when there is a very clear showing of grave abuse of discretion, when an award is obtained through fraud or the corruption of arbitrators, when a party is deprived of administrative due process, or when the findings of the CA are contrary to those of the CIAC. Unfortunately, the CA did not entirely assent to the CIAC's findings. Because while it upheld the CIAC's ruling on the computation of payments, it disregarded the rest of the tribunal's award. Hence, the Court, although not a trier of facts, is now constrained to examine and analyze anew the evidence which the parties presented before the arbitration body.

3. COMMERCIAL LAW; CORPORATION LAW; CORPORATIONS; DOCTRINE OF APPARENT AUTHORITY; A CORPORATION WILL BE ESTOPPED FROM DENYING THE AGENT'S AUTHORITY IF IT KNOWINGLY PERMITS ONE OF ITS OFFICERS OR ANY OTHER AGENT TO ACT WITHIN THE SCOPE OF AN APPARENT AUTHORITY, AND IT HOLDS HIM OUT TO THE PUBLIC AS POSSESSING THE POWER TO DO THOSE ACTS; DOCTRINE DOES NOT APPLY IF THE PRINCIPAL DID NOT COMMIT ANY ACT OR CONDUCT WHICH A THIRD PARTY KNEW AND RELIED UPON IN GOOD FAITH AS A RESULT OF THE EXERCISE OF REASONABLE PRUDENCE.— [T]he CA held that contracts entered into by a corporate officer or obligations assumed by such officer for and in behalf of the corporation are binding on said corporation, if such officer has acted within the scope of his authority, or even if such officer has exceeded the limits of his authority, the corporation still ratifies such contracts or obligations. The doctrine of apparent authority provides that a corporation will be estopped from denying the agent's authority if it knowingly permits one of its officers or any other agent to act within the scope of an apparent authority, and it holds him out to the public as possessing the power to do those acts. Apparent authority is derived not merely from practice. Its existence may be

ascertained through (1) the general manner in which the corporation holds out an officer or agent as having the power to act or, in other words, the apparent authority to act in general, with which it clothes him; or (2) the acquiescence in his acts of a particular nature, with actual or constructive knowledge thereof, whether within or beyond the scope of his ordinary powers. It requires presentation of evidence of similar acts executed either in its favor or in favor of other parties. It is not the quantity of similar acts which establishes apparent authority, but the vesting of a corporate officer with the power to bind the corporation. The doctrine does not apply, however, if the principal did not commit any act or conduct which a third party knew and relied upon in good faith as a result of the exercise of reasonable prudence. In the present case, the aforementioned circumstances are lacking and, indubitably, neither did PNCDC act in good faith.

4. **ID.; ID.; ID.; ID.; THE BOARD OF DIRECTORS, NOT THE PRESIDENT, EXERCISES CORPORATE POWER; IN THE ABSENCE OF A CHARTER OR BYLAW PROVISION TO THE CONTRARY, THE PRESIDENT IS PRESUMED TO HAVE AUTHORITY, WHO MUST ACT WITHIN THE DOMAIN OF THE GENERAL OBJECTIVES OF THE COMPANY'S BUSINESS AND WITHIN THE SCOPE OF HIS OR HER USUAL DUTIES.—** [I]t must be stressed that the board of directors, not the president, exercises corporate power. While in the absence of a charter or bylaw provision to the contrary the president is presumed to have authority, the questioned act should still be within the domain of the general objectives of the company's business and within the scope of his or her usual duties. Here, PRHTAI is an association of professional horse trainers in the Philippine horse racing industry organized as a non-stock corporation and it is committed to the uplifting of the economic condition of the working sector of the racing industry. It is not in its ordinary course of business to enter into housing projects, especially not in such scale and magnitude so massive as to amount to ₱101,150,000.00.

5. **CIVIL LAW; INTERESTS; RATE OF INTEREST ON THE AMOUNT DUE MODIFIED FROM TWELVE PERCENT (12%) TO SIX PERCENT (6%) *PER ANNUM*.—** The rate of interest on the amount due, however, should be changed

from twelve percent (12%) to six percent (6%) *per annum*, pursuant to the Bangko Sentral ng Pilipinas Circular No. 799, Series of 2013.

APPEARANCES OF COUNSEL

Ranada Malaya Sanchez and Simpao Law Offices for petitioner.

Ponce Enrile Reyes & Manalastas for respondent.

D E C I S I O N

PERALTA, *J.*:

The instant petition seeks the review of the Court of Appeals (*CA*) Decision[1] dated March 18, 2010 and its June 22, 2010 Resolution[2] in CA-G.R. SP No. 110337. The CA set aside the July 30, 2009 Construction Industry Arbitration Commission (*CIAC*) Arbitral Tribunal Decision[3] ruling in favor of petitioner Philippine Race Horse Trainer's Association, Inc. (*PRHTAI*). The CIAC held that the third and final contract between PRHTAI and respondent Piedras Negras Construction & Development Corporation (*PNCDC*) is unenforceable and that there was overpayment in the amount of ₱14,351,484.41 on the part of PRHTAI.

The factual antecedents of the case are as follows:

The instant controversy stems from a series of contracts which PRHTAI entered into pursuant to its housing project. On October 3, 2000, PRHTAI, through its president, Rogelio J. Catajan, entered into a contract (*first contract*) with Fil-Estate Properties, Inc. (*Fil-Estate*) for the development of the Royal Homes

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[1] Penned by Associate Justice Stephen C. Cruz, with Associate Justices Bienvenido L. Reyes (now a member of this Court), and Celia C. Librea-Leagogo, concurring; *rollo*, pp. 38-53.

[2] *Id*. at 55-57.

[3] Penned by Joven B. Joaquin, Alfredo F. Tadiar, and Eliseo I. Evangelista; *id.* at 227-264.

Subdivision Project. It involved the construction of 170 housing units in Fil-Estate's property located in Bulacnin, Lipa City, Batangas, for ₱67,453,000.00. Fil-Estate then later assigned its rights and obligations under the project to PNCDC, its sub-contractor. On October 13, 2004, a contract (*second contract*) was forged between PRHTAI and PNCDC for ₱80,324,788.00. On August 23, 2005, PRHTAI and PNCDC signed another contract (*third contract*) for the construction of the same 170 housing units, but this time for the revised amount of ₱101,150,000.00. Deducting the advances in the amount of ₱42,868,048.21, the remaining balance due to PNCDC became ₱58,281,951.80.

On April 25, 2007, PNCDC issued a Certificate of Completion and Acceptance in favor of PRHTAI. Come January 18, 2008, PNCDC demanded for the payment of the remaining balance. PRHTAI acknowledged its obligation but explained that it was experiencing financial difficulties.

Meanwhile, on April 28, 2008, a new set of directors and officers was elected at PRHTAI. Said new officers requested for copies of the documents relative to the project. Subsequently, they initiated inquiries on the subject housing project with the former officers and employees as well as the lending institutions involved in said project.

Unable to collect the remaining balance, PNCDC filed on March 4, 2009 a request for arbitration/complaint with the CIAC against PRHTAI for the payment of ₱14,571,618.24.

On August 19, 2009, a Notice of Award was issued, informing the parties that the CIAC Arbitral Tribunal has rendered its Decision dated July 30, 2009. It held that the third contract between PRHTAI and PNCDC is unenforceable and that there was even overpayment on the part of PRHTAI in the amount of ₱14,351,484.61. The decretal portion of the Award provides:

WHEREFORE, judgment is hereby rendered and **AWARD** is made on the monetary claims of **THE RESPONDENT, PHILIPPINE RACE HORSE TRAINER'S ASSOCIATION, INC.** directing the Claimant, **PIEDRAS NEGRAS CONSTRUCTION AND**

DEVELOPMENT CORPORATION, to pay the Respondent the amount of **₱14,951,484.61** representing the following;

Overpayment in the amount	**₱14,351,484.61**
Attorney's fees other legal expenses	**128,059.93**
TOTAL	**₱14,479,544.54**

In addition, Claimant is also directed to reimburse to the Respondent **₱371,940.07** the amount PRHTAI had already paid to CIAC.

Interest on the foregoing amount of **₱14,351,484.61** at the **legal rate of 6% per annum** computed from the date this Award is promulgated. After finality thereof, interest at the rate of **12%** per annum shall be paid thereon until full payment of the awarded amount shall have been made, "*this interim period being deemed to be at that time already a forbearance of credit.*" (*Eastern Shipping Lines, Inc. v Court of Appeals, et al.* (243 SCRA 78 [1994])

SO ORDERED.[4]

On March 18, 2010, however, the CA overturned the CIAC ruling, thus:

WHEREFORE, premises considered, the instant petition is hereby **GRANTED**, the decision of [the] CIAC is hereby **SET ASIDE** and a new one is entered as follows:

1) Philippine Race Horse Trainer's Association, Inc. is directed to pay Piedras Negras Construction and Development Corporation the balance of the final contract in the amount of ₱6,473,727.59 with legal interest of 6% per annum from finality of this decision.

2) PRHTAI is liable for the payment of arbitration expenses.

SO ORDERED.[5]

Aggrieved, PRHTAI filed a motion for reconsideration, but the same was denied. Hence, this petition.

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[4] *Rollo*, pp. 261-262. (Emphasis in the original)

[5] *Id*. at 52.

The issues to be decided on by the Court are the following:

I.

WHETHER OR NOT THE CIAC HAS JURISDICTION TO PASS UPON THE ENFORCEABILITY OF THE CONTRACT BETWEEN PRHTAI AND PNCDC.

II.

WHETHER OR NOT THE THIRD AND FINAL CONTRACT BETWEEN PRHTAI AND PNCDC IS UNENFORCEABLE.

III.

WHETHER OR NOT THERE IS OVERPAYMENT ON PRHTAI'S PART.

The petition is meritorious.

The jurisdiction of the CIAC is derived from law. It is broad enough to cover any dispute arising from, or connected with construction contracts, whether these involve mere contractual money claims or execution of the works.[6] As Section 4 of Executive Order (E.O.) No. 1008, otherwise known as the *Construction Industry Arbitration Law*, provides:

SEC. 4. *Jurisdiction*. – The ClAC shall have original and exclusive jurisdiction over disputes arising from, or connected with, contracts entered into by parties involved in construction in the Philippines, whether the dispute arises before or after the completion of the contract, or after the abandonment or breach thereof. These disputes may involve government or private contracts. For the Board to acquire jurisdiction. the parties to a dispute must agree to submit the same to voluntary arbitration.

The jurisdiction of the ClAC may include but is not limited to violation of specifications for materials and workmanship, violation of the terms of agreement, interpretation and/or application of contractual time and delays, maintenance and defects, payment, default of employer or contractor, and changes in contract cost.

Excluded from the coverage of this law are disputes arising from employer-employee relationships which shall continue to be covered by the Labor Code of the Philippines.

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[6] *Shinryo (Phils.) Company, Inc. v. RRN Incorporated*, 648 Phil. 342 (2010).

The CA sustained the CIAC's computation and determination with respect to the issue of overpayment. The appellate court agreed that there was an extensive discussion of all the claims and counterclaims presented by both PRHTAI and PNCDC. The CIAC's findings were adequately supported by evidence that the CA found no cogent reason to disturb the same. After all, the CIAC possesses the required expertise in the field of construction arbitration. It is settled that findings of fact of quasi-judicial bodies, like the CIAC, which have acquired expertise because their jurisdiction is confined to specific matters, are generally accorded, not only respect, but also finality. In particular, factual findings of construction arbitrators are final and conclusive and not reviewable by the Court on appeal. Factual findings of construction arbitrators, however, may be reviewed by the Court when the petitioner proves that: (1) the award was procured by corruption, fraud or other undue means; (2) there was evident partiality or corruption of the arbitrators or any of them; (3) the arbitrators were guilty of misconduct in refusing to hear evidence pertinent and material to the controversy; (4) one or more of the arbitrators were disqualified to act as such under Section 9 of Republic Act No. 876 and willfully refrained from disclosing such disqualifications or of any other misbehavior by which the rights of any party have been materially prejudiced; or (5) the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award upon the subject matter submitted to them was not made. Also considered as an exception is when there is a very clear showing of grave abuse of discretion, when an award is obtained through fraud or the corruption of arbitrators, when a party is deprived of administrative due process, or when the findings of the CA are contrary to those of the CIAC.[7]

Unfortunately, the CA did not entirely assent to the CIAC's findings. Because while it upheld the CIAC's ruling on the computation of payments, it disregarded the rest of the tribunal's award. Hence, the Court, although not a trier of facts, is now constrained to examine and analyze anew the evidence which the parties presented before the arbitration body.

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[7] *Id*. at 350.

In *Metro Construction, Inc. v. Chatham Properties, Inc.*,[8] the Court likewise reviewed the findings of fact of the CA because the latter's ruling on the issue of whether petitioner therein was in delay was contrary to the findings of the CIAC. In *Megaworld Globus Asia, Inc. v. DSM Construction and Development Corporation,*[9] the Court sustained the findings of the Arbitral Tribunal considering that the issues involved, which were unquestionably factual in nature, have been thoroughly discussed by the Arbitral Tribunal and subsequently affirmed by the CA.[10]

In the present case, upon careful examination, the Court finds that the matters sought to be resolved essentially require a factual determination, one that must rightly be left to the CIAC's sound expertise.

The CA found that PRHTAI gave its consent to the third contract, anchoring on the following documents:

a) September 26, 2000 Board Resolution allegedly authorizing Catajan to sign the Memorandum of Agreement;
b) Secretary's Certificate dated March 1, 2005 on the September 26, 2000 meeting;
c) April 24, 2006 Board Resolution supposedly authorizing Catajan to avail and apply for a loan with the Development Bank of the Philippines amounting to ₱30 Million to finance the construction of the remaining housing units and other expenses related to the housing project; and
d) Minutes of the Meeting of PRHTAI's new board of directors held on May 5, 2008.

However, the appellate court failed to sufficiently establish as to exactly how said aforementioned documents prove PRHTAI's supposed consent to the third contract. Catajan was never authorized by any PRHTAI Board Resolution to enter into and execute the Construction Contract dated August 23, 2005.

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[8] 418 Phil. 176 (2001).

[9] 468 Phil. 305 (2004).

[10] *Uniwide Sales Realty and Resources Corp. v. Titan-Ikeda Construction & Dev't. Corp.*, 540 Phil. 350 (2006).

The operative clause of the Board Resolution dated September 26, 2000 reads:

> Therefore, the Board[,] on its meeting held on September 26, 2000[,] after a series of meetings with the Fil-Estate Properties Corp. and the PAG-IBIG representatives regarding the Housing Benefit of its members, hereby [authorize] Mr. Rogelio J. Catajan, President of the Association, to enter, to act and sign the Memorandum of Agreement in behalf of the Association.[11]

Said Board Resolution is indeed an express authorization for Catajan to enter into a contract but only with Fil-Estate, not with PNCDC. Thus, after a week or on October 3, 2000, Catajan indeed signed a Memorandum of Agreement with Fil-Estate. The Resolution cannot possibly be construed as to likewise authorize Catajan to sign a contract with PNCDC. Although it may be argued that the third contract, which was forged more than four (4) years from the date of the Board Resolution supposedly authorizing the same, merely incorporated the first and second contracts involving the same housing project, Catajan still exceeded his authority when it agreed to pay PNCDC an increased contract price in the amount of ₱101,150,000.00. It must be noted that the first contract dated October 3, 2000 was for ₱67,453,000.00. Four (4) years later, on October 13, 2004, the second contract was entered into for ₱80,324,788.00. No justification, however, was shown why on August 23, 2005, or after a span of only less than a year, the costs suddenly ballooned to ₱101,150,000.00.

PNCDC acted with gross negligence when it relied on the Secretary's Certificate dated March 1, 2005 which, on its face, invites suspicion, instead of requiring a copy of the Board Resolution itself. As the CIAC aptly ruled, given the nature of its business and the fact that PNCDC had successfully completed over eighty (80) contracts in the past, ordinary prudence should have prompted it to look into the terms of the Board Resolution and evaluate if Catajan indeed possessed the necessary authority to negotiate for and sign the third contract.[12] Worse, the CIAC

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[11] *Rollo,* p. 237.

[12] *Id*. at 243.

found that said Secretary's Certificate is falsified and referred to statements that are not found in the Board Resolution dated September 26, 2000. On cross-examination, the Board Secretary, Felipe Falcon, admitted that he did not actually inspect said Board Resolution. In fact, when confronted, he could not explain why parts of the Resolution, as cited in his Certification, differ from that contained in the actual Board Resolution.[13] As to the Board Resolution dated April 24, 2006, its existence and due execution were never proved as a fact before the CIAC. It was likewise never identified nor authenticated by any competent witness. And with regard to the Minutes of PRHTAI's new board of directors meeting on May 5, 2008, the excerpts read:

> It was also approved by the board, to reconstruct the contract of loan with Pag-ibig and Development Bank of the Philippines. Dir. Rogelio J. Catajan reported that the 170 houses turned-over were made by the contractor Piedras Negras Construction, owned by Mr. Francis Maristela.[14]

It must be noted that the May 5, 2008 meeting was the very first organizational meeting of PRHTAI's new board of directors after its election on April 28, 2008, or barely seven (7) days later. At the time of said meeting, the new board still had no knowledge of Catajan's unauthorized execution of the third contract.

The CA likewise ruled that, in any case, PRHTAI's new board of directors already ratified the questioned indebtedness to PNCDC through a letter dated May 27, 2008 acknowledging the existence of said debt. The letter[15] reads:

May 27, 2008

Mr. Francisco Maristela
Piedras Negras Construction & Development Corporation
55 Malumanay St., Teachers Village, [West] Diliman,
Quezon City

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[13] *Id*. at 238.

[14] *Id*. at 22.

[15] *Id*. at 24.

Sir:

The Philippine Race Horse Trainers' Association Incorporated elected a new set of [officers] and [directors]. In its promise to the general membership to institute transparency in operating the association activities, as we go along, we encountered [problems] and found out that some vital information pertain to the records of housing project of member had been lost, in which case, the undersigned respectfully request a copy of the following:

- Loan and contract agreement, deed of absolute sale of purchased land.
- All check encashment and cash receipt made for payment.
- Transfer Certificate of Titles, (original)
- Development Bank of the Philippines contract and agreement.
- Any other documents that could help and to understand our undertakings and obligations.

The body will take up important (sic) that would pertain to the Financial Status of the association and need those documents to begin with.

Thank you very much.

Respectfully yours,

Pablito L. Guce
President

However, as can be clearly gleaned from the text of said letter, it contains nothing that would tend to imply that PRHTAI's new board of directors actually acknowledged its indebtedness to PNCDC. At the most, it is a mere request for copies of certain documents and it cannot reasonably be interpreted as a recognition or ratification of said debt. They were merely constrained to make such request because they still had no copies of their own, and said documents were missing from the office files. Moreover, although PRHTAI seemed to have acknowledged its obligation, it was Catajan, the very same person whose authority to represent PRHTAI is being assailed, who accepted the Certificate of Completion and Acceptance which PNCDC issued. To consider Catajan's acceptance of what PNCDC turned over as a valid ratification of his own wrongdoing would certainly be the height of absurdity.

Lastly, the CA held that contracts entered into by a corporate officer or obligations assumed by such officer for and in behalf of the corporation are binding on said corporation, if such officer has acted within the scope of his authority, or even if such officer has exceeded the limits of his authority, the corporation still ratifies such contracts or obligations. The doctrine of apparent authority provides that a corporation will be estopped from denying the agent's authority if it knowingly permits one of its officers or any other agent to act within the scope of an apparent authority, and it holds him out to the public as possessing the power to do those acts.[16] Apparent authority is derived not merely from practice. Its existence may be ascertained through (1) the general manner in which the corporation holds out an officer or agent as having the power to act or, in other words, the apparent authority to act in general, with which it clothes him; or (2) the acquiescence in his acts of a particular nature, with actual or constructive knowledge thereof, whether within or beyond the scope of his ordinary powers. It requires presentation of evidence of similar acts executed either in its favor or in favor of other parties. It is not the quantity of similar acts which establishes apparent authority, but the vesting of a corporate officer with the power to bind the corporation.[17] The doctrine does not apply, however, if the principal did not commit any act or conduct which a third party knew and relied upon in good faith as a result of the exercise of reasonable prudence.[18] In the present case, the aforementioned circumstances are lacking and, indubitably, neither did PNCDC act in good faith. Also, it must be stressed that the board of directors, not the president, exercises corporate power.[19] While in the absence of a charter or bylaw

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[16] *Advance Paper Corporation v. Arma Traders Corporation*, G.R. No. 176897, December 11, 2013, 712 SCRA 313, 330.

[17] *People's Aircargo and Warehousing Co., Inc. v. Court of Appeals*, 357 Phil. 850, 864 (1998).

[18] *Advance Paper Corporation v. Arma Traders Corporation, supra* note 16.

[19] *Safic Alcan & Cie v. Imperial Vegetable Oil Co., Inc.,* 407 Phil. 884, 899 (2001).

provision to the contrary the president is presumed to have authority, the questioned act should still be within the domain of the general objectives of the company's business and within the scope of his or her usual duties.[20] Here, PRHTAI is an association of professional horse trainers in the Philippine horse racing industry organized as a non-stock corporation and it is committed to the uplifting of the economic condition of the working sector of the racing industry. It is not in its ordinary course of business to enter into housing projects, especially not in such scale and magnitude so massive as to amount to ₱101,150,000.00.

The rate of interest on the amount due, however, should be changed from twelve percent (12%) to six percent (6%) *per annum*, pursuant to the Bangko Sentral ng Pilipinas Circular No. 799, Series of 2013.[21]

WHEREFORE, PREMISES CONSIDERED, the petition is **GRANTED**. The Court of Appeals Decision dated March 18, 2010 and its June 22, 2010 Resolution in CA-G.R. SP No. 110337 are hereby **REVERSED** and **SET ASIDE**. The Construction Industry Arbitration Commission Arbitral Tribunal Award dated July 30, 2009 is hereby **AFFIRMED, with MODIFICATION** as to the legal rate due, which must be six percent (6%) *per annum* of the amount awarded from the time of the finality of this Decision until its full satisfaction.

SO ORDERED.

Velasco, Jr. (Chairperson), Bersamin,[*] *Villarama, Jr.,* and *Perlas-Bernabe,*[**] *JJ.,* concur.

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[20] *Advance Paper Corporation v. Arma Traders Corporation*, *supra* note 16, at 332.

[21] *Nacar v. Gallery Frames*, G.R. No. 189871, August 13, 2013, 703 SCRA 439, 459.

[*] Designated Acting Member in lieu of Associate Justice Francis H. Jardeleza, per Special Order No. 2289 dated November 16, 2015.

[**] Designated Additional Member in lieu of Associate Justice Bienvenido L. Reyes, per Raffle dated November 11, 2015.

FIRST DIVISION

[G.R. No. 193964. December 2, 2015]

ENGINEER BEN Y. LIM, RBL FISHING CORPORATION, PALAWAN AQUACULTURE CORPORATION, and PENINSULA SHIPYARD CORPORATION, *petitioners, vs.* **HON. SULPICIO G. GAMOSA, Officer-in-Charge, NCIP REGIONAL HEARING OFFICE, REGION IV and TAGBANUA INDIGENOUS CULTURAL COMMUNITY OF BARANGAY BUENAVISTA, CORON, PALAWAN, as represented by FERNANDO P. AGUIDO, ERNESTO CINCO, BOBENCIO MOSQUERA, JURRY CARPIANO, VICTOR BALBUTAN, NORDITO ALBERTO, EDENG PESRO, CLAUDINA BAQUID, NONITA SALVA, and NANCHITA ALBERTO,** *respondents*.

SYLLABUS

1. POLITICAL LAW; ADMINISTRATIVE LAW; INDIGENOUS PEOPLES RIGHTS ACT (IPRA); NATIONAL COMMISSION ON INDIGENOUS PEOPLES (NCIP); JURISDICTION THEREOF.— Jurisdiction is the power and authority, conferred by the Constitution and by statute, to hear and decide a case. The authority to decide a cause at all is what makes up jurisdiction. Section 66 of the IPRA, the law conferring jurisdiction on the NCIP, reads: Sec. 66. *Jurisdiction of the NCIP*. " **The NCIP, through its regional offices, shall have jurisdiction over all claims and disputes involving rights of ICCs/IPs**: Provided, however, **That no such dispute shall be brought to the NCIP unless the parties have exhausted all remedies provided under their customary laws.** For this purpose, a certification shall be issued by the Council of Elders/ Leaders who participated in the attempt to settle the dispute that the same has not been resolved, which certification shall be a condition precedent to the filing of a petition with the NCIP. The conferment of such jurisdiction is consistent with state policy averred in the IPRA which recognizes and promotes all the rights of ICCs/IPs within the framework of the constitution. Such is likewise reflected in the mandate of the

NCIP to "protect and promote the interest and wellbeing of the ICCs/IPs with due regard to their beliefs, customs, traditions and[,] institutions."

2. ID.; ID.; ID.; ID.; THE CREATION OF NCIP DOES NOT *PER SE* GRANT IT PRIMARY AND/OR EXCLUSIVE AND ORIGINAL JURISDICTION, EXCLUDING THE REGULAR COURTS FROM TAKING COGNIZANCE AND EXERCISING JURISDICTION OVER CASES WHICH MAY INVOLVE RIGHTS OF INDIGENOUS CULTURAL COMMUNITIES (ICCS)/INDIGENOUS PEOPLES (IPS).— [T]he NCIP is the "primary government agency responsible for the formulation and implementation of policies, plans and programs to promote and protect the rights and well-being of the ICCs/IPs and the recognition of their ancestral domains as well as their rights thereto." Nonetheless, the creation of such government agency does not *per se* grant it primary and/or exclusive and original jurisdiction, excluding the regular courts from taking cognizance and exercising jurisdiction over cases which may involve rights of ICCs/IPs.

3. ID.; ID.; ID.; ID.; TO INVOKE THE JURISDICTION OF THE NCIP, IT IS REQUIRED THAT THE CLAIM AND DISPUTE INVOLVE THE RIGHT OF ICCS/IPS AND BOTH PARTIES HAVE EXHAUSTED ALL REMEDIES PROVIDED UNDER THEIR CUSTOMARY LAWS.— [I]n *Unduran et al. v. Aberasturi, et al.*, we ruled that Section 66 of the IPRA does not endow the NCIP with primary and/or exclusive and original jurisdiction over all claims and disputes involving rights of ICCs/IPs. Based on the qualifying proviso, we held that the NCIP's jurisdiction over such claims and disputes occur only when they arise between or among parties belonging to the same ICC/IP. Since two of the defendants therein were not IPs/ICCs, the regular courts had jurisdiction over the complaint in that case. x xx. Significantly, the language of Section 66 is only clear on the nature of the claim and dispute as involving rights of ICCs/IPs, but ambiguous and indefinite in other respects. While using the word "all" to quantify the number of the "claims and disputes" as covering each and every claim and dispute involving rights of ICCs/IPs, Section 66 unmistakably contains a proviso, which on its face restrains or limits the initial generality of the grant of

jurisdiction. *Unduran* lists the elements of the grant of jurisdiction to the NCIP: (1) the claim and dispute involve the right of ICCs/IPs; **and** (2) both parties have exhausted all remedies provided under their customary laws. Both elements must be present prior to the invocation and exercise of the NCIP's jurisdiction. Thus, despite the language that the NCIP shall have jurisdiction over all claims and disputes involving rights of ICCs/IPs, we cannot be confined to that first alone and therefrom deduce primary sole NCIP jurisdiction over all ICCs/IPs claims and disputes **to the exclusion of the regular courts**.

4. REMEDIAL LAW; COURTS; JURISDICTION; PRIMARY JURISDICTION OR THE DOCTRINE OF PRIOR RESORT; THE REGULAR COURTS SHOULD NOT DETERMINE A CONTROVERSY INVOLVING A QUESTION WHICH IS WITHIN THE JURISDICTION OF THE ADMINISTRATIVE TRIBUNAL BEFORE THE QUESTION IS RESOLVED BY THE ADMINISTRATIVE TRIBUNAL, WHERE THE QUESTION DEMANDS THE EXERCISE OF SOUND ADMINISTRATIVE DISCRETION REQUIRING THE SPECIAL KNOWLEDGE, EXPERIENCE, AND SERVICES OF THE ADMINISTRATIVE TRIBUNAL TO DETERMINE TECHNICAL AND INTRICATE MATTERS OF FACT, AND A UNIFORMITY OF RULING IS ESSENTIAL TO COMPLY WITH THE PREMISES OF THE REGULATORY STATUTE ADMINISTERED.— Primary jurisdiction, also known as the doctrine of Prior Resort, is the power and authority vested by the Constitution or by statute upon an administrative body to act upon a matter by virtue of its specific competence. The doctrine of primary jurisdiction prevents the court from arrogating unto itself the authority to resolve a controversy which falls under the jurisdiction of a tribunal possessed with special competence. In one occasion, we have held that regular courts cannot or should not determine a controversy involving a question which is within the jurisdiction of the administrative tribunal before the question is resolved by the administrative tribunal, where the question demands the exercise of sound administrative discretion requiring the special knowledge, experience, and services of the administrative tribunal to determine technical and intricate matters of fact, and a uniformity of ruling is essential to comply with the premises of the regulatory statute

administered. The objective of the doctrine of primary jurisdiction is to guide a court in determining whether it should refrain from exercising its jurisdiction until after an administrative agency has determined some question arising in the proceeding before the court.

5. ID.; ID.; ID.; ID.; APPLIES WHERE A CLAIM IS ORIGINALLY COGNIZABLE IN THE COURTS AND COMES INTO PLAY WHENEVER ENFORCEMENT OF THE CLAIM REQUIRES THE RESOLUTION OF ISSUES WHICH, UNDER A REGULATORY SCHEME, HAS BEEN PLACED WITHIN THE SPECIAL COMPETENCE OF AN ADMINISTRATIVE BODY; IN SUCH CASE, THE JUDICIAL PROCESS IS SUSPENDED PENDING REFERRAL OF SUCH ISSUES TO THE ADMINISTRATIVE BODY FOR ITS VIEW.— [P]rimary jurisdiction does not necessarily denote exclusive jurisdiction. It applies where a claim is originally cognizable in the courts and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, has been placed within the special competence of an administrative body; in such case, the judicial process is suspended pending referral of such issues to the administrative body for its view. In some instances, the Constitution and statutes grant the administrative body primary jurisdiction, concurrent with either similarly authorized government agencies or the regular courts, such as the distinct kinds of jurisdiction bestowed by the Constitution and statutes on the Ombudsman.

6. POLITICAL LAW; ADMINISTRATIVE LAW; INDIGENOUS PEOPLES RIGHTS ACT (IPRA); NATIONAL COMMISSION ON INDIGENOUS PEOPLES (NCIP); THE IPRA DOES CONFER ORIGINAL AND EXCLUSIVE JURISDICTION TO THE NCIP OVER ALL CLAIMS AND DISPUTES INVOLVING RIGHTS OF ICCS/IPS, AS IT SPECIFICALLY EXCLUDES DISPUTES INVOLVING RIGHTS OF IPS/ICCS WHERE THE OPPOSING PARTY IS NON-ICC/IP; THE LIMITED OR SPECIAL JURISDICTION OF THE NCIP, CONFINED ONLY TO A SPECIAL CAUSE INVOLVING RIGHTS OF IPS/ICCS, CAN ONLY BE EXERCISED UNDER THE LIMITATIONS AND CIRCUMSTANCES PRESCRIBED BY THE STATUTE.— In contrast to our holding in *Honasan II*, the

NCIP cannot be said to have even primary jurisdiction over all the ICC/IP cases comparable to what the Ombudsman has in cases falling under the exclusive jurisdiction of the Sandiganbayan. We do not find such specificity in the grant of jurisdiction to the NCIP in Section 66 of the IPRA. Neither does the IPRA confer **original and exclusive jurisdiction** to the NCIP over all claims and disputes involving rights of ICCs/IPs. x x x That the proviso found in Section 66 of the IPRA is exclusionary, specifically excluding disputes involving rights of IPs/ICCs where the opposing party is non-ICC/IP, is reflected in the IPRA's emphasis of customs and customary law to govern in the lives of the ICCs/IPs. In fact, even the IPRA itself recognizes that customs and customary law cannot be applied to non-IPs/ICCs since ICCs/IPs are recognized as a distinct sector of Philippine society. This recognition contemplates their difference from the Filipino majority, their way of life, how they have continuously lived as an organized community on communally bounded and defined territory. The ICCs/IPs share common bonds of language, customs, traditions and other distinctive cultural traits, which by their resistance to political, social and cultural inroads of colonization, non-indigenous religions and cultures, became historically differentiated from the majority. ICCs/IPs also include descendants of ICCs/IPs who inhabited the country at the time of conquest or colonization, who retain some or all of their own social, economic, cultural and political institutions but who may have been displaced from their traditional territories, or who may have resettled outside their ancestral domains. In all, the limited or special jurisdiction of the NCIP, confined only to a special cause involving rights of IPs/ICCs, can only be exercised under the limitations and circumstances prescribed by the statute.

7. ID.; ID.; ID.; ID.; THE NCIP IS ONLY VESTED WITH JURISDICTION TO DETERMINE THE RIGHTS OF ICCS/IPS BASED ON CUSTOMS AND CUSTOMARY LAW IN A GIVEN CONTROVERSY AGAINST ANOTHER ICC/IP, BUT NOT THE APPLICABLE LAW FOR EACH AND EVERY KIND OF ICC/IP CONTROVERSY EVEN AGAINST AN OPPOSING NON-ICC/IP.— [T]he primacy of customs and customary law sets the parameters for the NCIP's limited and special jurisdiction and its consequent application in dispute resolution. Demonstrably, the proviso in Section 66 of the IPRA limits the jurisdiction of the NCIP to cases of

claims and disputes involving rights of ICCs/IPs where both parties are ICCs/IPs because customs and customary law cannot be made to apply to non-ICCs/IPs within the parameters of the NCIP's limited and special jurisdiction. Indeed, non-ICCs/IPs cannot be subjected to this special and limited jurisdiction of the NCIP even if the dispute involves rights of ICCs/IPs since the NCIP has no power and authority to decide on a controversy **involving, as well, rights of non-ICCs/IPs which may be brought before a court of general jurisdiction within the legal bounds of rights and remedies**. Even as a practical concern, non-IPs and non-members of ICCs ought to be excepted from the NCIP's competence since it cannot determine the right-duty correlative, and breach thereof, between opposing parties who are ICCs/IPs and non-ICCs/IPs, the controversy necessarily contemplating application of other laws, not only customs and customary law of the ICCs/IPs. In short, the NCIP is only vested with jurisdiction to determine the rights of ICCs/IPs based on customs and customary law in a given controversy against another ICC/IP, but not the applicable law for each and every kind of ICC/IP controversy even against an opposing non-ICC/IP. x xx. [T]he phraseology of "**all** claims and disputes involving rights of ICCs/IPs" does not necessarily grant the NCIP all-encompassing jurisdiction whenever the case involves rights of ICCs/IPs without regard to the status of the parties, *i.e,* whether the opposing parties are both ICCs/IPs.

8. ID.; ID.; ID.; ID.; NCIP ADMINISTRATIVE CIRCULARS EXPANDING THE JURISDICTION OF THE NCIP AS ORIGINAL AND EXCLUSIVE, NOT SUSTAINED; ADMINISTRATIVE ISSUANCES MUST NOT OVERRIDE, BUT MUST REMAIN CONSISTENT WITH THE LAW THEY SEEK TO APPLY AND IMPLEMENT, AS THEY ARE INTENDED TO CARRY OUT, NOT TO SUPPLANT OR TO MODIFY, THE LAW.— That NCIP Administrative Circulars expand the jurisdiction of the NCIP as original and exclusive in Sections 5 and 1, respectively of Rule III: x x x is of no moment. The power of administrative officials to promulgate rules in the implementation of a statute is necessarily limited to what is provided for in the legislative enactment. It ought to be stressed that the function of promulgating rules and regulations may be legitimately exercised only for the purpose of carrying out the provisions of the law into effect. The administrative regulation must be within the scope and

purview of the law. The implementing rules and regulations of a law cannot extend the law or expand its coverage, as the power to amend or repeal a statute is vested in the legislature. Indeed, administrative issuances must not override, but must remain consistent with the law they seek to apply and implement. They are intended to carry out, not to supplant or to modify, the law. However, "administrative bodies are allowed, under their power of subordinate legislation, to implement the broad policies laid down in the statute by 'filling in' the details. All that is required is that the regulation does not contradict, but conforms with the standards prescribed by law.Perforce, in this case, the NCIP's Administrative Circulars' classification of its RHO's jurisdiction as original and exclusive, supplants the general jurisdiction granted by Batas Pambansa Bilang 129 to the trial courts and ultimately, modifies and broadens the scope of the jurisdiction conferred by the IPRA on the NCIP. We cannot sustain such a classification.

9. ID.; ID.; ID.; ID.; A BARE ALLEGATION THAT ONE IS ENTITLED TO SOMETHING IS NOT AN ALLEGATION BUT A CONCLUSION AND SUCH ALLEGATION ADDS NOTHING TO THE PLEADING, IT BEING NECESSARY TO PLEAD SPECIFICALLY THE FACTS UPON WHICH SUCH CONCLUSION IS FOUNDED.— It should be noted that a bare allegation that one is entitled to something is not an allegation but a conclusion. Such allegation adds nothing to the pleading, it being necessary to plead specifically the facts upon which such conclusion is founded. Rule 8 of the Rules of Court, entitled "Manner of Making Allegations in Pleadings" requires in Section 1, as a general rule, for "[e]very pleading [to] contain in a methodical and logical form, a plain, concise and direct statement of the ultimate facts on which the party pleading relies for his claim or defense, as the case may be, omitting the statement of mere evidentiary facts." Respondents' status as Tagbanuas, as indigenous persons or members of an indigenous cultural community, is not an ultimate fact from which respondents can anchor the rights they claim to have been violated by petitioners .In this case, respondents' petition, as written, does not mention ultimate facts that lead to the conclusion that (1) they are Tagbanuas, and (2) they are the representatives of the Tagbanua Indigenous Cultural Community. Neither are there allegations of ultimate facts showing acts or omissions on the part of petitioners which constitute a violation of respondents' rights.

10. ID.; ID.; ID.; ID.; PARTIES CLAIMING RELIEF UNDER THE IPRA SHOULD ALLEGE THE ULTIMATE FACTS CONSTITUTIVE OF THEIR CUSTOMS, POLITICAL STRUCTURES, INSTITUTIONS, DECISION MAKING PROCESSES, AND SUCH OTHER INDICATORS OF INDIGENOUS PERSONS NATURE DISTINCT AND NATIVE TO THEM.— [T]he allegation that respondents are Tagbanuas and that they are representatives of the Tagbanua Indigenous Cultural Communities are conclusions of their status not derived from facts that should have been alleged. Indeed, respondents did not even attempt to factually demonstrate their authority to represent the Tagbanua Indigenous Cultural Community. This is crucial since intra IPs' conflicts and contest for representation are not impossible. In that regard, Section 3(f) of the IPRA defines "customary laws" as "a body of written and/or unwritten rules, usages, customs and practices traditionally and continually recognized, accepted and observed by respective ICCs/IPs" Section 3(i), on the other hand, refers to "indigenous political structures" consisting of "organizational and cultural leadership systems, institutions, relationships, patterns and processes for decision making and participation, identified by ICCs/IPs such as, but not limited to, Council of Elders, Council of Timuays, Bodong Holders, or any other tribunal or body of similar nature." To establish their status as Tagbanuas or their representation as representatives of Tagbanua Indigenous Cultural Community, respondents, as "plaintiffs" claiming relief under the IPRA, should have alleged the ultimate facts constitutive of their customs, political structures, institutions, decision making processes, and such other indicators of indigenous persons nature distinct and native to them.

11. ID.; ID.; ID.; ID.; THE NCIP DOES NOT HAVE *IPSO FACTO* JURISDICTION OVER THE PETITION OF RESPONDENTS JUST BY THE MERE EXPEDIENT THAT THEIR PETITION INVOLVES RIGHTS OF ICCS/IPS.— [R]espondents should have asserted their identification through a reduction into facts of the definition and description of an ICC/IP in the IPRA: x x x. Also, the right of ancestral property requires historical proof which, of course, must proceed from allegations in the petition. x x x. Respondents made no allegation outlining and tracing the history of their indigenous ownership of domain and land. To further highlight the necessity

of respondents' allegation of their status as Tagbanuas is the stewardship concept of property which is most applicable to land among the Philippine IP. x x x. It is also significant to note that respondents do not identify themselves with other Tagbanuas who have been awarded a Certificate of Ancestral Domain Claim as of 1998.Palpably, in the factual milieu obtaining herein, the NCIP does not have *ipso facto* jurisdiction over the petition of respondents just by the mere expedient that their petition involves rights of ICCs/IPs.

12. ID.; ID.; ID.; ID.; RESOLUTION OF CONFLICTS BETWEEN PARTIES WHO ARE NOT BOTH ICCS/IPS MAY STILL FALL WITHIN THE GENERAL JURISDICTION OF THE REGULAR COURTS DEPENDENT ON THE ALLEGATIONS IN THE COMPLAINT OR PETITION AND THE STATUS OF THE PARTIES; NO REPEAL OF BATAS PAMBANSA BILANG 129.— [T]he IPRA does not contain a repeal of Batas Pambansa Bilang 129 limiting the general jurisdiction of the trial courts even as the IPRA purportedly grants the NCIP jurisdiction over "all claims and disputes involving rights of ICCs/IPs. "Section 83 of the IPRA, the repealing clause, only specifies Presidential Decree No. 410, Executive Order Nos. 122B and 122C as expressly repealed. While the same section does state that "all other laws, decrees, orders, rules and regulations or parts thereof inconsistent with this Act are hereby repealed or modified accordingly," such an implied repeal is predicated upon the condition that a substantial and an irreconcilable conflict must be found in existing and prior Acts. The two laws refer to different subject matters, albeit the IPRA includes the jurisdiction of the NCIP. As such, resolution of conflicts between parties who are not both ICCs/IPs may still fall within the general jurisdiction of the regular courts dependent on the allegations in the complaint or petition and the status of the parties. There is no clear irreconcilable conflict from the investiture of jurisdiction to the NCIP in instances where, among others, all the parties are ICCs/IPs and the claim or dispute involves their rights, and the specific wording of Batasang Pambansa Bilang 129, Sections 19-21 on the exclusive and original jurisdiction of the Regional Trial Courts, and Sections 33-35 on the exclusive original jurisdiction of the Metropolitan Trial Courts, Municipal Trial Courts, and Municipal Circuit Trial Courts. We should not, and cannot, adopt the theory of

implied repeal except upon a clear and unequivocal expression of the will of Congress, which is not manifest from the language of Section 66 of the IPRA which, to reiterate: (1) did not use the words "primary" and/or "original and exclusive" to describe the jurisdiction of the NCIP over "all claims and disputes involving rights of ICCs/IPs" and (2) contained a proviso requiring certification that the parties have exhausted their remedies provided under customary laws.

APPEARANCES OF COUNSEL

The Law Firm of Chan Robles & Associates for petitioners.
The Solicitor General for public respondent.
Leovigilda V. Guioguio for private respondents.

D E C I S I O N

PEREZ, *J.*:

While we recognize the rights of our Indigenous Peoples (IPs) and Indigenous Cultural Communities (ICCs) as determined in the Indigenous Peoples Rights Act (IPRA), we delineate, in this case, the jurisdiction of the National Commission on Indigenous Peoples (NCIP) as provided in Section 66[1] of the IPRA.

Assailed in this Petition for Review on *Certiorari* under Rule 45 of the Rules of Court is the Decision[2] of the Court of Appeals in CA-G.R. SP No. 98268 which denied the petition for *certiorari* of petitioners Engr. Ben Y. Lim, RBL Fishing Corporation,

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[1] Section 66. *Jurisdiction of the NCIP*.– The NCIP, through its regional offices, shall have jurisdiction over all claims and disputes involving rights of ICCs/IPs: Provided, however, That no such dispute shall be brought to the NCIP unless the parties have exhausted all remedies provided under their customary laws. For this purpose, a certification shall be issued by the Council of Elders/Leaders who participated in the attempt to settle the dispute that the same has not been resolved, which certification shall be a condition precedent to the filing of a petition with the NCIP.

[2] *Rollo*, pp. 44-56; penned by Associate Justice Antonio L. Villamor with Associate Justices Jose C. Reyes, Jr. and Rodil V. Zalameda concurring.

Palawan Aquaculture Corporation, and Peninsula Shipyard Corporation. Affirmed, then, is the Resolution[3] of the NCIP in NCIP Case No. RHO 4-01-2006.

Respondent Tagbanua Indigenous Cultural Community of Barangay Buenavista, Coron, Palawan, represented by individual respondents Fernando P. Aguido, Ernesto Cinco, Bobencio Mosquera, Jurry Carpiano, Victor Balbutan, Nordito Alberto, Edeng Pesro, Claudina Baquid, Nonita Salva, and Nanchita Alberto, filed a petition before the NCIP against petitioners for "Violation of Rights to Free and Prior and Informed Consent (FPIC) and Unauthorized and Unlawful Intrusion with Prayer for the Issuance of Preliminary Injunction and Temporary Restraining Order."[4]

Thereafter, the NCIP issued an Order dated 20 October 2006 and directing the issuance and service of summons, and setting the preliminary conference and initial hearing on the prayer for the issuance of a Temporary Restraining Order on 22 November 2006 and the conduct of an ocular inspection of the subject area on the following day, 23 November 2006.

Despite a motion to dismiss being a prohibited pleading under the NCIP Administrative Circular No. 1-03, petitioners moved to dismiss the petition on the following grounds:

1) Lack of jurisdiction over the subject matter of the petition because [petitioners] are not members of the Indigenous Cultural Communities/Indigenous Peoples;

2) Lack of jurisdiction over the persons of [petitioners], because summons were served by mail rather than by personal service;

3) Lack of cause of action, because there is no allegation in the petition or document attached thereto showing that [respondents] were indeed authorized by the purported Tagbanua Indigenous Cultural Community, and no Certificate of Ancestral Domain Title has as yet been issued over the claim; [and]

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[3] *Id*. at 95-105.

[4] *Id*. at 6; Petition for Review on *Certiorari*.

4) Violation of the rule against forum shopping because [respondents] have already filed criminal cases also based on the same alleged acts before the Municipal Trial Court of Coron-Busuanga.[5]

Not contented with their filing of a Motion to Dismiss, petitioners, by way of special appearance, filed a Motion to Suspend Proceedings, arguing that "considering the nature of the issues raised [in the Motion to Dismiss], particularly, the issue on jurisdiction, it is imperative that the [Motion to Dismiss] be resolved first before other proceedings could be conducted in the instant case."[6]

On 30 November 2006, the NCIP issued a Resolution[7] denying the motion to dismiss. While affirming that a Motion to Dismiss is prohibited under Section 29 of the Rules on Pleadings, Practice and Procedure before the NCIP, the NCIP squarely ruled that: (1) it had jurisdiction over the petition filed by respondents; (2) it acquired jurisdiction over the persons of petitioners; (3) it was premature to rule on the issue of lack of cause of action; and (4) respondents did not violate the rule on forum shopping.[8]

After the denial of their motion for reconsideration, petitioners filed a petition for *certiorari* before the appellate court, seeking to reverse, annul and set aside the NCIP's twin resolutions for being tainted with grave abuse of discretion amounting to lack or excess of jurisdiction.

As previously stated, the Court of Appeals denied the petition for *certiorari* and affirmed the resolutions of the NCIP. The appellate court echoed the NCIP's stance that from the wording of Section 66 of the IPRA, the NCIP was bestowed with an all-encompassing grant of jurisdiction over all claims and disputes involving rights of ICCs/IPs and that the requirement in the

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[5] Rules on Pleadings, Practice and Procedure Before the NCIP.

[6] *Rollo*, pp. 166-169.

[7] *Id*. at 95-105.

[8] *Id*.

proviso contained in the section, *i.e.*, obtaining a certification from the Council of Elders/Leaders that the parties had exhausted all remedies provided under their customary law prior to the filing of an action, applied only to instances where both parties were members of an ICC/IP.

The NCIP also cited Section 14 of its own Rules on Pleadings, Practice and Procedure Before the NCIP which provides exceptions to the requirement of exhaustion of administrative remedies under customary laws, such as where one of the parties is: (1) either a public or private corporation, partnership, association or juridical person or a public officer or employee and the dispute is in connection with the performance of his official functions; and (2) a non-IP/ICC or does not belong to the same IP/ICC. In all, the Court of Appeals affirmed the NCIP's resolution that when a claim or dispute involves rights of the IPs/ICCs, the NCIP has jurisdiction over the case regardless of whether the opposing party is a non-IP/ICC.

Adamant, petitioners appeal to us by a petition for review on *certiorari*, echoing the same issues raised before the appellate court:

I. WHETHER OR NOT THE HONORABLE COURT OF APPEALS SERIOUSLY ERRED IN HOLDING THAT x x x THE [NCIP HAS] JURISDICTION OVER THE SUBJECT MATTER OF THE PETITION x x x;

II. WHETHER OR NOT THE HONORABLE COURT OF APPEALS COMMITTED SERIOUS ERRORS IN HOLDING THAT x x x THE [NCIP] ACQUIRED JURISDICTION OVER THE PERSONS OF THE PETITIONERS; and

III. WHETHER OR NOT THE HONORABLE COURT OF APPEALS GRAVELY ERRED IN HOLDING THAT x x x RESPONDENTS HAVE CAUSE/S OF ACTION AGAINST THE PETITIONERS.[9]

Notably, petitioners have dropped their issue that respondents are guilty of forum shopping.

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[9] *Id*. at 14.

At the outset, we note that none of the petitioners, the NCIP, and the appellate court have proffered an argument, and opined, on the specific nature of the jurisdiction of the NCIP, whether such is primary and concurrent with courts of general jurisdiction, and/or original and exclusive, to the exclusion of regular courts.

In the main, petitioners argue that the NCIP does not have jurisdiction over the petition filed by respondents because they (petitioners) are non-IPs/ICCs. Essentially, they interpret the jurisdiction of the NCIP as limited to claims and disputes involving rights of IPs/ICCs where both opposing parties are IPs/ICCs.

On the other hand, the NCIP and the appellate court rely mainly on the wording of Section 66 of the IPRA and the averred purpose for the law's enactment, "to fulfill the constitutional mandate of protecting the rights of the indigenous cultural communities to their ancestral land and to correct a grave historical injustice to our indigenous people."[10] According to the two tribunals, "[a]ny interpretation that would restrict the applicability of the IPRA law exclusively to its members would certainly leave them open to oppression and exploitation by outsiders."[11] The NCIP and the appellate court maintain that Section 66 does not distinguish between a dispute among members of ICCs/IPs and a dispute involving ICC/IP members and non-members. Thus, there is no reason to draw a distinction and limit the NCIP's jurisdiction over "all claims and disputes involving rights of ICCs/IPs."[12] Effectively, even without asseverating it, the two tribunals interpret the statutory grant of jurisdiction to the NCIP as primary, original and exclusive, in all cases and instances where the claim or dispute involves rights of IPs/ICCs, without regard to whether one of the parties is non-IP/ICC.

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[10] *Id*. at 15.

[11] *Id*.

[12] *Id*. at 17.

In addition, the NCIP promulgated its rules and regulations such as NCIP Administrative Circular No. 1-03 dated 9 April 2003, known as the "Rules on Pleadings, Practice and Procedure Before the NCIP," and Administrative Circular No. 1, Series of 2014, known as "The 2014 Revised Rules of Procedure before the National Commission on Indigenous Peoples." Sections 5 and 1, respectively of both the 2003 and 2014 Administrative Circular, Rule III, provide for the jurisdiction of the NCIP Regional Hearing Officer (RHO), thus:

> Jurisdiction of the NCIP. – The NCIP through its Regional Hearing Offices shall exercise jurisdiction over all claims and disputes involving rights of ICCs/IPs and all cases pertaining to the implementation, enforcement, and interpretation of R.A. 8371, including but not limited to the following:
>
> **(1) Original and Exclusive Jurisdiction of the Regional Hearing Office (RHO)**:
>
> a. Cases involving disputes and controversies over ancestral lands/domains of ICCs/IPs;
>
> b. Cases involving violations of the requirement of free and prior and informed consent of ICCs/IPs;
>
> c. Actions for enforcement of decisions of ICCs/IPs involving violations of customary laws or desecration of ceremonial sites, sacred places, or rituals;
>
> d. Actions for redemption/reconveyance under Section 8(b) of R.A. 8371; and
>
> Such other cases analogous to the foregoing.

We first dispose of the primordial question on the nature and scope of the NCIP's jurisdiction as provided in the IPRA. Specifically, the definitive issue herein boils down to whether the NCIP's jurisdiction is limited to cases where both parties are ICCs/IPs or primary and concurrent with regular courts, and/or original and exclusive, to the exclusion of the regular courts, on all matters involving rights of ICCs/IPs.

We are thus impelled to discuss jurisdiction and the different classes thereof.

Jurisdiction is the power and authority, conferred by the Constitution and by statute, to hear and decide a case.[13] The authority to decide a cause at all is what makes up jurisdiction.

Section 66 of the IPRA, the law conferring jurisdiction on the NCIP, reads:

> Sec. 66. *Jurisdiction of the NCIP*. – **The NCIP, through its regional offices, shall have jurisdiction over all claims and disputes involving rights of ICCs/IPs**: Provided, however, **That no such dispute shall be brought to the NCIP unless the parties have exhausted all remedies provided under their customary laws.** For this purpose, a certification shall be issued by the Council of Elders/Leaders who participated in the attempt to settle the dispute that the same has not been resolved, which certification shall be a condition precedent to the filing of a petition with the NCIP. (Emphasis supplied).

The conferment of such jurisdiction is consistent with state policy averred in the IPRA which recognizes and promotes all the rights of ICCs/IPs within the framework of the constitution. Such is likewise reflected in the mandate of the NCIP to "protect and promote the interest and wellbeing of the ICCs/IPs with due regard to their beliefs, customs, traditions and[,] institutions."[14]

In connection thereto, from *Bank of Commerce v. Planters Development Bank,*[15] we learned that the provisions of the enabling statute are the yardsticks by which the Court would measure the quantum of quasi-judicial powers an administrative agency may exercise, as defined in the enabling act of such agency.

Plainly, the NCIP is the "primary government agency responsible for the formulation and implementation of policies, plans and programs to promote and protect the rights and well-

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[13] *Bank of Commerce v. Planters Development Bank*, G.R. Nos. 154470-71, and G.R. Nos. 154589-90, 24 September 2012, 681 SCRA 521, 522.

[14] IPRA Section 39.

[15] *Rollo*, pp. 95-105.

being of the ICCs/IPs and the recognition of their ancestral domains as well as their rights thereto."[16] Nonetheless, the creation of such government agency does not *per se* grant it primary and/or exclusive and original jurisdiction, excluding the regular courts from taking cognizance and exercising jurisdiction over cases which may involve rights of ICCs/IPs.

Recently, in *Unduran, et al. v. Aberasturi, et al.*,[17] we ruled that Section 66 of the IPRA does not endow the NCIP with primary and/or exclusive and original jurisdiction over all claims and disputes involving rights of ICCs/IPs. Based on the qualifying proviso, we held that the NCIP's jurisdiction over such claims and disputes occur only when they arise between or among parties belonging to the same ICC/IP. Since two of the defendants therein were not IPs/ICCs, the regular courts had jurisdiction over the complaint in that case.

In his concurring opinion in *Unduran*, Justice Jose P. Perez submits that the jurisdiction of the NCIP ought to be definitively drawn to settle doubts that still linger due to the implicit affirmation done in *The City Government of Baguio City, et al. v. Atty. Masweng, et al.*[18] of the NCIP's jurisdiction over cases where one of the parties are not ICCs/IPs.

In *Unduran* and as in this case, we are hard pressed to declare a primary and/or exclusive and original grant of jurisdiction to the NCIP over all claims and disputes involving rights of ICCs/IPs where there is no clear intendment by the legislature.

Significantly, the language of Section 66 is only clear on the nature of the claim and dispute as involving rights of ICCs/IPs, but ambiguous and indefinite in other respects. While using the word "all" to quantify the number of the "claims and disputes" as covering each and every claim and dispute involving rights of ICCs/IPs, Section 66 unmistakably contains a proviso, which

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[16] IPRA Section 38.

[17] G.R. No. 181284, October 20, 2015.

[18] 597 Phil. 668 (2009).

on its face restrains or limits the initial generality of the grant of jurisdiction.

Unduran lists the elements of the grant of jurisdiction to the NCIP: (1) the claim and dispute involve the right of ICCs/IPs; **and** (2) both parties have exhausted all remedies provided under their customary laws. Both elements must be present prior to the invocation and exercise of the NCIP's jurisdiction.

Thus, despite the language that the NCIP shall have jurisdiction over all claims and disputes involving rights of ICCs/IPs, we cannot be confined to that first alone and therefrom deduce primary sole NCIP jurisdiction over all ICCs/IPs claims and disputes **to the exclusion of the regular courts**. If it were the intention of the legislative that: (1) the NCIP exercise primary jurisdiction over, and/or (2) the regular courts be excluded from taking cognizance of, claims and disputes involving rights of ICCs/IPs, the legislature could have easily done so as in other instances conferring primary, and original and exclusive jurisdiction to a specific administrative body. We will revert to this point shortly but find it pertinent to first discuss the classes of jurisdiction.

Primary jurisdiction, also known as the doctrine of Prior Resort, is the power and authority vested by the Constitution or by statute upon an administrative body to act upon a matter by virtue of its specific competence.[19] The doctrine of primary jurisdiction prevents the court from arrogating unto itself the authority to resolve a controversy which falls under the jurisdiction of a tribunal possessed with special competence.[20] In one occasion, we have held that regular courts cannot or should not determine a controversy involving a question which is within the jurisdiction of the administrative tribunal before the question is resolved by the administrative tribunal, where the question demands the exercise of sound administrative discretion requiring the special knowledge, experience, and services of the administrative tribunal

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[19] *Cristobal v. CA*, 353 Phil. 318, 330 (1998).

[20] *Crusaders Broadcasting System, Inc. v. NTC,* 388 Phil. 624, 636 (2000).

to determine technical and intricate matters of fact, and a uniformity of ruling is essential to comply with the premises of the regulatory statute administered[21] The objective of the doctrine of primary jurisdiction is to guide a court in determining whether it should refrain from exercising its jurisdiction until after an administrative agency has determined some question arising in the proceeding before the court.[22]

Additionally, primary jurisdiction does not necessarily denote exclusive jurisdiction.[23] It applies where a claim is originally cognizable in the courts and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, has been placed within the special competence of an administrative body; in such case, the judicial process is suspended pending referral of such issues to the administrative body for its view.[24] In some instances, the Constitution and statutes grant the administrative body primary jurisdiction, concurrent with either similarly authorized government agencies or the regular courts, such as the distinct kinds of jurisdiction bestowed by the Constitution and statutes on the Ombudsman.

The case of *Honasan II v. The Panel of Investigating Prosecutors of the Department of Justice*[25] delineated primary and concurrent jurisdiction as opposed to original and exclusive jurisdiction vested by both the Constitution and statutes[26] on the Ombudsman concurrent, albeit primary, with the Department of Justice.

Paragraph (1) of Section 13, Article XI of the Constitution, *viz.*:

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[21] *Spouses Abejo v. Dela Cruz*, 233 Phil. 668, 684-685 (1987).

[22] *Fabia v. Court of Appeals,* 437 Phil. 389, 403 (2002).

[23] *Honasan II v. The Panel of Investigating Prosecutors of the Department of Justice,* G.R. No. 159747, 13 April 2004, 427 SCRA 46, 67.

[24] *Fabia v. Court of Appeals*, 437 Phil. 389, 403 (2002), *supra* note 20.

[25] *Supra* note 21.

[26] Republic Act No. 6770, known as "The Ombudsman Act of 1989," and the 1987 Administrative Code.

SEC. 13. *The Office of the Ombudsman shall have the following powers, functions, and duties*:

1. Investigate on its own, or on complaint by any person, any act or omission of any public official, employee, office or agency, when such act or omission appears to be illegal, unjust, improper, or inefficient.

does not exclude other government agencies tasked by law to investigate and prosecute cases involving public officials. If it were the intention of the framers of the 1987 Constitution, they would have expressly declared the exclusive conferment of the power to the Ombudsman. Instead, paragraph (8) of the same Section 13 of the Constitution provides:

(8) Promulgate its rules of procedure and exercise such other powers or perform such functions or duties as may be provided by law Accordingly, Congress enacted R.A. 6770, otherwise known as "The Ombudsman Act of 1989." Section 15 thereof provides:

Sec. 15. Powers, Functions and Duties. – The Office of the Ombudsman shall have the following powers, functions and duties:

(1) Investigate and prosecute on its own or on complaint by any person, any act or omission of any public officer or employee, office or agency, when such act or omission appears to be illegal, unjust, improper or inefficient. *It has primary jurisdiction over cases cognizable by the Sandiganbayan and, in the exercise of this primary jurisdiction, it may take over, at any stage, from any investigatory agency of the government, the investigation of such cases.*

Pursuant to the authority given to the Ombudsman by the Constitution and the Ombudsman Act of 1989 to lay down its own rules and procedure, the Office of the Ombudsman promulgated Administrative Order No. 8, dated November 8, 1990, entitled, *Clarifying and Modifying Certain Rules of Procedure of the Ombudsman*, to wit:

A complaint filed in or taken cognizance of by the Office of the Ombudsman charging any public officer or employee including those in government-owned or controlled corporations, with an act or omission alleged to be illegal, unjust, improper or inefficient is an Ombudsman case. Such a complaint may

be the subject of criminal or administrative proceedings, or both.

For purposes of investigation and prosecution, Ombudsman cases involving criminal offenses may be subdivided into two classes, to wit: (1) those cognizable by the Sandiganbayan, and (2) those falling under the jurisdiction of the regular courts. The difference between the two, aside from the category of the courts wherein they are filed, is on the authority to investigate as distinguished from the authority to prosecute, such cases.

The power to investigate or conduct a preliminary investigation on any Ombudsman case may be exercised by an investigator or prosecutor of the Office of the Ombudsman, or by any Provincial or City Prosecutor or their assistance, either in their regular capacities or as deputized Ombudsman prosecutors.

The prosecution of cases cognizable by the Sandiganbayan shall be under the direct exclusive control and supervision of the Office of the Ombudsman. In cases cognizable by the regular Courts, the control and supervision by the Office of the Ombudsman is only in Ombudsman cases in the sense defined above. The law recognizes a concurrence of jurisdiction between the Office of the Ombudsman and other investigative agencies of the government in the prosecution of cases cognizable by regular courts.

It is noteworthy that as early as 1990, the Ombudsman had properly differentiated the authority to investigate cases from the authority to prosecute cases. It is on this note that the Court will first dwell on the nature or extent of the authority of the Ombudsman to investigate cases. Whence, focus is directed to the second sentence of paragraph (1), Section 15 of the Ombudsman Act which specifically provides that the Ombudsman has primary jurisdiction over cases cognizable by the Sandiganbayan, and, in the exercise of this primary jurisdiction, it may take over, at any stage, from any investigating agency of the government, the investigation of such cases.

That the power of the Ombudsman to investigate offenses involving public officers or employees is not exclusive but is concurrent with other similarly authorized agencies of the government such as the provincial, city and state prosecutors

has long been settled in several decisions of the Court. (Emphasis supplied)

In *Cojuangco, Jr. v. Presidential Commission on Good Government*, decided in 1990, the Court expressly declared:

A reading of the foregoing provision of the Constitution does not show that the power of investigation including preliminary investigation vested on the Ombudsman is exclusive.

Interpreting the primary jurisdiction of the Ombudsman under Section 15 (1) of the Ombudsman Act, the Court held in said case:

Under Section 15 (1) of Republic Act No. 6770 aforecited, the Ombudsman has primary jurisdiction over cases cognizable by the Sandiganbayan so that it may take over at any stage from any investigatory agency of the government, the investigation of such cases. *The authority of the Ombudsman to investigate offenses involving public officers or employees is not exclusive but is concurrent with other similarly authorized agencies of the government. Such investigatory agencies referred to include the PCGG and the provincial and city prosecutors and their assistants, the state prosecutors and the judges of the municipal trial courts and municipal circuit trial court.*

In other words the provision of the law has opened up the authority to conduct preliminary investigation of offenses cognizable by the Sandiganbayan to all investigatory agencies of the government duly authorized to conduct a preliminary investigation under Section 2, Rule 112 of the 1985 Rules of Criminal Procedure with the only qualification that the Ombudsman may take over at any stage of such investigation in the exercise of his primary jurisdiction.

A little over a month later, the Court, in *Deloso vs. Domingo*, pronounced that the Ombudsman, under the authority of Section 13 (1) of the 1987 Constitution, has jurisdiction to investigate any crime committed by a public official, elucidating thus:

As protector of the people, the office of the Ombudsman has the power, function and duty to "act promptly on complaints filed in any form or manner against public officials" (Sec. 12) and to "investigate xxx any act or omission of any public official x x x when such act or omission appears to be illegal, unjust, improper or inefficient." (Sec.1[3].) The Ombudsman is also empowered to "direct the officer concerned," in this case the Special Prosecutor,

"to take appropriate action against a public official x x x and to recommend his prosecution" (Sec. 1[3]).

The clause "any [illegal] act or omission of any public official" is broad enough to embrace any crime committed by a public official. The law does not qualify the nature of the illegal act or omission of the public official or employee that the Ombudsman may investigate. It does not require that the act or omission be related to or be connected with or arise from, the performance of official duty. Since the law does not distinguish, neither should we.

The reason for the creation of the Ombudsman in the 1987 Constitution and for the grant to it of broad investigative authority, is to insulate said office from the long tentacles of official dom that are able to penetrate judges' and fiscals' offices, and others involved in the prosecution of erring public officials, and through the exertion of official pressure and influence, quash, delay, or dismiss investigations into malfeasances and misfeasances committed by public officers. It was deemed necessary, therefore, to create a special office to investigate *all* criminal complaints against public officers regardless of whether or not the acts or omissions complained of are related to or arise from the performance of the duties of their office. The Ombudsman Act makes perfectly clear that the jurisdiction of the Ombudsman encompasses "*all kinds of malfeasance, misfeasance, and non-feasance* that have been committed by *any officer or employee* as mentioned in Section 13 hereof, during his tenure of office" (Sec. 16, R.A. 6770).

Indeed, the labors of the constitutional commission that created the Ombudsman as a special body to investigate erring public officials would be wasted if its jurisdiction were confined to the investigation of minor and less grave offenses arising from, or related to, the duties of public office, but would exclude those grave and terrible crimes that spring from abuses of official powers and prerogatives, for it is the investigation of the latter where the need for an independent, fearless, and honest investigative body, like the Ombudsman, is greatest.

At first blush, there appears to be conflicting views in the rulings of the Court in the *Cojuangco, Jr.* case and the *Deloso* case. However, the contrariety is more apparent than real. In subsequent cases, the Court elucidated on the nature of the powers of the Ombudsman to investigate.

In 1993, the Court held in *Sanchez vs. Demetriou*, that while it may be true that the Ombudsman has jurisdiction to investigate and prosecute any illegal act or omission of any public official, the authority of the Ombudsman to investigate is merely a primary and not an exclusive authority, thus:

The Ombudsman is indeed empowered under Section 15, paragraph (1) of RA 6770 to investigate and prosecute any illegal act or omission of any public official. However as we held only two years ago in the case of *Aguinaldo v. Domagas*, this authority "is not an exclusive authority but rather a shared or concurrent authority in respect of the offense charged."

Petitioners finally assert that the information and amended information filed in this case needed the approval of the Ombudsman. It is not disputed that the information and amended information here did not have the approval of the Ombudsman. However, we do not believe that such approval was necessary at all. In *Deloso v. Domingo*; 191 SCRA 545 (1990), the Court held that the Ombudsman has authority to investigate charges of illegal acts or omissions on the part of any public official, i.e.; any crime imputed to a public official. *It must, however, be pointed out that the authority of the Ombudsman to investigate "any [illegal] act or omission of any public official" (191 SCRA 550) is not an exclusive authority but rather a shared or concurrent authority in respect of the offense charged,* i.e.; the crime of sedition. Thus, the non-involvement of the office of the Ombudsman in the present case does not have any adverse legal consequence upon the authority of the panel of prosecutors to file and prosecute the information or amended information.

In fact, other investigatory agencies of the government such as the Department of Justice in connection with the charge of sedition, and the Presidential Commission on Good Government, in ill gotten wealth cases, may conduct the investigation.

In *Natividad v. Felix*, a 1994 case, where the petitioner municipal mayor contended that it is the Ombudsman and not the provincial fiscal who has the authority to conduct a preliminary investigation over his case for alleged Murder, the Court held:

The *Deloso* case has already been re-examined in two cases, namely *Aguinaldo v. Domagas* and *Sanchez v. Demetriou*. However, by way of amplification, we feel the need for tracing the history of the legislation relative to the jurisdiction of Sandiganbayan since the

Ombudsman's primary jurisdiction is dependent on the cases cognizable by the former.

In the process, we shall observe how the policy of the law, with reference to the subject matter, has been in a state of flux.

These laws, in chronological order, are the following: (a) Pres. Decree No. 1486, — the first law on the Sandiganbayan; (b) Pres. Decree No. 1606 which expressly repealed Pres. Decree No. 1486; (c) Section 20 of Batas Pambansa Blg. 129; (d) Pres. Decree No. 1860; and (e) Pres. Decree No. 1861.

The latest law on the Sandiganbayan, Sec. 1 of Pres. Decree No. 1861 reads as follows:

"SECTION 1. Section 4 of Presidential Decree No. 1606 is hereby amended to read as follows:

'SEC. 4. *Jurisdiction*. – The Sandiganbayan shall exercise:

'(a) Exclusive original jurisdiction in all cases involving:

. . . . . .

(2) Other offenses or felonies committed by public officers and employees *in relation to their office*, including those employed in government-owned or controlled corporation, whether simple or complexed with other crimes, where the penalty prescribed by law is higher than prision correccional or imprisonment for six (6) years, or a fine of ₱6,000: PROVIDED, HOWEVER, that offenses or felonies mentioned in this paragraph where the penalty prescribed by law does not exceed prision correccional or imprisonment for six (6) years or a fine of ₱6,000 shall be tried by the proper Regional Trial Court, Metropolitan Trial Court, Municipal Trial Court and Municipal Circuit Trial Court."

A perusal of the aforecited law shows that two requirements must concur under Sec. 4(a)(2) for an offense to fall under the Sandiganbayan's jurisdiction, namely: the offense committed by the public officer must be in relation to his office and than penalty prescribed be higher then *prision correccional* or imprisonment for six (6) years, or a fine of ₱6,000.00.

Applying the law to the case at bench, we find that although the second requirement has been met, the first requirement is wanting. A review of these Presidential Decrees, except Batas Pambansa Blg.

129, would reveal that the crime committed by public officers or employees must be "in relation to their office" if it is to fall within the jurisdiction of the Sandiganbayan. This phrase which is traceable to Pres. Decree No. 1468, has been retained by Pres. Decree No. 1861 as a requirement before the Ombudsman can acquire primary jurisdiction on its power to investigate.

It cannot be denied that Pres. Decree No. 1861 is in pari materia to Article XI, Sections 12 and 13 of the 1987 Constitution and the Ombudsman Act of 1989 because, as earlier mentioned, the Ombudsman's power to investigate is dependent on the cases cognizable by the Sandiganbayan. Statutes are in pari materia when they relate to the same person or thing or to the same class of persons or things, or object, or cover the same specific or particular subject matter.

It is axiomatic in statutory construction that a statute must be interpreted, not only to be consistent with itself, but also to harmonize with other laws on the same subject matter, as to form a complete, coherent and intelligible system. The rule is expressed in the maxim, "interpretare et concordare legibus est optimus interpretand," or every statute must be so construed and harmonized with other statutes as to form a uniform system of jurisprudence. Thus, in the application and interpretation of Article XI, Sections 12 and 13 of the 1987 Constitution and the Ombudsman Act of 1989, Pres. Decree No. 1861 must be taken into consideration. It must be assumed that when the 1987 Constitution was written, its framers had in mind previous statutes relating to the same subject matter. In the absence of any express repeal or amendment, the 1987 Constitution and the Ombudsman Act of 1989 are deemed in accord with existing statute, specifically, Pres. Decree No. 1861.

R.A. No. 8249 which amended Section 4, paragraph (b) of the Sandiganbayan Law (P.D. 1861) likewise provides that for other offenses, aside from those enumerated under paragraphs (a) and (c), to fall under the exclusive jurisdiction of the Sandiganbayan, they must have been committed by public officers or employees in relation to their office.

In summation, the Constitution, Section 15 of the Ombudsman Act of 1989 and Section 4 of the Sandiganbayan Law, as amended, do not give to the Ombudsman exclusive jurisdiction to investigate offenses committed by public officers or employees. The authority of the Ombudsman to investigate offenses involving public officers or employees is concurrent with other government investigating

agencies such as provincial, city and state prosecutors. However, the Ombudsman, in the exercise of its primary jurisdiction over cases cognizable by the Sandiganbayan, may take over, at any stage, from any investigating agency of the government, the investigation of such cases.

In other words, respondent DOJ Panel is not precluded from conducting any investigation of cases against public officers involving violations of penal laws but if the cases fall under the exclusive jurisdiction of the Sandiganbayan, then respondent Ombudsman may, in the exercise of its primary jurisdiction[,] take over at any stage.

x x x x x x x x x

To reiterate for emphasis, the power to investigate or conduct preliminary investigation on charges against any public officers or employees may be exercised by an investigator or by any provincial or city prosecutor or their assistants, either in their regular capacities or as deputized Ombudsman prosecutors. The fact that all prosecutors are in effect deputized Ombudsman prosecutors under the OMB-DOJ Circular is a mere superfluity. The DOJ Panel need not be authorized nor deputized by the Ombudsman to conduct the preliminary investigation for complaints filed with it because the DOJ's authority to act as the principal law agency of the government and investigate the commission of crimes under the Revised Penal Code is derived from the Revised Administrative Code which had been held in the *Natividad* case as not being contrary to the Constitution. Thus, there is not even a need to delegate the conduct of the preliminary investigation to an agency which has the jurisdiction to do so in the first place. However, the Ombudsman may assert its primary jurisdiction at any stage of the investigation.[27] (Emphasis supplied)

In contrast to our holding in *Honasan II*, the NCIP cannot be said to have even primary jurisdiction over all the ICC/IP cases comparable to what the Ombudsman has in cases falling under the exclusive jurisdiction of the Sandiganbayan. We do not find such specificity in the grant of jurisdiction to the NCIP in Section 66 of the IPRA.

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[27] *Honasan II v. The Panel of Investigating Prosecutors of the Department of Justice*, *supra* note 21 at 63.

Neither does the IPRA confer **original and exclusive jurisdiction** to the NCIP over all claims and disputes involving rights of ICCs/IPs.

Thus, we revert to the point on the investiture of primary and/or original and exclusive jurisdiction to an administrative body which in all instances of such grant was explicitly provided in the Constitution and/or the enabling statute, to wit:

1. Commission on Elections' exclusive original jurisdiction over all elections contests;[28]

2. Securities and Exchange Commission's original and exclusive jurisdiction over all cases enumerated under Section 5 of Presidential Decree No. 902-A,[29] Prior to its transfer to courts of general jurisdiction or the appropriate Regional Trial Court by virtue of Section 4 of the Securities Regulations Code;

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[28] Article IX-C, Section 2, paragraph 2

Section 2. The Commission on elections shall exercise the following powers and functions:

x x x x x x x x x

(2) Exercise exclusive original jurisdiction over all contests relating to the elections, returns, and qualifications of all elective regional, provincial, and city officials, and appellate jurisdiction over all contests involving elective municipal officials decided by trial courts of general jurisdiction, or involving elective barangay officials decided by trial courts of limited jurisdiction.

[29] **Section 5.** In addition to the regulatory and adjudicative functions of the Securities and Exchange Commission over corporations, partnerships and other forms of associations registered with it as expressly granted under existing laws and decrees**, it shall have original and exclusive jurisdiction** to hear and decide cases involving.

a) Devices or schemes employed by or any acts, of the board of directors, business associates, its officers or partnership, amounting to fraud and misrepresentation which may be detrimental to the interest of the public and/or of the stockholder, partners, members of associations or organizations registered with the Commission.

b) Controversies arising out of intra-corporate or partnership relations, between and among stockholders, members, or associates; between any or all of them and the corporation, partnership or association of which they are stockholders, members or associates, respectively; and between such corporation, partnership or association and the state insofar as it concerns their individual franchise or right to exist as such entity; and

3. Energy Regulatory Commission's original and exclusive jurisdiction over all cases contesting rates, fees, fines, and penalties imposed by it in the exercise of its powers, functions and responsibilities;[30]

4. Department of Agrarian Reform's[31] primary jurisdiction to determine and adjudicate agrarian reform matters, and its exclusive original jurisdiction over all matters involving the implementation of agrarian reform except those falling under the exclusive jurisdiction of the Department of Agriculture (DA) and the Department of Environment and Natural Resources (DENR);[32]

5. Construction Industry Arbitration Commission's original and exclusive jurisdiction over disputes involving contracts of construction, whether government or private, as long as the parties agree to submit the same to voluntary arbitration;[33]

6. Voluntary arbitrator's or panel of voluntary arbitrator's original and exclusive jurisdiction over all unresolved grievances arising from the interpretation or implementation of the collective bargaining agreement and those arising from the interpretation or enforcement of company personnel policies;[34]

7. The National Labor Relations Commission's (NLRC's) original and exclusive jurisdiction over cases listed in Article 217 of the Labor Code involving all workers, whether agricultural or non-agricultural; and

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c) Controversies in the election or appointments of directors, trustees, officers or managers of such corporations, partnerships or associations.

[30] Republic Act No. 9136, Chapter IV, Section 43, par (v).

[31] Including the creation of the Department of Agrarian Reform Adjudication board (DARAB).

[32] The DAR's jurisdiction under Section 50 of RA No. 6657 is two-fold: (1) Essentially executive and pertains to the enforcement and administration of laws, carrying them into practical operation and enforcing their due observance, while (2) is judicial and involves the determination of rights and obligations of the parties.

[33] Except for disputes arising from employer-employee relationships which shall continue to be covered by the Labor Code of the Philippines; Executive Order No. 1008; or the "Construction Industry Arbitration Law."

[34] Labor Code Article. Nos. 260-261.

8. Board of Commissioners of the Bureau of Immigration's primary and exclusive jurisdiction over all deportation cases.[35]

That the proviso found in Section 66 of the IPRA is exclusionary, specifically excluding disputes involving rights of IPs/ICCs where the opposing party is non-ICC/IP, is reflected in the IPRA's emphasis of customs and customary law to govern in the lives of the ICCs/IPs. In fact, even the IPRA itself recognizes that customs and customary law cannot be applied to non-IPs/ICCs since ICCs/IPs are recognized as a distinct sector of Philippine society. This recognition contemplates their difference from the Filipino majority, their way of life, how they have continuously lived as an organized community on communally bounded and defined territory. The ICCs/IPs share common bonds of language, customs, traditions and other distinctive cultural traits, which by their resistance to political, social and cultural inroads of colonization, non-indigenous religions and cultures, became historically differentiated from the majority. ICCs/IPs also include descendants of ICCs/IPs who inhabited the country at the time of conquest or colonization, who retain some or all of their own social, economic, cultural and political institutions but who may have been displaced from their traditional territories, or who may have resettled outside their ancestral domains.[36]

In all, the limited or special jurisdiction of the NCIP, confined only to a special cause involving rights of IPs/ICCs, can only be exercised under the limitations and circumstances prescribed by the statute.

To effect the IPRA and its thrust to recognize and promote the rights of ICCs/IPs within the framework of the Constitution goes hand in hand with the IPRA's running theme of the primary distinctiveness of customary laws, and its application to almost all aspects of the lives of members of the IPs/ICCs, including the resolution of disputes among ICCs/IPs. The NCIP was created

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[35] ADMINISTRATIVE CODE of 1987, Book IV, Title III, Chapter 10, Section 31.

[36] See *Cruz v. Sec. of Environment & Natural Resources*, 400 Phil. 904 (2000).

under the IPRA exactly to act on and resolve claims and disputes involving the rights of ICCs/IPs.[37]

Former Chief Justice Reynato Puno, in his separate opinion in *Cruz*, the first challenge to the IPRA, emphasizes the primacy of customs and customary law in the lives of the members of ICCs/IPs:

> *Custom*, *from which customary law is derived, is also recognized under the Civil Code as a source of law*. Some articles of the Civil Code expressly provide that custom should be applied in cases where no codal provision is applicable. In other words, in the absence of any applicable provision in the Civil Code, custom, when duly proven, can define rights and liabilities.
>
> *Customary law* is a *primary*, not secondary, source of rights under the IPRA and uniquely applies to ICCs/IPs. *Its recognition does not depend on the absence of a specific provision in the civil law*. The indigenous concept of ownership under customary law is specifically acknowledged and recognized, and coexists with the civil law concept and the laws on land titling and land registration.[38]

Once again, the primacy of customs and customary law sets the parameters for the NCIP's limited and special jurisdiction and its consequent application in dispute resolution.[39] Demonstrably, the proviso in Section 66 of the IPRA limits the jurisdiction of the NCIP to cases of claims and disputes involving rights of ICCs/IPs where both parties are ICCs/IPs because customs and customary law cannot be made to apply to non-ICCs/IPs within the parameters of the NCIP's limited and special jurisdiction.

Indeed, non-ICCs/IPs cannot be subjected to this special and limited jurisdiction of the NCIP even if the dispute involves

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[37] Republic Act No. 8371, Sec. 40.

[38] *Supra* note 35.

[39] See IBP Journal Article of Dean Pacifico Agabin, The Influence of Philippine Indigenous Law in the Development of new Concept of Social Justice where customs and customary law govern dispute resolution of ICCs/IPs.

rights of ICCs/IPs since the NCIP has no power and authority to decide on a controversy **involving, as well, rights of non-ICCs/IPs which may be brought before a court of general jurisdiction within the legal bounds of rights and remedies**. Even as a practical concern, non-IPs and non-members of ICCs ought to be excepted from the NCIP's competence since it cannot determine the right-duty correlative, and breach thereof, between opposing parties who are ICCs/IPs and non-ICCs/IPs, the controversy necessarily contemplating application of other laws, not only customs and customary law of the ICCs/IPs. In short, the NCIP is only vested with jurisdiction to determine the rights of ICCs/IPs based on customs and customary law in a given controversy against another ICC/IP, but not the applicable law for each and every kind of ICC/IP controversy even against an opposing non-ICC/IP.

In *San Miguel Corporation v. NLRC*,[40] we delineated the jurisdiction of the Labor Arbiter and the NLRC, specifically paragraph 3 thereof, as all money claims of workers, limited to "cases arising from employer-employee relations." The same clause was not expressly carried over, in printer's ink, in Article 217 as it exists today but the Court ruled that such was a limitation on the jurisdiction of the Labor Arbiter and the NLRC, thus:

> The jurisdiction of Labor Arbiters and the National Labor Relations Commission is outlined in Article 217 of the Labor Code x x x:
>
> "ART. 217. *Jurisdiction of Labor Arbiters and the Commission.* – (a) The Labor Arbiters shall have the *original and exclusive jurisdiction* to hear and decide within thirty (30) working days after submission of the case by the parties for decision, the following cases involving all workers, whether agricultural or non-agricultural:
>
> 1. Unfair labor practice cases;
> 2. Those that workers may file involving wages, hours of work and other terms and conditions of employment;

[40] 244 Phil. 741, 746-748 (1998).

3. *All money claims of workers, including those based on non-payment or underpayment of wages, overtime compensation, separation pay and other benefits provided by law or appropriate agreement,* except claims for employees' compensation, social security, medicare and maternity benefits;

4. Cases involving household services; and

5. Cases arising from any violation of Article 265 of this Code, including questions involving the legality of strikes and lockouts.

(b) The Commission shall have exclusive appellate jurisdiction over all cases decided by Labor Arbiters."

While paragraph 3 above refers to "all money claims of workers," **it is not necessary to suppose that the entire universe of money claims that might be asserted by workers against their employers has been absorbed into the original and exclusive jurisdiction of Labor Arbiters.** In the first place, paragraph 3 should not [be] read not in isolation from but rather within the context formed by paragraph 1 (relating to unfair labor practices), paragraph 2 (relating to claims concerning terms and conditions of employment), paragraph 4 (claims relating to household services, a particular species of employer-employee relations), and paragraph 5 (relating to certain activities prohibited to employees or to employers). It is evident that there is a unifying element which runs through paragraphs 1 to 5 and that is, that they all refer to cases or disputes arising out of or in connection with an employer-employee relationship. This is, in other words, a situation where the rule of *noscitur a sociis* may be [used] in clarifying the scope of paragraph 3, and any other paragraph of Article 217 of the Labor Code, as amended. We reach the above conclusion from an examination of the terms themselves of Article 217, as last amended by B.P. Blg. 227, and even though earlier versions of Article 217 of the Labor Code expressly brought within the jurisdiction of the Labor Arbiters and the NLRC "cases arising from employer-employee relations," which clause was not expressly carried over, in printer's ink, in Article 217 as it exists today. For it cannot be presumed that money claims of workers which do not arise out of or in connection with their employer-employee relationship, and which would therefore fall within the general jurisdiction of the regular courts of justice, were intended by the

legislative authority to be taken away from the jurisdiction of the courts and lodged with Labor Arbiters on an exclusive basis. The court, therefore, believes and so holds that the "money claims of workers" referred to in paragraph 3 of Article 217 embraces money claims which arise out of or in connection with the employer-employee relationship, or some aspect or incident of such relationship. Put a little differently, that money claims of workers which now fall within the original and exclusive jurisdiction of Labor Arbiters are those money claims which have some reasonable causal connection with the employer-employee relationship.

Clearly, the phraseology of "**all** claims and disputes involving rights of ICCs/IPs" does not necessarily grant the NCIP all-encompassing jurisdiction whenever the case involves rights of ICCs/IPs without regard to the status of the parties, *i.e,* whether the opposing parties are both ICCs/IPs.

In *Union Glass & Container Corp., et al. v. SEC, et al.,*[41] we learned to view the bestowal of jurisdiction in the light of the nature and the function of the adjudicative body that was granted jurisdiction, thus:

> This grant of jurisdiction must be viewed in the light of the nature and function of the SEC under the law. Section 4 of PD No. 902-A confers upon the latter "absolute jurisdiction, supervision and control over all corporations, partnerships or associations, who are grantees of primary franchise and/or license or permit issued by the government to operate in the Philippines x x x." The principal function of the SEC is the supervision and control over corporations, partnerships and associations with the end in view that investment in these entities may be encouraged and protected, and their activities pursued for the promotion of economic development.
>
> **It is in aid of this office that the adjudicative power of the SEC must be exercised. Thus the law explicitly specified and delimited its jurisdiction to matters intrinsically connected with the regulation of corporations, partnerships and associations and those dealing with the internal affairs of such corporations, partnerships or associations.**[42]

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[41] 211 Phil. 222 (1983).

[42] *Id*. at 230.

Drawing a parallel to *Union Glass*,[43] the expertise and competence of the NCIP cover only the implementation and the enforcement of the IPRA and customs and customary law of specific ICCs/IPs; the NCIP does not have competence to determine rights, duties and obligations of non-ICCs/IPs under other laws although such may also involve rights of ICCs/IPs. Consistently, the wording of Section 66 that "the NCIP shall have jurisdiction over all claims and disputes involving rights of ICCs/IPs" plus the proviso necessarily contemplate a limited jurisdiction over cases and disputes between IPs/ICCs.

That NCIP Administrative Circulars[44] expand the jurisdiction of the NCIP as original and exclusive in Sections 5 and 1, respectively of Rule III:

> Jurisdiction of the NCIP. – The NCIP through its Regional Hearing Offices shall exercise jurisdiction over all claims and disputes involving rights of ICCs/IPs and all cases pertaining to the implementation, enforcement, and interpretation of R.A. 8371, including but not limited to the following:
>
> (A.) Original and Exclusive Jurisdiction of the Regional Hearing Office (RHO):
>
> 1.) Cases involving disputes and controversies over ancestral lands/domains of ICCs/IPs;
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> x x x x x x x x x
>
> 5.) Cases involving violations of the requirement of free and prior and informed consent of ICCs/IPs;
>
> x x x x x x x x x
>
> 6.) Actions for enforcement of decisions of ICCs/IPs involving violations of customary laws or desecration of ceremonial sites, sacred places, or rituals;
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> x x x x x x x x x
>
> 8.) Actions for redemption/reconveyance under Section8(b) of R.A. 8371; and
>
> 9.) Such other cases analogous to the foregoing.

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[43] *Id*.

[44] No.1-03 dated 9 April 2003 and No. 1 dated 9 October 2014.

is of no moment. The power of administrative officials to promulgate rules in the implementation of a statute is necessarily limited to what is provided for in the legislative enactment.[45]

It ought to be stressed that the function of promulgating rules and regulations may be legitimately exercised only for the purpose of carrying out the provisions of the law into effect. The administrative regulation must be within the scope and purview of the law.[46] The implementing rules and regulations of a law cannot extend the law or expand its coverage, as the power to amend or repeal a statute is vested in the legislature. Indeed, administrative issuances must not override, but must remain consistent with the law they seek to apply and implement. They are intended to carry out, not to supplant or to modify, the law.[47]

However, "administrative bodies are allowed, under their power of subordinate legislation, to implement the broad policies laid down in the statute by 'filling in' the details. All that is required is that the regulation does not contradict, but conforms with the standards prescribed by law.[48]

Perforce, in this case, the NCIP's Administrative Circulars' classification of its RHO's jurisdiction as original and exclusive, supplants the general jurisdiction granted by Batas Pambansa Bilang 129 to the trial courts and ultimately, modifies and broadens the scope of the jurisdiction conferred by the IPRA on the NCIP. We cannot sustain such a classification.

As previously adverted to, we are not unaware of *The City Government of Baguio City, et al. v. Atty. Masweng*, *et al.*[49] and similar cases where we made an implicit affirmation of the

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[45] *Land Bank of the Philippines v. Court of Appeals*, G.R. No. 118712 and G.R. No. 118745, October 6, 1995, 249 SCRA 149, 157-158.

[46] Nachura, *OUTLINE OF POLITICAL LAW*, p. 416.

[47] *Commissioner of Internal Revenue v. Court of Appeals*, G.R. No. 108358, 20 January 1995 240 SCRA 368, 372.

[48] *The Public Schools District Supervisors Ass'n. v.Hon. De Jesus*, 524 Phil. 366, 386 (2006).

[49] *Supra* note 18.

NCIP's jurisdiction over cases where one of the parties are non-ICCs/IPs. Such holding, however, and all the succeeding exercises of jurisdiction by the NCIP, cannot tie our hands and declare a grant of primary and/or original and exclusive jurisdiction, where there is no such explicit conferment by the IPRA. At best, the limited jurisdiction of the NCIP is concurrent with that of the regular trial courts in the exercise of the latter's general jurisdiction extending to all controversies brought before them within the legal bounds of rights and remedies.[50]

Jurisprudence has held on more than one occasion that in determining which body has jurisdiction over a case, we consider the nature of the question that is the subject of controversy as well as the status or relationship of the parties.[51]

Thus, we examine the pertinent allegations in respondents' petition:

4. That [respondents] are members of the Tagbanua Indigenous Cultural Communities in the Calamianes group of islands [in] Coron, Palawan;

5. That Barangay Buenavista, Coron is part of the ancestral domains of the Tagbanuas within Cluster 1 of the Calamianes group of islands;

6. That prior to the enactment of the Indigenous Peoples Rights Act of 1997 (IPRA), they have already filed their claim for the recognition of their ancestral domains with the Department of Environment and Natural Resources under DAO-2-93 and DAO No. 61-91;

7. That because of the enactment of the IPRA, the Provincial Special Task Force on Ancestral Domains (PSTFAD) recommended instead the validation of their proofs and claims with the newly created National Commission on Indigenous Peoples (NCIP) for the corresponding issuance of a Certificate of Ancestral Domains Title (CADT).

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[50] Feria, *Civil Procedure Annotated,* p. 150.

[51] *Eristingcol v. Limjoco, Court of Appeals, et al.,* 601 Phil. 136, 142 (2009).

8. That Sections 3.1 and 11 of the IPRA provided that the State recognizes the rights of the Indigenous Cultural Communities (ICCs) to our ancestral domains by virtue of their Native Title and that, it was even optional on their part to request for the issuance of a title or CADT;

9. That as such, it was not even required that they have to obtain first a CADT before their rights to their ancestral domains be recognized;

10. That furthermore, their free and prior informed consent (FPIC) are required before any person or entity, whether private or government can enter or undertake any activity within their ancestral domains;

11. That in order to ensure that their rights to FPIC are not violated, Section 59 of the IPRA provides that the NCIP had to issue first a Certification Precondition (CP) that their consent had been elicited first;

12. That their Free and Prior Informed Consent was not elicited by [petitioners] Engr. Ben Lim, RBL Fishing Corporation, Palawan Aquaculture Corporation and Peninsula Shipyard Corporation when they unlawfully entered and occupied portions of their ancestral domains [in] Sitio Makwaw and Sitio Minukbay Buenavista, Coron, Palawan at a time when the IPRA was already operative;

13. That the workers of the abovenamed persons had destroyed the houses of [their] tribal members, coerced some to stop from cultivating their lands and had set up houses within the said portions of their ancestral domains;

14. That the unlawful intrusion and occupation of [petitioners] within the aforesaid portions of their ancestral domains and their violation of the rights of [respondents] to Free and Prior and Informed Consent and the criminal acts committed by [petitioners'] workers had cause (*sic*) incalculable sufferings among [respondents] x x x.[52]

In their petition before the NCIP, respondents alleged: (1) their status as Tagbanuas, claiming representation of the Tagbanua Indigenous Cultural Communities in the Calamianes Group of Islands in Coron, Palawan; (2) the provision in the law which

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[52] *Rollo,* pp. 76-77.

recognizes native title of indigenous cultural communities and indigenous persons; (3) that they have already filed their claim for the recognition of their ancestral domains with the DENR; (4) that they have yet to obtain a Certificate of Ancestral Domain Title (CADT) from the NICP which, under the IPRA, is the agency tasked to validate their claim; (5) the purported violation of petitioners of their rights to free and prior and informed consent; and (6) that petitioners unlawfully intruded and occupied respondents' ancestral domains.

From their allegations in the petition, such call to the fore: (1) respondents' lack of CADT; and (2) the status of petitioners as non-ICCs/IPs and petitioners' apparent ignorance that respondents are IPs, and their claim of ancestral domain over the subject property.

It should be noted that a bare allegation that one is entitled to something is not an allegation but a conclusion.[53] Such allegation adds nothing to the pleading, it being necessary to plead specifically the facts upon which such conclusion is founded.[54] Rule 8 of the Rules of Court, entitled "Manner of Making Allegations in Pleadings" requires in Section 1, as a general rule, for "[e]very pleading [to] contain in a methodical and logical form, a plain, concise and direct statement of the ultimate facts on which the party pleading relies for his claim or defense, as the case may be, omitting the statement of mere evidentiary facts."

Respondents' status as Tagbanuas, as indigenous persons or members of an indigenous cultural community, is not an ultimate fact from which respondents can anchor the rights they claim to have been violated by petitioners.

In this case, respondents' petition, as written, does not mention ultimate facts that lead to the conclusion that (1) they are Tagbanuas, and (2) they are the representatives of the Tagbanua

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[53] *Mathay v. Consolidated Bank & Trust Company*, 157 Phil. 551, 572 (1974).

[54] *Id*. citing 41 Am. Jur., p. 303.

Indigenous Cultural Community. Neither are there allegations of ultimate facts showing acts or omissions on the part of petitioners which constitute a violation of respondents' rights.

We elucidate.

In this case, respondents allege that prior to the enactment of the IPRA, they have previously applied for recognition of their ancestral domain with the DENR under DENR Administrative Order No. 2-93 and No. 61-91; and with the advent of the IPRA, it was no longer required that they first obtain a CADT. However, *una voce*, they aver that it has been recommended that they validate "their proofs and claims" with the NCIP for the issuance of a CADT. The allegation itself goes against respondents' conclusions that they are Tagbanuas.

Such a pronouncement does not contradict the indigenous concept of ownership even without a paper title and that the CADT is merely a formal recognition of native title.[55] This is clear from Section 11 of the IPRA, to wit:

> SEC. 11. *Recognition of Ancestral Domain Rights.* " The rights of ICCs/IPs to their ancestral domains by virtue of Native Title shall be recognized and respected. Formal recognition, when solicited by ICCs/IPs concerned shall be embodied in a Certificate of Ancestral Domain Title (CADT), which shall recognize the title of the concerned ICCs/IPs over the territories identified and delineated.

And along those lines, we have subsequently held in *Lamsis, et al. v. Dong-e*[56] that:

> The application for issuance of a Certificate of Ancestral Land Title pending before the NCIP is akin to a registration proceeding. It also seeks an official recognition of one's claim to a particular land and is also *in rem*. **The titling of ancestral lands is for the purpose of "officially establishing" one's land as an ancestral land. Just like a registration proceeding, the titling of ancestral**

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[55] Separate Opinion of former Chief Justice Reynato S. Puno in *Cruz v. Sec. of Environment & Natural Resources*, *supra* note 34 at 998.

[56] 648 Phil. 372 (2010)

lands does not vest ownership upon the applicant but only recognizes ownership that has already vested in the applicant by virtue of his and his predecessor-in-interest's possession of the property since time immemorial.[57]

Nonetheless, the allegation that respondents are Tagbanuas and that they are representatives of the Tagbanua Indigenous Cultural Communities are conclusions of their status not derived from facts that should have been alleged. Indeed, respondents did not even attempt to factually demonstrate their authority to represent the Tagbanua Indigenous Cultural Community. This is crucial since intra IPs' conflicts and contest for representation are not impossible.

In that regard, Section 3(f) of the IPRA defines "customary laws" as "a body of written and/or unwritten rules, usages, customs and practices traditionally and continually recognized, accepted and observed by respective ICCs/IPs" Section 3(i), on the other hand, refers to "indigenous political structures" consisting of "organizational and cultural leadership systems, institutions, relationships, patterns and processes for decision making and participation, identified by ICCs/IPs such as, but not limited to, Council of Elders, Council of Timuays, Bodong Holders, or any other tribunal or body of similar nature." To establish their status as Tagbanuas or their representation as representatives of Tagbanua Indigenous Cultural Community, respondents, as "plaintiffs" claiming relief under the IPRA, should have alleged the ultimate facts constitutive of their customs, political structures, institutions, decision making processes, and such other indicators of indigenous persons nature distinct and native to them.

Truly, respondents should have asserted their identification through a reduction into facts of the definition and description of an ICC/IP in the IPRA:

Indigenous Cultural Communities/Indigenous Peoples refer to a group of people or homogenous societies identified by self ascription and

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[57] *Id*. at 393-394.

ascription by others, who have continuously lived as organized community on communally bounded and defined territory, and who have, under claims of ownership since time immemorial, occupied, possessed and utilized such territories, sharing common bonds of language, customs, traditions and other distinctive cultural traits, or who have, through resistance to political, social and cultural inroads of colonization, non indigenous religions and cultures, became historically differentiated from the majority of Filipinos. ICCs/IPs shall likewise include peoples who are regarded as indigenous on account of their descent from the populations which inhabited the country, at the time of conquest or colonization, or at the time of inroads of non indigenous religions and cultures, or the establishment of present state boundaries, who retain some or all of their own social, economic, cultural and political institutions, but who may have been displaced from their traditional domains or who may have resettled outside their ancestral domains[.][58]

Also, the right of ancestral property requires historical proof which, of course, must proceed from allegations in the petition. As noted in the separate opinion of former Chief Justice Reynato S. Puno in *Cruz v. Sec of Environment & Natural Resources*,[59] the IPRA grants to ICCs/IPs rights over ancestral domains and ancestral lands where land is the central element of the IPs' existence, *viz.*:

x x x There is no traditional concept of permanent, individual, land ownership. Among the Igorots, ownership of land more accurately applies to the tribal right to use the land or to territorial control. The people are the secondary owners or stewards of the land and that if a member of the tribe ceases to work, he loses his claim of ownership, and the land reverts to the beings of the spirit world who are its true and primary owners. Under the concept of "trusteeship," the right to possess the land does not only belong to the present generation but the future ones as well.

Customary law on land rests on the traditional belief that no one owns the land except the gods and spirits, and that those who work the land are its mere stewards. **Customary law has a strong**

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[58] Republic Act No. 8371, Sec. 3(h).

[59] *Supra* note 34.

preference for communal ownership, which could either be ownership by a group of individuals or families who are related by blood or by marriage, or ownership by residents of the same locality who may not be related by blood or marriage. The system of communal ownership under customary laws draws its meaning from the subsistence and highly collectivized mode of economic production. The Kalingas, for instance, who are engaged in team occupation like hunting, foraging for forest products, and swidden farming found it natural that forest areas, swidden farms, orchards, pasture and burial grounds should be communally-owned. For the Kalingas, everybody has a common right to a common economic base. Thus, as a rule, rights and obligations to the land are shared in common.

Although highly bent on communal ownership, customary law on land also sanctions individual ownership. The residential lots and terrace rice farms are governed by a **limited system of individual ownership**. It is limited because while the individual owner has the right to use and dispose of the property, he does not possess all the rights of an exclusive and full owner as defined under our Civil Code. Under Kalinga customary law, the alienation of individually-owned land is strongly discouraged except in marriage and succession and except to meet sudden financial needs due to sickness, death in the family, or loss of crops. Moreover, and to be alienated should first be offered to a clan-member before any village-member can purchase it, and in no case may land be sold to a non-member of the *ili*.

Land titles do not exist in the indigenous peoples' economic and social system. The concept of individual land ownership under the civil law is alien to them. Inherently colonial in origin, our national land laws and governmental policies frown upon indigenous claims to ancestral lands. Communal ownership is looked upon as inferior, if not inexistent.[60]

Under the IPRA, ancestral domains and ancestral lands are two concepts, distinct and different from one another:

a) *Ancestral Domains.* – Subject to Section 56 hereof, refer to all areas generally belonging to ICCs/IPs comprising lands, inland waters, coastal areas, and natural resources therein, held under a claim of ownership, occupied or possessed by ICCs/IPs by themselves

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[60] *Id.* at 135.

or through their ancestors, communally or individually since time immemorial, continuously to the present except when interrupted by war, *force majeure* or displacement by force, deceit, stealth or as a consequence of government projects or any other voluntary dealings entered into by government and private individuals/ corporations, and which are necessary to ensure their economic, social and cultural welfare. It shall include ancestral lands, forests, pasture, residential, agricultural, and other lands individually owned whether alienable and disposable or otherwise, hunting grounds, burial grounds, worship areas, bodies of water, mineral and other natural resources, and lands which may no longer be exclusively occupied by ICCs/IPs but from which they traditionally had access to for their subsistence and traditional activities, particularly the home ranges of ICCs/IPs who are still nomadic and/or shifting cultivators;

b) *Ancestral Lands*. – Subject to Section 56 hereof, refers to land occupied, possessed and utilized by individuals, families and clans who are members of the ICCs/IPs since time immemorial, by themselves or through their predecessors-in-interest, under claims of individual or traditional group ownership, continuously, to the present except when interrupted by war, *force majeure* or displacement by force, deceit, stealth, or as a consequence of government projects and other voluntary dealings entered into by government and private individuals/corporations, including, but not limited to, residential lots, rice terraces or paddies, private forests, swidden farms and tree lots.[61]

Respondents made no allegation outlining and tracing the history of their indigenous ownership of domain and land.

To further highlight the necessity of respondents' allegation of their status as Tagbanuas is the stewardship concept of property which is most applicable to land among the Philippine IP:[62]

Land is not an individual item which a man owns for himself and by himself. For he secures the rights to land in two ways:

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[61] *Id*.

[62] Agabin, IBP Journal, *The Influence of Philippine Indigenous Law in the Development of New Concepts of Social Justice*, Vol. 36, No. 4, October – December 2011, p. 9.

Firstly, as a citizen of the tribe he is entitled to some arable land and building land, and to the use of public pasturage, fishing waters, and wild products. Secondly, in all tribes except those who shift their gardens widely and have an abundance of land, he gets rights from membership of a village and a group of kinsfolk. That is, a man's right to land in the tribal home depends upon his accepting membership of a tribe, with all its obligations. The right of every subject, while he is a subject, is jealously safeguarded.[63]

It is also significant to note that respondents do not identify themselves with other Tagbanuas who have been awarded a Certificate of Ancestral Domain Claim as of 1998.[64]

Palpably, in the factual milieu obtaining herein, the NCIP does not have *ipso facto* jurisdiction over the petition of respondents just by the mere expedient that their petition involves rights of ICCs/IPs.

One other thing jumps out from all the discussions herein: the IPRA does not contain a repeal of Batas Pambansa Bilang 129 limiting the general jurisdiction of the trial courts even as the IPRA purportedly grants the NCIP jurisdiction over "all claims and disputes involving rights of ICCs/IPs."

Section 83 of the IPRA, the repealing clause, only specifies Presidential Decree No. 410, Executive Order Nos. 122B and 122C as expressly repealed. While the same section does state that "all other laws, decrees, orders, rules and regulations or parts thereof inconsistent with this Act are hereby repealed or modified accordingly," such an implied repeal is predicated upon the condition that a substantial and an irreconcilable conflict must be found in existing and prior Acts. The two laws refer to different subject matters, albeit the IPRA includes the jurisdiction of the NCIP. As such, resolution of conflicts between parties who are not both ICCs/IPs may still fall within the general jurisdiction of the regular courts dependent on the allegations in the complaint or petition and the status of the parties.

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[63] Max Gluckman, *Politics, Law, and Ritual Society* 294 (1965), *id.*

[64] See http://pcij.org/stories/1998/coron.html last visited 14 May 2013.

There is no clear irreconcilable conflict from the investiture of jurisdiction to the NCIP in instances where, among others, all the parties are ICCs/IPs and the claim or dispute involves their rights, and the specific wording of Batasang Pambansa Bilang 129, Sections 19-21[65] on the exclusive and original

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[65] **Section 19.** *Jurisdiction in civil cases.* – Regional Trial Courts shall exercise exclusive original jurisdiction:

(1) In all civil actions in which the subject of the litigation is incapable of pecuniary estimation;

(2) In all civil actions which involve the title to, or possession of, real property, or any interest therein, where the assessed value of the property involved exceeds Twenty thousand pesos (₱20,000.00) or for civil actions in Metro Manila, where such the value exceeds Fifty thousand pesos (₱50,000.00) except actions for forcible entry into and unlawful detainer of lands or buildings, original jurisdiction over which is conferred upon Metropolitan Trial Courts, Municipal Trial Courts, and Municipal Circuit Trial Courts;

(3) In all actions in admiralty and maritime jurisdiction where the demand or claim exceeds One hundred thousand pesos (₱100,000.00) or, in Metro Manila, where such demand or claim exceeds Two hundred thousand pesos (₱200,000.00);

(4) In all matters of probate, both testate and intestate, where the gross value of the estate exceeds One hundred thousand pesos (₱100,000.00) or, in probate matters in Metro Manila, where such gross value exceeds Two hundred thousand pesos (₱200,000.00);

(5) In all actions involving the contract of marriage and marital relations;

(6) In all cases not within the exclusive jurisdiction of any court, tribunal, person or body exercising jurisdiction or any court, tribunal, person or body exercising judicial or quasi-judicial functions;

(7) In all civil actions and special proceedings falling within the exclusive original jurisdiction of a Juvenile and Domestic Relations Court and of the Courts of Agrarian Relations as now provided by law; and

(8) In all other cases in which the demand, exclusive of interest, damages of whatever kind, attorney's fees, litigation expenses, and costs or the value of the property in controversy exceeds One hundred thousand pesos (₱100,000.00) or, in such other abovementioned items exceeds Two hundred thousand pesos (₱200,000.00). (as amended by R.A. No. 7691[*])

jurisdiction of the Regional Trial Courts, and Sections 33-35[66] on the exclusive original jurisdiction of the Metropolitan Trial Courts, Municipal Trial Courts, and Municipal Circuit Trial Courts.

Section 20. *Jurisdiction in criminal cases.* – Regional Trial Courts shall exercise exclusive original jurisdiction in all criminal cases not within the exclusive jurisdiction of any court, tribunal or body, except those now falling under the exclusive and concurrent jurisdiction of the Sandiganbayan which shall hereafter be exclusively taken cognizance of by the latter.

Section 21. *Original jurisdiction in other cases.* – Regional Trial Courts shall exercise original jurisdiction:

(1) In the issuance of writs of *certiorari*, prohibition, *mandamus*, *quo warranto, habeas corpus* and injunction which may be enforced in any part of their respective regions; and

(2) In actions affecting ambassadors and other public ministers and consuls.

[66] **Section 33.** *Jurisdiction of Metropolitan Trial Courts, Municipal Trial Courts and Municipal Circuit Trial Courts in civil cases.* – Metropolitan Trial Courts, Municipal Trial Courts, and Municipal Circuit Trial Courts shall exercise:

(1) Exclusive original jurisdiction over civil actions and probate proceedings, testate and intestate, including the grant of provisional remedies in proper cases, where the value of the personal property, estate, or amount of the demand does not exceed One hundred thousand pesos (₱100,000.00) or, in Metro Manila where such personal property, estate, or amount of the demand does not exceed Two hundred thousand pesos (₱200,000.00) exclusive of interest damages of whatever kind, attorney's fees, litigation expenses, and costs, the amount of which must be specifically alleged: Provided, That where there are several claims or causes of action between the same or different parties, embodied in the same complaint, the amount of the demand shall be the totality of the claims in all the causes of action, irrespective of whether the causes of action arose out of the same or different transactions;

(2) Exclusive original jurisdiction over cases of forcible entry and unlawful detainer: Provided, That when, in such cases, the defendant raises the question of ownership in his pleadings and the question of possession cannot be resolved without deciding the issue of ownership, the issue of ownership shall be resolved only to determine the issue of possession.

(3) Exclusive original jurisdiction in all civil actions which involve title to, or possession of, real property, or any interest therein where

We should not, and cannot, adopt the theory of implied repeal except upon a clear and unequivocal expression of the will of Congress, which is not manifest from the language of Section 66 of the IPRA which, to reiterate: (1) did not use the words "primary" and/or "original and exclusive" to describe the jurisdiction of the NCIP over "all claims and disputes involving rights of ICCs/IPs" and (2) contained a proviso requiring certification that the parties have exhausted their remedies provided under customary laws.

We are quick to clarify herein that even as we declare that in some instances the regular courts may exercise jurisdiction over cases which involve rights of ICCs/IPs, the governing law for these kinds of disputes necessarily include the IPRA and the rights the law bestows on ICCs/IPs.

All told, we rule that Section 66 of the IPRA, even as it grants jurisdiction to the NCIP over all claims and disputes

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the assessed value of the property or interest therein does not exceed Twenty thousand pesos (₱20,000.00) or, in civil actions in Metro Manila, where such assessed value does not exceed Fifty thousand pesos (₱50,000.00) exclusive of interest, damages of whatever kind, attorney's fees, litigation expenses and costs: *Provided,* That value of such property shall be determined by the assessed value of the adjacent lots. *(as amended by R.A. No. 7691)*

Section 34. *Delegated jurisdiction in cadastral and land registration cases.* – Metropolitan Trial Courts, Municipal Trial Courts, and Municipal Circuit Trial Courts may be assigned by the Supreme Court to hear and determine cadastral or land registration cases covering lots where there is no controversy or opposition, or contested lots the (sic) where the value of which does not exceed One hundred thousand pesos (₱100,000.00), such value to be ascertained by the affidavit of the claimant or by agreement of the respective claimants if there are more than one, or from the corresponding tax declaration of the real property. Their decisions in these cases shall be appealable in the same manner as decisions of the Regional Trial Courts. *(as amended by R.A. No. 7691)*

Section 35. *Special jurisdiction in certain cases.* – In the absence of all the Regional Trial Judges in a province or city, any Metropolitan Trial Judge, Municipal Trial Judge, Municipal Circuit Trial Judge may hear and decide petitions for a writ of *habeas corpus* or applications for bail in criminal cases in the province or city where the absent Regional Trial Judges sit.

involving rights of ICCs/IPs, requires that the opposing parties are both ICCs/IPs who have exhausted all their remedies under their customs and customary law before bringing their claim and dispute to the NCIP. The validity of respondents' claim is another matter and a question that we need not answer for the moment. Too, we do not resolve herein the other issues raised by petitioners given that we already declared that the NCIP does not have jurisdiction over the case of respondents against petitioners.

WHEREFORE, the appeal is **GRANTED**. The Decision of the Court of Appeals in CA-G.R. SP No. 98268 dated 26 April 2010 and the Resolution of the National Commission on Indigenous Peoples in RHO 4-01-2006 dated 30 November 2006 are **REVERSED AND SET ASIDE**. The petition in RHO 4-01-2006 is **DISMISSED** for lack of jurisdiction of the National Commission on Indigenous Peoples. Section 1 of NCIP Administrative Circular No. 1, Series of 2014, promulgated on 9 October 2014 declaring the jurisdiction of the Regional Hearing Officer as original and exclusive is declared **VOID** for expanding the law. Respondents may refile their complaint against petitioners in a court of general jurisdiction.

No costs.

SO ORDERED.

Sereno, C.J. (Chairperson), Leonardo-de Castro, Bersamin, and *Perlas-Bernabe, JJ.,* concur.

THIRD DIVISION

[G.R. No. 195547. December 2, 2015]

MA. CORAZON M. OLA, *petitioner*, *vs.* **PEOPLE OF THE PHILIPPINES,** *respondent*.

SYLLABUS

1. REMEDIAL LAW; ORDER; THE REMEDY OF THE AGGRIEVED PARTY AGAINST A FINAL ORDER OR RESOLUTION OF THE COURT OF APPEALS IS A PETITION FOR REVIEW ON *CERTIORARI* UNDER RULE 45 OF THE RULES OF COURT, BUT WHERE THE ORDER IS INTERLOCUTORY, THE AGGRIEVED PARTY'S REMEDY IS A PETITION FOR *CERTIORARI* UNDER RULE 65.— What petitioner essentially assails in the present petition is the CA's denial of her motion to file an amended appellant's brief. It is settled that the remedy of a party against an adverse disposition of the CA would depend on whether the same is a final order or merely an interlocutory order. If the Order or Resolution issued by the CA is in the nature of a final order, the remedy of the aggrieved party would be to file a petition for review on *certiorari* under Rule 45 of the Rules of Court. Otherwise, the appropriate remedy would be to file a petition for *certiorari* under Rule 65.

2. ID.; ID.; FINAL ORDER AND INTERLOCUTORY ORDER, DISTINGUISHED.— In *Republic of the Phils. v. Sandiganbayan (Fourth Division), et al.*, this Court laid down the rules to determine whether a court's disposition is already a final order or merely an interlocutory order and the respective remedies that may be availed in each case, thus: Case law has conveniently demarcated the line between a final judgment or order and an interlocutory one on the basis of the disposition made. A judgment or order is considered final if the order disposes of the action or proceeding completely, or terminates a particular stage of the same action; in such case, the remedy available to an aggrieved party is appeal. If the order or resolution, however, merely resolves incidental matters and leaves something more to be done to resolve the merits of the case, the order is interlocutory and the aggrieved party's remedy

is a petition for *certiorari* under Rule 65. Jurisprudence pointedly holds that: *As distinguished from a final order which disposes of the subject matter in its entirety or terminates a particular proceeding or action, leaving nothing else to be done but to enforce by execution what has been determined by the court, an interlocutory order does not dispose of a case completely, but leaves something more to be adjudicated upon. The term final judgment or order signifies a judgment or an order which disposes of the case as to all the parties, reserving no further questions or directions for future determination. On the other hand, a court order is merely* interlocutory in character if it leaves substantial proceedings yet to be had in connection with the controversy. It does not end the task of the court in adjudicating the parties' contentions and determining their rights and liabilities as against each other. In this sense, it is basically **provisional in its application**.

3. ID.; ID.; INTERLOCUTORY ORDER; RESORT TO PETITION FOR REVIEW ON *CERTIORARI* TO ASSAIL THE RESOLUTION OF THE COURT OF APPEALS DENYING THE PETITIONER'S MOTION TO AMEND APPEAL BRIEF IS ERRONEOUS, AS THE ASSAILED RESOLUTION IS AN INTERLOCUTORY ORDER.— [T]he Court agrees with the contention of the Office of the Solicitor General (*OSG*) that the assailed Resolutions of the CA are interlocutory orders, as they do not dispose of the case completely but leave something to be decided upon. What has been denied by the CA was a mere motion to amend petitioner's appeal brief and the appellate court has yet to finally dispose of petitioner's appeal by determining the main issue of whether or not she is indeed guilty of estafa. As such, petitioner's resort to the present petition for review on *certiorari* is erroneous. Thus, on this ground alone, the instant petition is dismissible as the Court finds no cogent reason not to apply the rule on dismissal of appeals under Section 5, Rule 56 of the Rules of Court.

4. ID.; ID.; ID.; WHERE THE COMPLAINT WHICH THE PARTY SOUGHT TO AMEND WAS ALREADY DISMISSED, AN ORDER DENYING THE MOTION TO AMEND SUCH COMPLAINT, IS FINAL AND NOT INTERLOCUTORY, HENCE, APPEALABLE, AS THERE IS NOTHING ELSE TO BE DONE BY THE TRIAL COURT AFTER SUCH DENIAL OTHER THAN TO

EXECUTE THE ORDER OF DISMISSAL; ON THE OTHER HAND, AN ORDER DENYING THE PARTY'S MOTION TO AMEND AN APPEAL BRIEF WHICH WAS NOT DISMISSED BY THE COURT OF APPEALS IS AN INTERLOCUTORY ORDER, THUS BARRING RESORT TO AN APPEAL, AS SUBSTANTIAL PROCEEDINGS ARE YET TO BE CONDUCTED IN CONNECTION WITH THE CONTROVERSY.— The Court is neither persuaded by petitioner's argument that the CA Resolution which denied her motion to amend her brief is appealable. Petitioner's reliance on the case of *Constantino, et al. v. Hon. Reyes, et al.,* is misplaced. x x x. [P]etitioner has taken the Court's ruling in *Constantino* out of context. In the said case, the complaint which the petitioner therein sought to amend was already dismissed. The order which denied petitioner's motion to amend the complaint is, therefore, final, and not interlocutory, as there is nothing else to be done by the trial court after such denial other than to execute the order of dismissal. Thus, the order denying the motion to amend the complaint is appealable. On the other hand, what is sought to be amended in the present case is not a complaint but an appeal brief which was not dismissed by the CA. More importantly, the denial of petitioner's motion to amend her appeal brief does not end the task of the CA in adjudicating the parties' contentions and determining their rights and liabilities as against each other. Substantial proceedings are yet to be conducted in connection with the controversy, thus barring resort to an appeal.

5. ID.; ID.; ID.; THE CONSTITUTIONAL PROVISION THAT NO DECISION SHALL BE RENDERED BY ANY COURT WITHOUT EXPRESSING THEREIN CLEARLY AND DISTINCTLY THE FACTS AND THE LAW ON WHICH IT IS BASED DOES NOT APPLY TO INTERLOCUTORY ORDERS, AS THE SAME REFERS ONLY TO DECISIONS ON THE MERITS AND NOT TO ORDERS OF THE COURT RESOLVING INCIDENTAL MATTERS.— The Court does not agree with petitioner's insistence that the questioned Resolutions deprived her of her right to due process because the CA supposedly failed to inform her of the issues involved in and of the reasons for rendering the said Resolutions. It is true that under Section 14, Article VIII of the Constitution, no decision shall be rendered by any court without expressing therein clearly and distinctly the facts and the law on which

it is based. However, petitioner must be reminded that what she assails are interlocutory orders and it has already been ruled by this Court that the above constitutional provision does not apply to interlocutory orders because it refers only to decisions on the merits and not to orders of the court resolving incidental matters. In any case, even a cursory reading of the September 9, 2010 Resolution of the CA readily shows that the appellate court has laid down the factual and procedural premises and discussed the reasons and the bases for denying petitioner's motion.

6. **ID.; PLEADINGS AND PRACTICE; AFTER A RESPONSIVE PLEADING HAS BEEN FILED, SUBSTANTIAL AMENDMENTS MAY BE MADE ONLY BY LEAVE OF COURT, BUT SUCH LEAVE MAY BE REFUSED IF IT APPEARS TO THE COURT THAT THE MOTION WAS MADE WITH INTENT TO DELAY; DENIAL OF THE PETITIONER'S MOTION TO AMEND HER BRIEF ON THE GROUND THAT THE DELAY IN FILING SUCH MOTION IS UNJUSTIFIED, UPHELD.—** The CA has correctly ruled that under Section 4, paragraph 2, Rule 2, of the Rules of Court, petitioner had twenty (20) days from receipt of herein respondent's brief to file a reply brief to discuss matters raised in respondent's brief which were not covered in her brief. However, as found by the CA, petitioner's manifestation requesting an additional period to file an appropriate pleading as well as her motion for leave of court to file an amended appellant's brief was filed seventy-nine (79) days late and, as such, was deemed "not acceptable or too long to ignore." Even if the court were to apply the rule on amendment of pleadings, it is clear under Section 3, Rule 10 of the Rules of Court that after a responsive pleading has been filed, as in the present case, substantial amendments may be made only by leave of court. Moreover, such leave may be refused if it appears to the court that the motion was made with intent to delay. In the instant case, the Court finds that the CA did not commit any error in refusing to grant petitioner's motion to amend her brief on the ground that the delay in filing such motion is unjustified.

7. **ID.; APPEALS; MERELY RIGHTS WHICH ARISE FROM STATUTE, AND THEREFORE MUST BE EXERCISED IN THE MANNER PRESCRIBED BY LAW.—** [I]t bears to point out that the premise that underlies all appeals is that

they are merely rights which arise from statute; therefore, they must be exercised in the manner prescribed by law. It is to this end that rules governing pleadings and practice before appellate courts were imposed. These rules were designed to assist the appellate court in the accomplishment of its tasks, and overall, to enhance the orderly administration of justice. Failing in this respect, the instant petition should be denied.

APPEARANCES OF COUNSEL

Pablo Domingo Law Office for petitioner.
The Solicitor General for respondent.

D E C I S I O N

PERALTA, *J.*:

Before the Court is a petition for review on *certiorari* under Rule 45 of the Rules of Court seeking to set aside the Resolutions[1] of the Court of Appeals (*CA*), dated September 9, 2010,[2] December 14, 2010,[3] and February 14, 2011[4] in CA-G.R. CR No. 32066.

The instant petition traces its origin to an Information filed with the Regional Trial Court (*RTC*) of Las Piñas City, dated October 23, 2006, charging herein petitioner and a certain Manuel Hurtada (*Hurtada*) and Aida Ricarse (*Ricarse*) with the crime of estafa as defined and punished under Article 315, paragraph 2 of the Revised Penal Code. The Information reads as follows:

That on or about the 27th day of September 2006, and prior thereto, in the City of Las Piñas, Philippines and within the jurisdiction of

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[1] Penned by Associate Justice Elihu A. Ybañez, with Associate Justices Bienvenido L. Reyes and Estela M. Perlas-Bernabe (now members of this Court), concurring.

[2] *Rollo,* pp. 86-88.

[3] *Id.* at 90-91.

[4] *Id.* at 92-93.

this Honorable Court, the abovenamed accused, conspiring and confederating together and all of them mutually helping and aiding one another by means of deceit, false pretenses and fraudulent acts executed prior to or simultaneously with the commission of fraud, did then and there wilfully, unlawfully and feloniously defraud ELIZABETH T. LAUZON in the following manner to wit: that accused by means of false pretenses and fraudulent representations which they made to the complainant that they are authorized to sell, dispose or encumber a parcel of land located at Las Piñas City covered by TCT No. T-19987 issued by the [Register] of Deeds of Las Piñas City and that they promised to transfer the Certificate of Title in the name of the complainant, said accused fully knew that their manifestation and representations were false and untrue, complainant was induced to part with her money in the amount of ₱420,000.00, as she in fact gave the amount of ₱420,000.00 representing part of the purchase price of the said parcel of land and for which accused received and acknowledge[d] the same, and after complainant conducted the necessary verification with the Register of Deeds of Las Piñas City it turned out that the registered owner of the said parcel of land is Marita F. Sanlay and mortgaged to Household Development Bank then assigned to National Home Mortgage Finance Corporation (*NHMFC*), and that accused are not authorized to sell, dispose or encumber the parcel of land covered by TCT No. T-19987, to the damage and prejudice of the complainant in the amount of ₱420,000.00.[5]

After trial, the RTC found petitioner and her co-accused guilty of other forms of swindling under Article 316 of the Revised Penal Code. The dispositive portion of the RTC Decision reads, thus:

WHEREFORE, as the crime was committed with abuse of confidence reposed on Manuel Hurtada by Elizabeth Lauzon without any mitigating circumstance to offset, all three accused, namely: 1) Manuel Hurtada, Jr. y Buhat; 2) Aida Ricarse y Villadelgado and 3) Ma. Corazon Ola, are hereby found guilty beyond reasonable doubt of Estafa under Article 316 of the Revised Penal Code and each sentenced to undergo imprisonment of Six (6) months straight penalty and to indemnify, jointly and severally, the complainant

[5] *Id.* at 167-168.

Elizabeth T. Lauzon in the amount of ₱320,000.00 and to pay a fine of ₱1,000,000.00 and to pay the cost of the suit.

SO ORDERED.[6]

Petitioner and the other accused appealed the RTC Decision to the CA. Petitioner and Ricarse jointly filed their Brief for Accused-Appellants[7] dated June 10, 2009, while Hurtada filed his Brief for the Accused-Appellant[8] dated September 9, 2009.

A Brief for the Appellee,[9] dated March 1, 2010, was subsequently filed.

On May 28, 2010, petitioner filed a Manifestation with Leave of Court praying that she be granted a period of twenty (20) days within which to filed an appropriate pleading.

On June 29, 2010, petitioner filed a Motion for Leave of Court to File Amended Appellant's Brief.[10]

In its first assailed Resolution promulgated on September 9, 2010, the CA denied petitioner's motion for having been filed out of time.

Petitioner filed a Motion for Reconsideration,[11] but the CA denied it in its second assailed Resolution dated December 14, 2010.

Undeterred, petitioner, on January 4, 2011, filed a Very Urgent *Ex-Parte* Motion for [Extension of Time] to File for Vacation of Resolution or Appropriate Pleading.[12]

On February 14, 2011, the CA issued its third assailed Resolution denying petitioner's motion, treating the same as a second motion for reconsideration, which is a prohibited pleading.

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[6] *Id.* at 168-169.

[7] *Id.* at 180-196.

[8] *Id.* at 198-218.

[9] *Id.* at 219-242.

[10] *Id.* at 243-248.

[11] *Id.* at 13-22.

[12] *Id.* at 27-35.

Hence, the instant petition for review on *certiorari* based on the following grounds:

(a) whether or not the Honorable Court of Appeals (*CA*) by wholly adopting the stance of the Honorable Office of the Solicitor General has overlooked the evidence on record, from the pleadings and four affidavits of merits filed with the CA, and in the process violated the due process of law of the petitioner as enunciated in *Ang Tibay v. CIR,* and subsequent SC decisions thereto.

(b) whether or not the petitioner has made a second motion for reconsideration.

(c) whether or not the governing law or rule is Rule 10 on amendments of pleading, and not Section 6, both of Rule 6 and 11, in relation to Section 9 of Rule 44 and Section 4 of Rule 124 on matter of reply, all of the Rules of Court; and

(d) whether or not the liberality rule for amendment of pleadings instead of the general rule on liberality must be applied in favor of the petitioner.[13]

At the outset, the Court notes that the instant case suffers from a procedural infirmity which this Court cannot ignore as it is fatal to petitioner's cause.

What petitioner essentially assails in the present petition is the CA's denial of her motion to file an amended appellant's brief. It is settled that the remedy of a party against an adverse disposition of the CA would depend on whether the same is a final order or merely an interlocutory order.[14] If the Order or Resolution issued by the CA is in the nature of a final order, the remedy of the aggrieved party would be to file a petition for review on *certiorari* under Rule 45 of the Rules of Court.[15] Otherwise, the appropriate remedy would be to file a petition for *certiorari* under Rule 65.[16]

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[13] *Id.* at 118.

[14] *Spouses Bergonia v. Court of Appeals, et al.,* 680 Phil. 334, 339 (2012).

[15] *Id.*

[16] *Id.*

In *Republic of the Phils. v. Sandiganbayan (Fourth Division), et al.*,[17] this Court laid down the rules to determine whether a court's disposition is already a final order or merely an interlocutory order and the respective remedies that may be availed in each case, thus:

> Case law has conveniently demarcated the line between a final judgment or order and an interlocutory one on the basis of the disposition made. A judgment or order is considered final if the order disposes of the action or proceeding completely, or terminates a particular stage of the same action; in such case, the remedy available to an aggrieved party is appeal. If the order or resolution, however, merely resolves incidental matters and leaves something more to be done to resolve the merits of the case, the order is interlocutory and the aggrieved party's remedy is a petition for *certiorari* under Rule 65. Jurisprudence pointedly holds that:
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> > *As distinguished from a final order which disposes of the subject matter in its entirety or terminates a particular proceeding or action, leaving nothing else to be done but to enforce by execution what has been determined by the court, an interlocutory order does not dispose of a case completely, but leaves something more to be adjudicated upon. The term final judgment or order signifies a judgment or an order which disposes of the case as to all the parties, reserving no further questions or directions for future determination.*
> >
> > *On the other hand, a court order is merely* interlocutory in character if it leaves substantial proceedings yet to be had in connection with the controversy. It does not end the task of the court in adjudicating the parties' contentions and determining their rights and liabilities as against each other. In this sense, it is basically **provisional in its application**.[18]

In the present case, the Court agrees with the contention of the Office of the Solicitor General (*OSG*) that the assailed Resolutions of the CA are interlocutory orders, as they do not dispose of the case completely but leave something to be decided upon.[19]

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[17] 678 Phil. 358 (2011).

[18] *Id.* at 387-388. (Citations omitted)

[19] *Australian Professional Realty, Inc., et al. v. Municipality of Padre Garcia, Batangas,* 684 Phil. 283, 291 (2012).

What has been denied by the CA was a mere motion to amend petitioner's appeal brief and the appellate court has yet to finally dispose of petitioner's appeal by determining the main issue of whether or not she is indeed guilty of estafa. As such, petitioner's resort to the present petition for review on *certiorari* is erroneous.

Thus, on this ground alone, the instant petition is dismissible as the Court finds no cogent reason not to apply the rule on dismissal of appeals under Section 5,[20] Rule 56 of the Rules of Court.

The Court is neither persuaded by petitioner's argument that the CA Resolution which denied her motion to amend her brief is appealable. Petitioner's reliance on the case of *Constantino, et al. v. Hon. Reyes, et al.*,[21] is misplaced. In the said case, petitioner Constantino wanted to amend his complaint after the same was dismissed by the then Court of First Instance (*CFI*) on the ground that the complaint stated no cause of action. However, the trial court dismissed petitioner's motion to admit the amended complaint. Petitioner sought to appeal the case but the trial court disapproved the record on appeal on the ground that the appeal had been filed out of time. In granting the petition for *mandamus* filed before this Court to compel the CFI judge to approve the record on appeal, this Court held that "[e]ven after an order dismissing his complaint is issued, an amendment may still be allowed. The motion to amend should be filed before the order of dismissal becomes final and unappealable, because thereafter there would be nothing to amend. If the amendment is denied, the order of denial is appealable and the time within

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[20] Sec. 5 Grounds for dismissal of appeal. – The appeal may be dismissed *motu proprio* or on motion of the respondent on the following petition;

(a) Failure to take the appeal within the reglementary period;
(b) Lack of merit in the petition;
(c) Falure to pay the requisite docket fee and other lawful fees or to make a deposit for costs;
(d) Failure to comply with the requirements regarding proof of service and contents of and the documents which should accompany the petition;
(e) Failure to comply with any circular, directive or order of the Supreme Court without justifiable cause;
(f) Error in the choice or mode of appeal; and
(g) The fact that the case is not appealable to the Supreme Court.

[21] 118 Phil. 385 (1963).

which to appeal is counted from the order of denial — not from the order dismissing the original complaint."[22]

From the above factual and procedural antecedents, it is clear that petitioner has taken the Court's ruling in *Constantino* out of context. In the said case, the complaint which the petitioner therein sought to amend was already dismissed. The order which denied petitioner's motion to amend the complaint is, therefore, final, and not interlocutory, as there is nothing else to be done by the trial court after such denial other than to execute the order of dismissal. Thus, the order denying the motion to amend the complaint is appealable. On the other hand, what is sought to be amended in the present case is not a complaint but an appeal brief which was not dismissed by the CA. More importantly, the denial of petitioner's motion to amend her appeal brief does not end the task of the CA in adjudicating the parties' contentions and determining their rights and liabilities as against each other. Substantial proceedings are yet to be conducted in connection with the controversy, thus barring resort to an appeal.

In any case, even if the Court will consider petitioner's contentions in the present petition, the Court still finds that the CA did not commit any error in issuing the assailed Resolutions.

The Court does not agree with petitioner's insistence that the questioned Resolutions deprived her of her right to due process because the CA supposedly failed to inform her of the issues involved in and of the reasons for rendering the said Resolutions.

It is true that under Section 14, Article VIII of the Constitution, no decision shall be rendered by any court without expressing therein clearly and distinctly the facts and the law on which it is based. However, petitioner must be reminded that what she assails are interlocutory orders and it has already been ruled by this Court that the above constitutional provision does not apply to interlocutory orders because it refers only to decisions on the merits and not to orders of the court resolving incidental matters.[23]

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[22] *Constantino, et al. v. Hon. Reyes, et al., supra,* at 388-389.

[23] *Nicos Industrial Corporation v. Court of Appeals,* G.R. No. 88709, February 11, 1992, 206 SCRA 127, 132-133; *Mendoza v. Court of First Instance of Quezon, etc., et al.,* 151-A Phil. 815, 827 (1973).

In any case, even a cursory reading of the September 9, 2010 Resolution of the CA readily shows that the appellate court has laid down the factual and procedural premises and discussed the reasons and the bases for denying petitioner's motion.

Petitioner, nonetheless, reiterates her argument that the principle on the liberal interpretation of the Rules should be applied in the present case. She further contends that instead of Section 4, paragraph 2, Rule 124 of the Rules of Court, it should be Rule 10 of the same Rules, referring to amendments of pleadings, which should govern the instant case.

The Court is not persuaded.

The CA has correctly ruled that under Section 4, paragraph 2, Rule 2, of the Rules of Court, petitioner had twenty (20) days from receipt of herein respondent's brief to file a reply brief to discuss matters raised in respondent's brief which were not covered in her brief. However, as found by the CA, petitioner's manifestation requesting an additional period to file an appropriate pleading as well as her motion for leave of court to file an amended appellant's brief was filed seventy-nine (79) days late and, as such, was deemed "not acceptable or too long to ignore."[24]

Even if the court were to apply the rule on amendment of pleadings, it is clear under Section 3, Rule 10 of the Rules of Court that after a responsive pleading has been filed, as in the present case, substantial amendments may be made only by leave of court. Moreover, such leave may be refused if it appears to the court that the motion was made with intent to delay. In the instant case, the Court finds that the CA did not commit any error in refusing to grant petitioner's motion to amend her brief on the ground that the delay in filing such motion is unjustified.

Finally, it bears to point out that the premise that underlies all appeals is that they are merely rights which arise from statute; therefore, they must be exercised in the manner prescribed by law.[25]

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[24] See CA Resolution dated September 9, 2010, *rollo,* p. 11.

[25] *De Liano v. Court of Appeals,* 421 Phil. 1033, 1040 (2001).

It is to this end that rules governing pleadings and practice before appellate courts were imposed.[26] These rules were designed to assist the appellate court in the accomplishment of its tasks, and overall, to enhance the orderly administration of justice.[27] Failing in this respect, the instant petition should be denied.

WHEREFORE, the instant petition is **DENIED**. The assailed Resolutions of the Court of Appeals, dated September 9, 2010, December 14, 2010 and February 14, 2011, in CA-G.R. CR No. 32066, are **AFFIRMED**.

The Court of Appeals is **DIRECTED** to proceed with the resolution of the case on the merits **WITH DISPATCH.**

SO ORDERED.

Sereno, C.J., Velasco, Jr. (Chairperson), Bersamin, and *Villarama, Jr., JJ.,* concur.

SECOND DIVISION

[G.R. No. 196415. December 2, 2015]

COMMISSIONER OF INTERNAL REVENUE, *petitioner, vs.* **TOLEDO POWER COMPANY,** *respondent*.

[G.R. No. 196451. December 2, 2015]

TOLEDO POWER COMPANY, *petitioner, vs.* **COMMISSIONER OF INTERNAL REVENUE,** *respondent*.

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[26] *Id.*

[27] *Id.*

SYLLABUS

1. **TAXATION; REFUND OR CREDIT OF UNUTILIZED INPUT VAT; ADMINISTRATIVE AND JUDICIAL CLAIMS, TIME FOR FILING.—** Pursuant to Section 112 (A) and (D) of the NIRC, a taxpayer has two (2) years from the close of the taxable quarter when the zero-rated sales were made within which to file with the CIR an administrative claim for refund or credit of unutilized input VAT attributable to such sales. The CIR, on the other hand, has 120 days from receipt of the complete documents within which to act on the administrative claim. Upon receipt of the decision, a taxpayer has 30 days within which to appeal the decision to the CTA. However, if the 120-day period expires without any decision from the CIR, the taxpayer may appeal the inaction to the CTA within 30 days from the expiration of the 120-day period. In *Commissioner of Internal Revenue v. San Roque Power Corporation*, we said that the 120+30-day period must be strictly observed except from the date of issuance of BIR Ruling No. DA-489-03 on December 10, 2003, which allowed taxpayers to file a judicial claim without waiting for the end of the 120-day period, up to the date of promulgation of C*ommissioner of Internal Revenue v. Aichi Forging Company of Asia, Inc.* on October 6, 2010, where we declared that compliance with the 120+30-day period is mandatory and jurisdictional. In this case, TPC applied for a claim for refund or credit of its unutilized input VAT for the taxable year 2002 on December 22, 2003. Since the CIR did not act on its application within the 120-day period, TPC appealed the inaction on April 22, 2004. Clearly, both the administrative and the judicial claims were filed within the prescribed period provided in Section 112 of the NIRC.

2. **ID.; ID.; FAILURE TO SUBMIT ALL RELEVANT DOCUMENTS SET OUT IN RMO No. 53-98, NOT FATAL; BOTH THE ADMINISTRATIVE AND THE JUDICIAL CLAIMS FOR REFUND OR CREDIT OF UNUTILIZED INPUT VAT WERE TIMELY AND VALIDLY FILED IN CASE AT BAR.—** [T]he administrative claim was not pro forma as TPC submitted documents to support its claim for refund and even manifested its willingness to submit additional documents if necessary. The CIR, however, never requested TPC to submit additional documents. Thus, she cannot now raise the issue that TPC failed to submit the complete documents.

Neither do we find the alleged failure of TPC to submit all relevant documents set out in RMO No. 53-98 fatal to its claim. In *Commissioner of Internal Revenue v. Team Sual Corporation (formerly Mirant Sual Corporation),* we said that: The CIR's reliance on RMO 53-98 is misplaced. There is nothing in Section 112 of the NIRC, RR 3-88 or RMO 53-98 itself that requires submission of the complete documents enumerated in RMO 53-98 for a grant of a refund or credit of input VAT. The subject of RMO 53-98 states that it is a "Checklist of Documents to be Submitted by a Taxpayer upon Audit of his Tax Liabilities . . . ." In this case, TSC was applying for a grant of refund or credit of its input tax. There was no allegation of an audit being conducted by the CIR. Even assuming that RMO 53-98 applies, it specifically states that some documents are required to be submitted by the taxpayer "if applicable." Moreover, if TSC indeed failed to submit the complete documents in support of its application, the CIR could have informed TSC of its failure, consistent with Revenue Memorandum Circular No. (RMC) 42-03. However, the CIR did not inform TSC of the document it failed to submit, even up to the present petition. The CIR likewise raised the issue of TSC's alleged failure to submit the complete documents only in its motion for reconsideration of the CTA Special First Division's 4 March 2010 Decision. Accordingly, we affirm the CTA EB's finding that TSC filed its administrative claim on 21 December 2005, and submitted the complete documents in support of its application for refund or credit of its input tax at the same time. In view of the foregoing, we find that both the administrative and the judicial claims were timely and validly filed.

3. ID.; ID.; TO BE ENTITLED TO A REFUND OR CREDIT OF UNUTILIZED INPUT VAT ATTRIBUTABLE TO THE SALE OF ELECTRICITY UNDER THE ELECTRIC POWER INDUSTRY REFORM ACT 0F 2001 (EPIRA), A TAXPAYER MUST ESTABLISH THAT IT IS A GENERATION COMPANY, AND THAT IT DERIVED SALES FROM POWER GENERATION.— Section 6 of the EPIRA provides that the sale of generated power by generation companies shall be zero-rated. Section 4 (x) of the same law states that a generation company "refers to any person or entity authorized by the ERC to operate facilities used in the generation of electricity." Corollarily, to be entitled to a refund or credit of unutilized input VAT attributable to the sale of electricity under

the EPIRA, a taxpayer must establish: (1) that it is a generation company, and (2) that it derived sales from power generation.

4. POLITICAL LAW; ADMINISTRATIVE LAW; ELECTRIC POWER INDUSTRY REFORM ACT OF 2001(EPIRA); BEING ENGAGED IN THE BUSINESS OF POWER GENERATION DOES NOT MAKE ONE A GENERATION COMPANY UNDER THE EPIRA; NEITHER IS THE FILING OF AN APPLICATION FOR CERTIFICATE OF COMPLIANCE (COC) WITH THE ENERGY REGULATORY COMMISSION (ERC) AUTOMATICALLY ENTITLE ONE TO THE RIGHTS OF A GENERATION COMPANY UNDER THE EPIRA; GENERATION FACILITY AND GENERATION COMPANY, DISTINGUISHED.— [T]he parties did not stipulate that TPC is a generation company. They only stipulated that TPC is engaged in the business of power generation and that it filed an application with the ERC on June 20, 2002. However, being engaged in the business of power generation does not make TPC a generation company under the EPIRA. Neither did TPC's filing of an application for COC with the ERC automatically entitle TPC to the rights of a generation company under the EPIRA. At this point, a distinction must be made between a generation facility and a generation company. A generation facility is defined under the EPIRA Rules and Regulations as "a facility for the production of electricity." While a generation company, as previously mentioned, "refers to any person or entity authorized by the ERC to operate facilities used in the generation of electricity." Based on the foregoing definitions, what differentiates a generation facility from a generation company is that the latter is authorized by the ERC to operate, as evidenced by a COC. Under the EPIRA, all new generation companies and existing generation facilities are required to obtain a COC from the ERC. New generation companies must show that they have complied with the requirements, standards, and guidelines of the ERC before they can operate. As for existing generation facilities, they must submit to the ERC an application for a COC together with the required documents within ninety (90) days from the effectivity of the EPIRA Rules and Regulations. Based on the documents submitted, the ERC will determine whether the applicant has complied with the standards and requirements for operating a generation company. If the applicant is found compliant, only then will the ERC issue a COC.

5. TAXATION; REFUND OR CREDIT OF UNUTILIZED INPUT VAT; SALES OF ELECTRICITY BY A GENERATION FACILITY, WHICH IS NOT YET A GENERATION COMPANY UNDER EPIRA AT THE TIME OF SALE, CANNOT QUALIFY FOR A VAT ZERO-RATING UNDER THE EPIRA; RESPONDENT-TOLEDO POWER COMPANY'S SALES OF ELECTRICITY TO CEBEDO, ACMDC AND AFC CANNOT QUALIFY FOR VAT ZERO-RATING UNDER THE EPIRA.— In this case, when the EPIRA took effect in 2001, TPC was an existing generation facility. And at the time the sales of electricity to CEBECO, ACMDC, and AFC were made in 2002, TPC was not yet a generation company under EPIRA. Although it filed an application for a COC on June 20, 2002, it did not automatically become a generation company. It was only on June 23, 2005, when the ERC issued a COC in favor of TPC, that it became a generation company under EPIRA. Consequently, TPC's sales of electricity to CEBECO, ACMDC, and AFC cannot qualify for VAT zero-rating under the EPIRA.

6. ID.; ID.; ID.; VAT RULING NO. 011-5 IS NOT A GENERAL INTERPRETATIVE RULE THAT CAN BE APPLIED TO ALL TAXPAYERS SIMILARLY SITUATED, AS THE SAME WAS ISSUED IN RESPONSE TO THE QUERY MADE BY A TAXPAYER TO THE COMMISSIONER OF INTERNAL REVENUE, AS SUCH, IT IS APPLICABLE ONLY TO A PARTICULAR TAXPAYER.— Neither can TPC rely on VAT Ruling No. 011-5, which considered the sales of electricity of Hedcor effectively zero-rated from the effectivity of the EPIRA despite the fact that it was issued a COC only on November 5, 2003, as this is a specific ruling, issued in response to the query made by Hedcor to the CIR. As such, it is applicable only to a particular taxpayer, which is Hedcor. Thus, it is not a general interpretative rule that can be applied to all taxpayers similarly situated. [W]e find no error on the part of the CTA *En Banc* in considering TPC's sales of electricity to CEBECO, ACMDC, and AFC for taxable year 2002 as invalid zero-rated sales, and in consequently denying TPC's claim for refund or credit of unutilized input VAT attributable to the said sales of electricity.

7. ID.; ID.; A CLAIM FOR REFUND OR CREDIT OF UNUTILIZED INPUT VAT UNDER SECTION 112 OF THE

NATIONAL INTERNAL REVENUE CODE (NIRC) CANNOT BE USED AS A MEANS TO ASSESS A TAXPAYER FOR ANY DEFICIENCY VAT, ESPECIALLY IF THE PERIOD TO ASSESS HAD ALREADY PRESCRIBED; COURTS CAN ONLY REVIEW THE ASSESSMENTS ISSUED BY THE COMMISSIONER OF INTERNAL REVENUE BUT IT CANNOT ISSUE ASSESSMENTS AGAINST TAXPAYERS FOR IT HAS NO ASSESSMENT POWERS.— But while TPC's sales of electricity to CEBECO, ACMDC, and AFC are not zero-rated, we cannot hold it liable for deficiency VAT by imposing 10% VAT on said sales of electricity as what the CIR wants us to do. As a rule, taxes cannot be subject to compensation because the government and the taxpayer are not creditors and debtors of each other. However, we are aware that in several cases, we have allowed the determination of a taxpayer's liability in a refund case, thereby allowing the offsetting of taxes. x x x But in all these cases, we allowed offsetting of taxes only because the determination of the taxpayer's liability is intertwined with the resolution of the claim for tax refund of erroneously or illegally collected taxes under Section 229 of the NIRC. A situation that is not present in the instant case. In this case, TPC filed a claim for tax refund or credit under Section 112 of the NIRC, where the issue to be resolved is whether TPC is entitled to a refund or credit of its unutilized input VAT for the taxable year 2002. And since it is not a claim for refund under Section 229 of the NIRC, the correctness of TPC's VAT returns is not an issue. Thus, there is no need for the court to determine whether TPC is liable for deficiency VAT. Besides, it would be unfair to allow the CIR to use a claim for refund under Section 112 of the NIRC as a means to assess a taxpayer for any deficiency VAT, especially if the period to assess had already prescribed. As we have said, the courts have no assessment powers, and therefore, cannot issue assessments against taxpayers. The courts can only review the assessments issued by the CIR, who under the law is vested with the powers to assess and collect taxes and the duty to issue tax assessments within the prescribed period.

APPEARANCES OF COUNSEL

The Solicitor General for Commissioner of Internal Revenue.
Puno and Puno for Toledo Power Company.

D E C I S I O N

DEL CASTILLO,* ***J.*:**

The burden of proving entitlement to a tax refund rests on the taxpayer.

Before this Court are Consolidated Petitions for Review on *Certiorari*[1] assailing the November 22, 2010 Decision[2] and the April 6, 2011 Resolution[3] of the Court of Tax Appeals (CTA) in CTA EB Nos. 623 and 629.

Factual Antecedents

Toledo Power Corporation (TPC) is a general partnership principally engaged in the business of power generation and sale of electricity to the National Power Corporation (NPC), Cebu Electric Cooperative III (CEBECO), Atlas Consolidated Mining and Development Corporation (ACMDC), and Atlas Fertilizer Corporation (AFC).[4]

On December 22, 2003, TPC filed with the Bureau of Internal Revenue (BIR) Regional District Office (RDO) No. 83 an administrative claim for refund or credit of its unutilized input Value Added Tax (VAT) for the taxable year 2002 in the total amount of ₱14,254,013.27 under Republic Act No. 9136 or the Electric Power Industry Reform Act of 2001 (EPIRA) and the National Internal Revenue Code of 1997 (NIRC).[5]

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* Per Special Order No. 2282 dated November 13, 2015.

[1] *Rollo*, G.R. No. 196415, pp. 7-29; *rollo*, G.R. No. 196451, pp. 3-27.

[2] *Id*. at 36-53; penned by Associate Justice Olga Palanca-Enriquez and concurred in by Presiding Justice Ernesto D. Acosta and Associate Justices Juanito C. Castañeda, Jr., Lovell R. Bautista, Erlinda P. Uy, Caesar A. Casanova, Esperanza R. Fabon-Victorino, Cielito N. Mindaro-Grulla, and Amelita R. Cotangco-Manalastas. Separate Opinion of Associate Justice Lovell R. Bautista, *id*. at 54-57.

[3] *Id*. at 60-65.

[4] *Id*. at 38.

[5] *Id*. at 39.

On April 22, 2004, due to the inaction of the Commissioner of Internal Revenue (CIR), TPC filed with the CTA a Petition for Review, docketed as CTA Case No. 6961 and raffled to the CTA First Division (CTA Division).[6]

In response to the Petition for Review, the CIR argued that TPC failed to prove its entitlement to a tax refund or credit.[7]

Ruling of the CTA Division

On November 11, 2009, the CTA Division rendered a Decision[8] partially granting TPC's claim in the reduced amount of ₱7,598,279.29.[9] Since NPC is exempt from the payment of all taxes, including VAT, the CTA Division allowed TPC to claim a refund or credit of its unutilized input VAT attributable to its zero-rated sales of electricity to NPC for the taxable year 2002.[10] The CTA Division, however, denied the claim attributable to TPC's sales of electricity to CEBECO, ACMDC and AFC due to the failure of TPC to prove that it is a generation company under the EPIRA.[11] The CTA Division did not consider the said sales as valid zero-rated sales because TPC did not submit a Certificate of Compliance (COC) from the Energy Regulatory Commission (ERC).[12] Although TPC filed an application for a COC on June 20, 2002 with the ERC, the CTA Division found this insufficient to prove that TPC is a generation company under the EPIRA.[13] The pertinent portions of the Decision read:

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[6] *Id*.

[7] *Id*. at 39-40.

[8] *Id*. at 68-81; penned by Associate Justice Lovell R. Bautista and concurred in by Associate Justice Caesar A. Casanova, Concurring and Dissenting Opinion of Presiding Justice Ernesto D. Acosta, *id*. at 82-86.

[9] *Id*. at 80.

[10] *Id*. at 74-80.

[11] *Id*. at 72-74.

[12] *Id*. at 74.

[13] *Id*.

Therefore, out of the ₱439,660,958.77 zero-rated sales declared by [TPC] in its Quarterly VAT Returns for the four quarters of 2002, only the amount of ₱280,337,939.83 pertaining to [TPC's] sales of electricity to NPC shall be considered as valid zero-rated sales x x x,

x x x x x x x x x

[TPC's] sales of electricity to companies other than NPC worth ₱159,323,018.94 shall be denied VAT zero-rating for [TPC's] failure to present Certificate of Compliance from the ERC, as stated earlier. x x x

x x x x x x x x x

After finding that [TPC] had VAT zero-rated sales for the four quarters of 2002 in the amount of ₱280,337,939.83, the Court now determines the amount of input VAT attributable thereto.

[TPC] submitted its summary lists of purchases and corresponding suppliers' invoices/official receipts, Bureau of Customs (BOC) Import Entries and Internal Revenue Declarations (IEIRDs), BOC official receipts, and other documentary evidence in support of the following input taxes reported in its Quarterly VAT Returns for the four quarters of 2002:

x x x x x x x x x

Upon examination of the supporting documents of [TPC], the Court[-]Commissioned Independent CPA recommended that out of the total reported input VAT of ₱14,558,043.30, only the amount of ₱11,347,363.55 represents [TPC's] valid claim, while the remaining amount of ₱3,210,679.75 should be disallowed x x x

x x x x x x x x x

The Court finds the disallowance of the above input taxes proper except for input taxes classified under Nos. 3 and 10 in the respective amounts of ₱6,568.00 and ₱3,121,787.60.

The input VAT of ₱6,568.00 represents [TPC's] valid claim because the same is duly supported by BOC official receipt. As to the input taxes of ₱3,121,787.60, [TPC] submitted documents marked as Exhibits "SS-3" top "SS-28" but only with respect to the claimed amount of ₱1,106,820.84 as summarized in Exhibit "SS." Out of the ₱1,106,820.84 input VAT claim, only the amount of ₱969,369.59 is valid, while the remaining input VAT of ₱137,421.25 shall be denied x x x.

x x x x x x x x x

Therefore, the ₱3,121,787.60 input VAT disallowed by the Independent CPA for not having supporting documents shall now be reduced to ₱2,152,418.01 (₱3,121,787.60 less ₱969,369.59).

In addition to the disallowances found by the Independent CPA, the amount of ₱102,700.85, representing out-of-period claim, shall be denied.

In sum, only the input VAT claim of ₱12,220,600.29 is duly substantiated in accordance with Sections 110(A) and 113(A) of the NIRC of 1997, as implemented by Sections 4.104-1, 4.104-5, and 4.108-1 of Revenue Regulations No. 7-95. The amount of ₱12,220,600.29 is computed below:

Input VAT per 2002 Quarterly VAT Returns			₱14,558,043.30
Less:	Disallowances		
	Per Independent CPA	₱3,210,679.75	
	Less: Valid Claim		
	Input VAT on Importation of Goods	6,568.00	
	Input VAT per add'l documents submitted	969,369.59	2,234,742.16
	Per this Court's further verification		102,700.85
Substantiated Input VAT			₱12,220,600.29

A portion of the substantiated input VAT of ₱12,220,600.29, however, shall be applied against [TPC's] reported output VAT liability of ₱304,030.03, x x x

x x x x x x x x x

Hence, only the remaining input VAT of ₱11,916,570.26 can be attributed to the entire zero-rated sales declared by [TPC] in the amount of ₱439,660,958.77, and only the input VAT of ₱7,598,279.29 is attributable to the substantiated zero-rated sales of ₱280,337,939.83, as computed below:

Substantiated Input VAT	₱12,220,600.29
Less: Output VAT	304,030.03
Excess Input VAT	₱11,916,570.26
Substantiated Zero-Rated Sales	₱280,337,939.83
Divided by Total Reported Zero-Rated Sales	÷ 439,660,958.77
Multiplied by Substantiated Excess Input VAT	x 11,916,570.26
Excess Input VAT attributable to Substantiated Zero-Rated Sales	₱7,598,279.29

As evidenced by its Quarterly VAT Returns from the first quarter of 2003 to the second quarter of 2004, [TPC] was able to prove that the input VAT of ₱7,598,279.29 was not applied against any output VAT in the succeeding quarters.

x x x x x x x x x

WHEREFORE, premises considered, the instant Petition for Review is hereby PARTIALLY GRANTED. Accordingly, respondent is hereby ORDERED TO REFUND or TO ISSUE A TAX CREDIT CERTIFICATE in favor of [TPC] the amount of SEVEN MILLION FIVE HUNDRED NINETY EIGHT THOUSAND TWO HUNDRED SEVENTY NINE PESOS AND 29/100 (₱7,598,279.29), representing its unutilized input taxes attributable to zero-rated sales for taxable year 2002.

SO ORDERED.[14]

TPC moved for partial reconsideration contending that as an existing generation company, it was not required to obtain a COC from the ERC as a prerequisite for its operations, and that the issue of whether it is a generation company was never raised during the trial.[15] In any case, it attached photocopies of its application for a COC dated June 20, 2002 and its COC dated June 23, 2004.[16]

The CIR, likewise, sought partial reconsideration arguing that the administrative claim was merely *pro forma* since TPC failed to submit the complete documents required under Revenue Memorandum Order (RMO) No. 53-98,[17] which were necessary to ascertain the correct amount to be refunded in the administrative claim.[18]

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[14] *Id*. at 76-80.

[15] *Rollo*, G.R. No. 196451, pp. 92-94.

[16] *Id*. at 93.

[17] Checklist of Documents to be Submitted by a Taxpayer upon Audit of his Tax Liabilities as well as of the Mandatory Reporting Requirements to be Prepared by a Revenue Officer, all of which Comprise a Complete Tax Docket, June 25, 1998.

[18] *Rollo*, G.R. No. 196451, pp. 99-100.

On April 13, 2010, the CTA Division issued a Resolution[19] denying both motions for lack of merit. It maintained that TPC timely filed its administrative claim for refund and that its failure to comply with RMO No. 53-98 was not fatal.[20] The CTA Division also said that in claiming a refund under the EPIRA, the taxpayer must prove that it was duly authorized by the ERC to operate a generation facility and that it derived its sales from power generation.[21] In this case, TPC failed to present a COC to prove that it was duly authorized by the ERC to operate as a generation facility in 2002.[22] As to the attached photocopy of the COC, the CTA Division gave no credence to it as it was not formally offered in evidence and no valid reason was offered by TPC to justify its late submission.[23]

Unfazed, both parties elevated the case before the CTA *En Banc*.

Ruling of the CTA En Banc

On November 22, 2010, the CTA *En Banc* rendered a Decision dismissing both Petitions. It sustained the findings of the CTA Division that both the administrative and the judicial claims were timely filed and that TPC's non-compliance with RMO No. 53-98 was not fatal to its claim.[24] Also, since TPC was not yet issued a COC in 2002, the CTA *En Banc* agreed with the CTA Division that TPC's sales of electricity to CEBECO, ACMDC, and AFC for the taxable year 2002 could not qualify for a VAT zero-rating under the EPIRA.[25] The CTA *En Banc* likewise noted that contrary to the claim of TPC, there is no

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[19] *Id*. at 91-102. Concurring Opinion of Presiding Justice Ernesto D. Acosta, *id*. at 103-105.

[20] *Id*. at 100-101.

[21] *Id*. at 94-97.

[22] *Id*.

[23] *Id*. at 98-99.

[24] *Rollo*, G.R. No. 196415, pp. 44-48.

[25] *Id*. at 48-50.

stipulation in the Joint Stipulation of Facts and Issues (JSFI) that TPC is a generation company under the EPIRA.[26] Thus:

> WHEREFORE, premises considered, the above-captioned petitions are hereby DISMISSED. The assailed Decision dated November 11, 2009 and Resolution dated April 13, 2010 rendered by the Former First Division in CTA Case No. 6961 are hereby AFFIRMED.
>
> SO ORDERED.[27]

Both parties moved for partial reconsideration but the CTA *En Banc* denied both motions for lack of merit in its April 6, 2011 Resolution.[28]

Issues

Hence, the instant Petitions with the following issues:

G.R. No. 196415

> Whether x x x the [CTA] *En Banc* committed reversible error in holding that TPC is entitled to a refund or tax credit certificate in the reduced amount of ₱7,598,279.29, representing alleged unutilized input tax, considering that —
>
> A. TPC did not comply with the rule on exhaustion of administrative remedies.
>
> B. TPC is liable for deficiency VAT for those sales of electricity to companies other than NPC that failed to qualify as VAT zero-rated sales under the EPIRA x x x, hence, considered subject to VAT under Section 108 of the [NIRC], as amended.
>
> C. x x x TPC did not comply with the pertinent provisions of Section 112 (A) of the NIRC x x x, as amended.[29]

G.R. No. 196451

> A. Whether TPC established that it is a generation company during the period of its claim for refund.

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[26] *Id*. at 50-51.

[27] *Id*. at 52.

[28] *Id*. at 60-65.

[29] *Id*. at 262.

B. Whether the fact of TPC being a generation company was raised as an issue by the parties for the CTA to resolve.

C. Whether TPC is entitled to the rights of a generation company under the EPIRA prior to the issuance of its COC.[30]

Simply put, the issues raised in the Petitions can be grouped into two:

A. Whether the administrative and the judicial claims for tax refund or credit were timely and validly filed.

B. Whether the TPC is entitled to the full amount of its claim for tax refund or credit.

The CIR's Arguments

The CIR contends that TPC is not entitled to a refund or credit in the reduced amount of ₱7,598,279.29, representing its alleged unutilized input VAT for taxable year 2002 because it failed to comply with the rules on exhaustion of administrative remedies.[31] She insists that the BIR was deprived of the opportunity to determine the truthfulness of the claim as TPC failed to submit the complete documents set out in RMO No. 53-98.[32] And since TPC failed to present all relevant documents, it failed to prove that it did not apply its unutilized input VAT against output VAT as provided in Section 112 (A) of the NIRC.[33] Thus, the *pro forma* administrative claim filed by TPC has no effect.[34] Moreover, since TPC's sales of electricity to companies other than NPC were denied VAT zero-rating, TPC should be held liable for deficiency VAT in the amount of ₱4,015,731.63.[35]

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[30] *Id*. at 226.

[31] *Id*. at 263-267.

[32] *Id*.

[33] *Id*. at 269-270.

[34] *Id*. 264-265.

[35] Deficiency VAT computation: amount of sale of electricity denied by the CTA multiplied by 10% VAT less the substantiated excess input VAT [₱159,323,018.94 x 10% = ₱15,923,301.89 – ₱11,916,570.26 = ₱4,015,731.63], *id*. at 267-269.

TPC's Arguments

TPC, on the other hand, argues that its administrative claim was not *pro forma* as it submitted relevant supporting documents, to wit: (a) its Articles of Partnership; (b) ERC Registration and Compliance Certificate; (c) VAT Registration Certificate; (d) Quarterly VAT Returns for the 1st to 4th quarters of 2002; (e) Summary of Input Tax Payments for the 1st to 4th quarters of 2002 showing the details of TPC's purchases of goods and services as well as the corresponding input taxes paid, and the pertinent supporting VAT invoices and official receipts; and (f) application for zero rating for 2002.[36] It also complied with the rule on exhaustion of administrative remedies as it waited for the CIR to rule on its administrative claim before filing the judicial claim.[37]

Citing VAT Ruling No. 011-5,[38] TPC further claims that it is entitled to the full amount of tax refund or credit because it became entitled to the rights of a generation company under the EPIRA when it filed its application with the ERC on June 20, 2002.[39] Thus, the belated issuance of the COC has no effect on its claim for tax refund or credit. Besides, in the JSFI, the parties already agreed that TPC is a generation company under the EPIRA.[40] In addition, it is not liable for deficiency VAT, even if, for the sake of argument, its sales of electricity to CEBECO, ACMDC, and AFC are not zero-rated, as an assessment cannot be issued in a refund case, not to mention that the BIR's period to assess had already prescribed.[41]

Our Ruling

The Petitions are bereft of merit.

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[36] *Id*. at 227-228.

[37] *Id*. at 228.

[38] Ruling on the letter-request of Hydro Electric Development Corporation issued by Jose Mario C. Buñag, OIC-Commissioner of Internal Revenue on August 8, 2005.

[39] *Rollo*, G.R. No. 196415, pp. 238-251.

[40] *Id*. at 233-236.

[41] *Id*. at 232-233.

Both the administrative and the judicial claims were timely and validly filed.

Pursuant to Section 112 (A)[42] and (D)[43] of the NIRC, a taxpayer has two (2) years from the close of the taxable quarter when the zero-rated sales were made within which to file with the CIR an administrative claim for refund or credit of unutilized input VAT attributable to such sales. The CIR, on the other hand, has 120 days from receipt of the complete documents within which to act on the administrative claim. Upon receipt of the decision, a taxpayer has 30 days within which to appeal the decision to the CTA. However, if the 120-day period expires without any decision from the CIR, the taxpayer may appeal the inaction to the CTA within 30 days from the expiration of the 120-day period.

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[42] SEC. 112. *Refunds or Tax Credits of Input Tax.* —

(A) Zero-rated or Effectively Zero-rated Sales. — Any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, within two (2) years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales, except transitional input tax, to the extent that such input tax has not been applied against output tax: Provided, however, That in the case of zero-rated sales under Section 106(A)(2)(a)(1), (2) and (B) and Section 108(B)(1) and (2), the acceptable foreign currency exchange proceeds thereof had been duly accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP): Provided, further, That where the taxpayer is engaged in zero-rated or effectively zero-rated sale and also in taxable or exempt sale of goods or properties or services, and the amount of creditable input tax due or paid cannot be directly and entirely attributed to any one of the transactions, it shall be allocated proportionately on the basis of the volume of sales.

x x x x x x x x x

(Amended by Republic Act [RA] No. 9337, An Act Amending Sections 27, 28, 34, 106, 107, 108, 109, 110, 111, 112, 113, 114, 116, 117, 119, 121, 148, 151, 236, 237 and 288 of the National Internal Revenue Code of 1997, as amended, and for other purposes.)

[43] SEC. 112. *Refunds or Tax Credits of Input Tax.* —

(D) Period within which Refund or Tax Credit of Input Taxes shall be Made. — In proper cases, the Commissioner shall grant a refund or issue the tax credit certificate for creditable input taxes within one hundred twenty (120)

In *Commissioner of Internal Revenue v. San Roque Power Corporation*,[44] we said that the 120+30-day period must be strictly observed except from the date of issuance of BIR Ruling No. DA-489-03 on December 10, 2003, which allowed taxpayers to file a judicial claim without waiting for the end of the 120-day period, up to the date of promulgation of C*ommissioner of Internal Revenue v. Aichi Forging Company of Asia, Inc.*[45] on October 6, 2010, where we declared that compliance with the 120+30-day period is mandatory and jurisdictional.

In this case, TPC applied for a claim for refund or credit of its unutilized input VAT for the taxable year 2002 on December 22, 2003. Since the CIR did not act on its application within the 120-day period, TPC appealed the inaction on April 22, 2004. Clearly, both the administrative and the judicial claims were filed within the prescribed period provided in Section 112 of the NIRC.

Also, the administrative claim was not *pro forma* as TPC submitted documents to support its claim for refund and even manifested its willingness to submit additional documents if necessary.[46] The CIR, however, never requested TPC to submit additional documents. Thus, she cannot now raise the issue that TPC failed to submit the complete documents.

Neither do we find the alleged failure of TPC to submit all relevant documents set out in RMO No. 53-98 fatal to its claim.

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days from the date of submission of complete documents in support of the application filed in accordance with Subsections (A) and (B) hereof.

In case of full or partial denial of the claim for tax refund or tax credit, or the failure on the part of the Commissioner to act on the application within the period prescribed above, the taxpayer affected may, within thirty (30) days from the receipt of the decision denying the claim or after the expiration of the one hundred twenty day period, appeal the decision or the unacted claim with the [CTA]. (Renumbered as Section 112 (C) by RA No. 9337.)

[44] G.R Nos. 187485, 196113, and 197156, February 12, 2013, 690 SCRA 336.

[45] 646 Phil. 710 (2010).

[46] *Rollo*, G.R. No. 196415, pp. 87-89.

In *Commissioner of Internal Revenue v. Team Sual Corporation (formerly Mirant Sual Corporation),*[47] we said that:

> The CIR's reliance on RMO 53-98 is misplaced. There is nothing in Section 112 of the NIRC, RR 3-88 or RMO 53-98 itself that requires submission of the complete documents enumerated in RMO 53-98 for a grant of a refund or credit of input VAT. The subject of RMO 58-98 states that it is a "Checklist of Documents to be Submitted by a Taxpayer upon **Audit** of his Tax Liabilities . . . ." In this case, TSC was applying for a grant of refund or credit of its input tax. There was no allegation of an audit being conducted by the CIR. Even assuming that RMO 53-98 applies, it specifically states that some documents are required to be submitted by the taxpayer "if applicable."
>
> Moreover, if TSC indeed failed to submit the complete documents in support of its application, the CIR could have informed TSC of its failure, consistent with Revenue Memorandum Circular No. (RMC) 42-03. However, the CIR did not inform TSC of the document it failed to submit, even up to the present petition. The CIR likewise raised the issue of TSC's alleged failure to submit the complete documents only in its motion for reconsideration of the CTA Special First Division's 4 March 2010 Decision. Accordingly, we affirm the CTA EB's finding that TSC filed its administrative claim on 21 December 2005, and submitted the complete documents in support of its application for refund or credit of its input tax at the same time.[48]

In view of the foregoing, we find that both the administrative and the judicial claims were timely and validly filed.

Now, as to the validity of TPC's claim, there is no question that TPC is entitled to a refund or credit of its unutilized input VAT attributable to its zero-rated sales of electricity to NPC for the taxable year 2002 pursuant to Section 108 (B) (3)[49] of

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[47] G.R. No. 205055, July 18, 2014, 730 SCRA 242.

[48] *Id*. at 255-257.

[49] SEC. 108. *Value-added Tax on Sale of Services and Use, or Lease of Properties*. —

x x x x x x x x x

the NIRC, as amended, in relation to Section 13[50] of the Revised Charter of the NPC, as amended. Hence, the only issue to be resolved is whether TPC is entitled to a refund of its unutilized input VAT attributable to its sales of electricity to CEBECO, ACMDC, and AFC.

TPC is not entitled to a refund or credit of unutilized input VAT

(B) Transactions Subject to Zero Percent (0%) Rate. — The following services performed in the Philippines by VAT-registered persons shall be subject to zero percent (0%) rate:

x x x x x x x x x

(3) Services rendered to persons or entities whose exemption under special laws or international agreements to which the Philippines is a signatory effectively subjects the supply of such services to zero percent (0%)rate.

[50] REPUBLIC ACT NO. 6395, An Act Revising the Charter of the National Power Corporation.

Sec. 13. *Non-profit Character of the Corporation; Exemption from all Taxes, Duties, Fees, Imposts and other Charges by Government and Governmental Instrumentalities*. — The Corporation shall be non-profit and shall devote all its returns from its capital investment, as well as excess revenues from its operation, for expansion. To enable the Corporation to pay its indebtedness and obligations and in furtherance and effective implementation of the policy enunciated in Section one of this Act, the Corporation is hereby declared exempt:

(a) From the payment of all taxes, duties, fees, imposts, charges, costs and service fees in any court or administrative proceedings in which it may be a party, restrictions and duties to the Republic of the Philippines, its provinces, cities, municipalities and other government agencies and instrumentalities;

(b) From all income taxes, franchise taxes and realty taxes to be paid to the National Government, its provinces, cities, municipalities and other government agencies and instrumentalities;

(c) From all import duties, compensating taxes and advanced sales tax, and wharfage fees on import of foreign goods required for its operations and projects; and

(d) From all taxes, duties, fees, imposts, and all other charges imposed by the Republic of the Philippines, its provinces, cities, municipalities and other government agencies and instrumentalities, on all petroleum products used by the Corporation in the generation, transmission, utilization, and sale of electric power. (Repealed by Section 24 of Republic Act No. 9337.)

attributable to its sales of electricity to CEBECO, ACMDC, and AFC.

Section 6[51] of the EPIRA provides that the sale of generated power by generation companies shall be zero-rated. Section 4 (x) of the same law states that a generation company "refers to any person or entity authorized by the ERC to operate facilities used in the generation of electricity." Corollarily, to be entitled to a refund or credit of unutilized input VAT attributable to the sale of electricity under the EPIRA, a taxpayer must establish: (1) that it is a generation company, and (2) that it derived sales from power generation.

In this case, TPC failed to present a COC from the ERC during the trial. On partial reconsideration, TPC argued that there was no need for it to present a COC because the parties already stipulated in the JSFI that TPC is a generation company and that it became entitled to the rights under the EPIRA when it filed its application with the ERC on June 20, 2002.

We find the arguments raised by TPC unavailing.

There is nothing in the JSFI to show that the parties agreed that TPC is a generation company under the EPIRA. The pertinent portions of the JSFI read:

JOINTLY STIPULATED FACTS

1. [TPC] is principally engaged in the business of power generation and subsequent sale thereof to the [NPC, CEBECO, ACMDC, and AFC].[52]

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[51] SECTION 6. *Generation Sector*. — Generation of electric power, a business affected with public interest, shall be competitive and open.

x x x x x x x x x

Pursuant to the objective of lowering electricity rates to end-users, sales of generated power by generation companies shall be value added tax zero-rated.

x x x x x x x x x

(Repealed by Section 24 of Republic Act No. 9337)

[52] *Rollo*, G.R. No. 196415, p. 234.

2. On 20 June 2002, petitioner filed an application with the Energy Regulatory Commission (ERC) for the issuance of a Certificate of Compliance pursuant to the Implementing Rules and Regulations of the EPIRA.

x x x x x x x x x

ADMITTED FACTS

x x x x x x x x x

3. Effective 26 June 2001, sales of generated power by generation companies became VAT zero-rated by virtue of Section 4(x) in relation to Section 6 of the EPIRA and Rule 5, Section 6 of the Rules and Regulations to Implement the EPIRA.[53]

Obviously, the parties did not stipulate that TPC is a generation company. They only stipulated that TPC is engaged in the business of power generation and that it filed an application with the ERC on June 20, 2002. However, being engaged in the business of power generation does not make TPC a generation company under the EPIRA. Neither did TPC's filing of an application for COC with the ERC automatically entitle TPC to the rights of a generation company under the EPIRA.

At this point, a distinction must be made between a generation facility and a generation company. A generation facility is defined under the EPIRA Rules and Regulations as "a facility for the production of electricity."[54] While a generation company, as

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[53] *Id*. at 50-51.

[54] RULES AND REGULATIONS TO IMPLEMENT REPUBLIC ACT NO. 9136, ENTITLED "ELECTRIC POWER INDUSTRY REFORM ACT OF 2001"

PART I

General Provisions

x x x x x x x x x

RULE 4

Definition of Terms

x x x x x x x x x

(oo) "*Generation Facility*" refers to a facility for the production of electricity;

x x x x x x x x x

previously mentioned, "refers to any person or entity authorized by the ERC to operate facilities used in the generation of electricity." Based on the foregoing definitions, what differentiates a generation facility from a generation company is that the latter is authorized by the ERC to operate, as evidenced by a COC.

Under the EPIRA, all new generation companies and existing generation facilities are required to obtain a COC from the ERC. New generation companies must show that they have complied with the requirements, standards, and guidelines of the ERC before they can operate.[55] As for existing generation facilities, they must submit to the ERC an application for a COC together with the required documents within ninety (90) days from the effectivity of the EPIRA Rules and Regulations.[56] Based on

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[55] REPUBLIC ACT NO. 9136, SECTION 6. *Generation Sector*. — Generation of electric power, a business affected with public interest, shall be competitive and open.

Upon the effectivity of this Act, any new generation company shall, before it operates, secure from the Energy Regulatory Commission (ERC) a certificate of compliance pursuant to the standards set forth in this Act, as well as health, safety and environmental clearances from the appropriate government agencies under existing laws.

x x x x x x x x x

[56] RULES AND REGULATIONS TO IMPLEMENT REPUBLIC ACT NO. 9136, ENTITLED "ELECTRIC POWER INDUSTRY REFORM ACT OF 2001"

x x x x x x x x x

PART II

Structure and Operation of Electric Power Industry

RULE 5

Generation Sector

x x x x x x x x x

SECTION 4. *Obligations of a Generation Company*. —

(a) A COC shall be secured from the ERC before commercial operation of a new Generation Facility. The COC shall stipulate all obligations of a Generation Company consistent with this Section and such other operating guidelines as ERC may establish. The ERC shall establish and publish the standards and requirements for issuance of a COC. A COC shall be issued upon compliance with such standards and requirements.

the documents submitted, the ERC will determine whether the applicant has complied with the standards and requirements for operating a generation company. If the applicant is found compliant, only then will the ERC issue a COC.

In this case, when the EPIRA took effect in 2001, TPC was an existing generation facility. And at the time the sales of electricity to CEBECO, ACMDC, and AFC were made in 2002, TPC was not yet a generation company under EPIRA. Although it filed an application for a COC on June 20, 2002, it did not automatically become a generation company. It was only on June 23, 2005, when the ERC issued a COC in favor of TPC, that it became a generation company under EPIRA. Consequently, TPC's sales of electricity to CEBECO, ACMDC, and AFC cannot qualify for VAT zero-rating under the EPIRA.

Neither can TPC rely on VAT Ruling No. 011-5, which considered the sales of electricity of Hedcor effectively zero-rated from the effectivity of the EPIRA despite the fact that it was issued a COC only on November 5, 2003, as this is a specific ruling, issued in response to the query made by Hedcor to the CIR. As such, it is applicable only to a particular taxpayer, which is Hedcor. Thus, it is not a general interpretative rule that can be applied to all taxpayers similarly situated.[57]

All told, we find no error on the part of the CTA *En Banc* in considering TPC's sales of electricity to CEBECO, ACMDC, and AFC for taxable year 2002 as invalid zero-rated sales, and in consequently denying TPC's claim for refund or credit of unutilized input VAT attributable to the said sales of electricity.

(i) A Person owning an existing Generation Facility or a Generation Facility under construction, shall submit within ninety (90) days from effectivity of these Rules to ERC, when applicable, a certificate of DOE/NPC accreditation, a three (3) year operational history, a general company profile and other information that ERC may require. Upon making a complete submission to the ERC, such Person shall be issued a COC by the ERC to operate such existing Generation Facility.

x x x x x x x x x

[57] *Commissioner of Internal Revenue v. San Roque Power Corporation, supra* note 44 at 404.

TPC is not liable for deficiency VAT.

But while TPC's sales of electricity to CEBECO, ACMDC, AFC are not zero-rated, we cannot hold it liable for deficiency VAT by imposing 10% VAT on said sales of electricity as what the CIR wants us to do.

As a rule, taxes cannot be subject to compensation because the government and the taxpayer are not creditors and debtors of each other.[58] However, we are aware that in several cases, we have allowed the determination of a taxpayer's liability in a refund case, thereby allowing the offsetting of taxes.

In *Commissioner of Internal Revenue v. Court of Tax Appeals*,[59] we allowed offsetting of taxes in a tax refund case because there was an existing deficiency income and business tax assessment against the taxpayer. We said that "[t]o award such refund despite the existence of that deficiency assessment is an absurdity and a polarity in conceptual effects" and that "to grant the refund without determination of the proper assessment and the tax due would inevitably result in multiplicity of proceedings or suits."[60]

Similarly, in *South African Airways v. Commissioner of Internal Revenue*,[61] we permitted offsetting of taxes because the correctness of the return filed by the taxpayer was put in issue.

In the recent case of *SMI-ED Philippines Technology, Inc. v. Commissioner of Internal Revenue*,[62] we also allowed offsetting because there was a need for the court to determine if a taxpayer claiming refund of erroneously paid taxes is more properly liable for taxes other than that paid. We explained that the determination

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[58] *Philex Mining Corp. v. Commissioner of Internal Revenue*, 356 Phil. 189, 198 (1998).

[59] G.R. No. 106611, July 21, 1994, 234 SCRA 348, 357.

[60] *Id*. at 357.

[61] 626 Phil. 566, 579 (2010).

[62] G.R. No. 175410, November 12, 2014.

of the proper category of tax that should have been paid is not an assessment but is an incidental issue that must be resolved in order to determine whether there should be a refund.[63] However, we clarified that while offsetting may be allowed, the BIR can no longer assess the taxpayer for deficiency taxes in excess of the amount claimed for refund if prescription has already set in.[64]

But in all these cases, we allowed offsetting of taxes only because the determination of the taxpayer's liability is intertwined with the resolution of the claim for tax refund of erroneously or illegally collected taxes under Section 229[65] of the NIRC. A situation that is not present in the instant case.

In this case, TPC filed a claim for tax refund or credit under Section 112 of the NIRC, where the issue to be resolved is whether TPC is entitled to a refund or credit of its unutilized input VAT for the taxable year 2002. And since it is not a claim for refund under Section 229 of the NIRC, the correctness of TPC's VAT returns is not an issue. Thus, there is no need for the court to determine whether TPC is liable for deficiency VAT.

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[63] *Id*.

[64] *Id*.

[65] SEC. 229. Recovery of Tax Erroneously or Illegally Collected. — No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, of any sum alleged to have been excessively or in any manner wrongfully collected without authority, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.

In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment: Provided, however, That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid.

Besides, it would be unfair to allow the CIR to use a claim for refund under Section 112 of the NIRC as a means to assess a taxpayer for any deficiency VAT, especially if the period to assess had already prescribed. As we have said, the courts have no assessment powers, and therefore, cannot issue assessments against taxpayers.[66] The courts can only review the assessments issued by the CIR, who under the law is vested with the powers to assess and collect taxes and the duty to issue tax assessments within the prescribed period.[67]

WHEREFORE, the Petitions are hereby **DENIED**. The November 22, 2010 Decision and the April 6, 2011 Resolution of the Court of Tax Appeals in CTA EB Nos. 623 and 629 are hereby **AFFIRMED**.

SO ORDERED.

Velasco, Jr.,[**] *Perez,*[***] *Mendoza,* and *Leonen, JJ.,* concur.

SECOND DIVISION

[G.R. No. 201652. December 2, 2015]

HEIRS OF SIMEON LATAYAN, namely: LEONIDES Q. LATAYAN, ARIEL Q. LATAYAN, and ETHEL Q. LATAYAN-AMPIL, represented by their Attorney-in-Fact, LEONIDES Q. LATAYAN, *petitioners, vs*. **PEING TAN, JOHNNY TAN, HERMINIGILDO CASALAN, WEBINO VILLAREAL, DIOSCORO MOLO, DAMACINO BAYAWA, EDGAR NARITA,YOLANDA**

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[66] *SMI-ED Philippine Technology, Inc. v. Commissioner of Internal Revenue, supra* note 62.

[67] *Id*.

[**] Per Special Order No. 2281 dated November 13, 2015.

[***] Per Special Order No. 2301 dated December 1, 2015.

NARITA, POLICRONIA CAPIONES, ANDRES LOZANO, GREGORIO YAGAO, EMILIANO GUMATAY, JESUS ALCONTIN,ADANI DULAUON, MARIO PEREZ, LARRY CIMAFRANCA, FELIXBERTO BULADACO, CIPRIANO AHIT, BUENAVENTURA BACALSO and SALDE ESPIA,* *respondents.*

SYLLABUS

1. REMEDIAL LAW; COURTS; JURISDICTION; THE COURT OR TRIBUNAL MUST LOOK AT THE MATERIAL ALLEGATIONS IN THE COMPLAINT, THE ISSUES OR QUESTIONS THAT ARE THE SUBJECT OF THE CONTROVERSY, AND THE CHARACTER OF THE RELIEF PRAYED FOR IN ORDER TO DETERMINE WHETHER THE NATURE AND SUBJECT MATTER OF THE COMPLAINT IS WITHIN ITS JURISDICTION; ISSUES RAISED IN CASE AT BAR ARE COGNIZABLE BY THE SECRETARY OF THE DEPARTMENT OF AGRARIAN REFORM (DAR).— The jurisdiction of a court or tribunal over the nature and subject matter of an action is conferred by law. The court or tribunal must look at the material allegations in the complaint, the issues or questions that are the subject of the controversy, and the character of the relief prayed for in order to determine whether the nature and subject matter of the complaint is within its jurisdiction. If the issues between the parties are intertwined with the resolution of an issue within the exclusive jurisdiction of a court or tribunal, the dispute must be addressed and resolved by the said court or tribunal. x x x Considering that herein petitioners' predecessor-in-interest (i.e. Simeon) sought to cancel respondents' registered CLOAs on the grounds: (1) that no agrarian dispute was involved in this case; (2) that the subject lots are exempt from CARP coverage, and (3) that due process

* The Department of Agrarian Reform Adjudication Board, the Provincial Agrarian Reform Officer (PARO), the Municipal Agrarian Reform Officer (MARO), and the Regional Director of the Department of Agrarian Reform who were originally impleaded as respondents were no longer indicated in the caption and dropped as respondents pursuant to Section 4, Rule 45 of the Rules of Court.

of law was not observed when the original petitioner (Simeon) was divested of the ownership of the subject lots: it thus stands to reason that it is the DAR Secretary that has jurisdiction to resolve the controversy pursuant to applicable law, rules, and jurisprudence.

2. LABOR AND SOCIAL LEGISLATION; AGRARIAN LAWS; JURISDICTION OF THE DEPARTMENT OF AGRARIAN REFORM ADJUDICATION BOARD (DARAB) AND THE SECRETARY OF THE DEPARTMENT OF AGRARIAN REFORM (DAR).— Both illuminating and instructive are these pronouncements by this Court that bear with particular relevance on the petition at bench – Section 1, Rule II of the 1994 DARAB Rules of Procedure, the rule in force at the time of the filing of the petition, provides: Section 1. *Primary and Exclusive Original and Appellate Jurisdiction.* — The Board shall have primary and exclusive jurisdiction, both original and appellate, to determine and adjudicate all agrarian disputes involving the implementation of the [CARP] under [RA 6657], Executive Order Nos. 228, 229 and 129-A, [RA 3844] as amended by [RA 6389], [PD 27] and other agrarian laws and their implementing rules and regulations. Specifically, such jurisdiction shall include but not be limited to cases involving following: x x x f) Those involving the issuance, correction and cancellation of [CLOAs] and Emancipation Patents (EPs) which are registered with the Land Registration Authority; x x x While the DARAB may entertain petitions for cancellation of CLOAs, as in this case, its jurisdiction is, however, confined only to agrarian disputes. As explained in the case of *Heirs of Dela Cruz v. Heirs of Cruz* and reiterated in the recent case of *Bagongahasa v. Spouses Cesar Caguin*, for the DARAB to acquire jurisdiction, the controversy must relate to an agrarian dispute between the landowners and tenants in whose favor CLOAs have been issued by the DAR Secretary x x x **Furthermore, it bears to emphasize that under the new law, [RA 9700], x x x which took effect on July 1, 2009, all cases involving the cancellation of CLOAs and other titles issued under any agrarian reform program are now within the exclusive and original jurisdiction of the DAR Secretary. Section 9 of the said law provides: Section 9. Section 24 of [RA 6657], as amended, is further amended to read as follows: x x x All cases involving the cancellation of registered emancipation patents, certificates of land ownership award,**

and other titles issued under any agrarian reform program are within the exclusive and original jurisdiction of the Secretary of the DAR.

3. REMEDIAL LAW; COURTS; JURISDICTION; DOCTRINE OF PRIMARY JURISDICTION; COURTS ARE NOT ALLOWED TO ARROGATE UNTO ITSELF AUTHORITY TO RESOLVE A CONTROVERSY, THE JURISDICTION OVER WHICH IS INITIALLY LODGED WITH AN ADMINISTRATIVE BODY OF SPECIAL COMPETENCE. — And while this Court does indeed seek to expeditiously resolve the case at bench in compliance with its constitutionally–mandated duty, the well-settled principle of primary jurisdiction, as stressed in *Bagongahasa v. Romualdez,* must likewise be observed thus: While it is true that the PARAD and the DARAB lack jurisdiction in this case due to the absence of any tenancy relations between the parties, lingering essential issues are yet to be resolved as to the alleged lack of notice of coverage to respondents as landowners and their deprivation of just compensation. Let it be stressed that while these issues were discussed by the PARAD in his decision, the latter was precisely bereft of any jurisdiction to rule particularly in the absence of any notice of coverage for being an ALI case. Let it also be stressed that these issues were not met head-on by petitioners. At this juncture, the issues should not be left hanging at the expense and to the prejudice of respondents. However, this Court refuses to rule on the validity of the CARP coverage of the subject properties and the issuance of the assailed CLOAs. The doctrine of primary jurisdiction precludes the courts from resolving a controversy over which jurisdiction was initially lodged with an administrative body of special competence. The doctrine of primary jurisdiction does not allow a court to arrogate unto itself authority to resolve a controversy, the jurisdiction over which is initially lodged with an administrative body of special competence. The Office of the DAR Secretary is in a better position to resolve the particular issue of non-issuance of a notice of coverage — an ALI case — being primarily the agency possessing the necessary expertise on the matter. The power to determine such issue lies with the DAR, not with this Court.

APPEARANCES OF COUNSEL

L & J Tan Law Firm for petitioners.

D E C I S I O N

DEL CASTILLO,[**] ***J.*:**

This Petition for Review on *Certiorari*[1] assails the April 29, 2011 Decision[2] and the April 18, 2012 Resolution[3] of the Court of Appeals (CA) in CA-G.R. SP No. 02756-MIN. The CA affirmed the May 9, 2005 Decision[4] and the January 6, 2009 Resolution[5] of the Department of Agrarian Reform and Adjudication Board (DARAB) in DARAB Case No. 10403, which reversed the July 10, 2000 Decision[6] and the September 13, 2000 Resolution[7] of the Office of the Provincial Adjudicator (PARAD) in DARAB Case No. XI-1589-DC-99 which nullified respondents' Certificates of Land Ownership Award (CLOAs).

Factual Antecedents

On January 31, 2000, Simeon Latayan (Simeon), represented by his son and attorney-in-fact, Leonides Latayan, filed an

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[**] Per Special Order No. 2281 dated November 13, 2015.

[1] *Rollo*, pp. 5-28.

[2] *Id*. at 30-44; penned by Associate Justice Edgardo A. Camello and concurred in by Associate Justices Rodrigo F. Lim, Jr. and Edgardo T. Lloren.

[3] *Id*. at 45-47; penned by Associate Justice Edgardo A. Camello and concurred in by Associate Justices Edgardo T. Lloren and Zenaida T. Galapate- Laguilles.

[4] DARAB Records; pp. 330-334; penned by Assistant Secretary Augusto P. Quijano and concurred in by Assistant Secretaries Lorenzo R. Reyes, Edgar A. Igano, and Defin B. Samson.

[5] *Id*. at 356-357; penned by Assistant Secretary Augusto P. Quijano and concurred in by Assistant Secretaries Ambrocio B. De Luna, Defin B. Samson, and Edgar A. Igano.

[6] *Id*. at 166-170; penned by Regional Adjudicator Norberto P. Sinsona.

[7] *Id*. at 231-233.

Amended Complaint[8] before the PARAD Davao City, for cancellation of the CLOAs issued to respondents, docketed as DARAB Case No. XI-1589-DC-99. Simeon alleged that he is the registered owner of two adjoining lots covered by Transfer Certificates of Title Nos. T-14201 and T-14202 comprising 23.1488 hectares. He contended that the titles to the subject lots were unilaterally and arbitrarily cancelled without his consent or knowledge, and without notice and placed under the coverage of the Comprehensive Agrarian Reform Program (CARP) sans payment of just compensation. After the compulsory acquisition, the subject lots were divided and distributed to respondents. Simeon claimed that the subject properties are exempt from the CARP because they had been fully developed into an agro-industrial estate, are within the 1,000-meter strip of the highway, and are currently leased as a commercial farm to the Southern Tropical Fruits, Incorporated (STFI). Moreover, Simeon argued that respondents could not be properly considered as farmers-beneficiaries as they never occupied the subject lots nor introduced improvements therein; that if anything, respondents merely wanted to use the law to unlawfully divest him of his proprietary rights to the subject lots, and enjoy the improvements he had introduced and replace him as STFI's lessor. Simeon thus prayed that respondents' CLOAs be cancelled and that a preliminary mandatory injunction be issued in his favor to maintain him in his peaceful and lawful possession of the subject lots, over which he in due course of law had indeed been lawfully issued certificates of title.

In their Amended Answer,[9] respondents denied that Simeon's titles were unilaterally or arbitrarily cancelled. They insisted that, on the contrary, Simeon's titles were duly and properly cancelled in accordance with law. They claimed that Simeon was properly furnished a copy of Notice of Coverage; was invited to a conference to discuss the inclusion of the subject properties under the CARP; and was sent a copy of a Notice to Acquire

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[8] *Id*. at 22-30.

[9] *Id*. at 48-51.

and Notice of Land Valuation. They also asserted that Simeon's landholdings is extensive, about 93 hectares of which is agricultural land. They also averred that only a portion of the subject lots is within the highway's 1,000-meter strip. Finally, they claimed that they were identified by the proper authorities as qualified beneficiaries. In sum, they opined that Simeon's titles to the subject lots were properly cancelled and their CLOAs duly issued.

Ruling of the PARAD

On July 10, 2000, the PARAD rendered a Decision[10] in favor of Simeon. The PARAD noted that Simeon was never notified of the coverage by CARP of his properties and that he learned of the same only when he filed with the Department of Agrarian Reform (DAR) a petition for exemption of his landholdings from the operation of the CARP. According to the PARAD, that was the first time Simeon learned that his properties would be taken over by the so-called farmers-beneficiaries. The PARAD concluded that Simeon was denied due process since there was no observance of the procedural steps for the proper implementation of the CARP Law. Thus, the cancellation of Simeon's titles was unwarranted.

The dispositive portion of the Decision reads as follows:

> WHEREFORE, premises considered, judgment is hereby rendered:
>
> 1. Declaring the compulsory coverage on the land of the complainant [Simeon] a complete nullity and further declaring the CLOAs issued thereon null and void;
>
> 2. Ordering the MARO of Baguio District, Davao City, to re-document and cover the area anew under compulsory coverage, properly observing the administrative guidelines on the matter.
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> SO ORDERED.[11]

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[10] *Id*. at 166-170.

[11] *Id*. at 170.

Respondents moved for reconsideration[12] which was denied in the Resolution[13] of September 13, 2000.

Proceedings before the DARAB

Respondents filed an appeal with the DARAB.[14] While the appeal was pending, Simeon died and was substituted by his sons, Leonides and Ariel, and his daughter, Ethel, herein petitioners.

In its May 9, 2005 Decision,[15] the DARAB set aside the PARAD Decision and dismissed the case for lack of jurisdiction. The DARAB held —

> The issues however in this case partakes the nature [of] agrarian law, which are purely administrative in nature. Hence, falling within the exclusive jurisdiction of the Honorable DAR Secretary. As correctly noted [by] the [PARAD] there was no proper observance of administrative processes in terms of coverage as well [as] the identification of farmer[s]-beneficiaries. These issues [fall] squarely under the jurisdiction of the Honorable DAR Secretary as mandated by DAR Administrative Order No. 6, Series of 2000, which include the following:
>
> 1) classification and identification of landholdings under the CARP, including protests [or] oppositions thereto and petitions for lifting of coverage;
>
> 2) identification, qualification or disqualification of potential farmer[s]-beneficiaries.
>
> Having ruled that the issues are administrative in nature, this Board for that matter has no recourse but to respect the primary jurisdiction of the administrative agency. x x x
>
> Jurisdiction is conferred by law. x x x
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> x x x x x x x x x

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[12] *Id*. at 173-177.

[13] *Id*. at 231-233.

[14] *Id*. at 246-254.

[15] *Id.* at 330-334.

WHEREFORE, premises considered[,] the decision of the [PARAD] is SET ASIDE and the case is DISMISSED for lack of jurisdiction.

SO ORDERED.[16]

Petitioners filed a Motion for Reconsideration[17] which was denied in the January 6, 2009 Resolution.[18]

Proceedings before the CA

Aggrieved, petitioners elevated the DARAB's judgment to the CA *via* a Petition for Review.[19] But in the assailed Decision dated April 29, 2011,[20] the CA upheld the DARAB with modification. The CA ruled:

> Verily, the case at bar does not concern an agrarian dispute as there is no established tenancy relationship between petitioners' father and [respondents]. Neither is the case one for just compensation, contrary to petitioners' assertion. It originated as an action for cancellation of CLOAs registered with the Register of Deeds, thus seemingly cognizable at the initial stage by the PARAD and thereafter by the DARAB. However, for the DARAB to have jurisdiction in such cases, they must relate to an agrarian dispute between [the] landowner and [the] tenants to whom [the] CLOAs have been issued by the DAR Secretary. The cases involving the issuance, correction and cancellation of the CLOAs by the DAR in the administrative implementation of agrarian reform laws, rules and regulations to parties who are not agricultural tenants or lessees are within the jurisdiction of the DAR and not of the DARAB. Moreover, it involves issues with respect to the classification and identification of landholdings for coverage under the agrarian reform program, and the identification, qualification or disqualification of private respondents as farmer[s]-beneficiaries. These issues are not cognizable by the PARAD and the DARAB, but by the DAR Secretary because these are Agrarian Law Implementation (ALI) Cases.

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[16] *Id*. at 330, 332-333.

[17] *Id*. at 351-355.

[18] *Id*. at 356-357.

[19] CA *rollo*, pp. 4-28.

[20] *Rollo*, pp. 30-44.

In the present case, the DAR Secretary a[p]proved CLOAs Nos. CL-3731 and CL-3729 in favor of [respondents] in the exercise of his adminsitrative powers and in the implementation of the agrarian reform laws. The approval was based on the investigation of the MARO, over whom the DAR Secretary has supervision and control. The DAR Secretary also had the authority to withdraw the CLOA[s] upon a finding that the same is contrary to law and DAR orders, circulars and memoranda. The resolution of such issues by the DAR S[e]cretary will entail the application and implementation of agrarian reform laws, x x x as well as the implementing orders, circulars and rules and regulations issued by the DAR. x x x

Without doubt, the DARAB committed no reversible error when it set aside the decision of the PARAD and dismissed the case recognizing that jurisdiction over the matters involved is rightly vested with the DAR Secretary.

Indeed, the jurisdiction of the court or tribunal is not affected by the defenses or theories set up by the defendant or respondent in his answer or motion to dismiss. x x x Jurisdiction should be determined by considering not only the status or the relationship of the parties but also the nature of the issues or questions that is the subject of the controversy. The proceedings before a court or tribunal without jurisdiction, including its decision, are null and void, hence, susceptible to direct and collateral attacks. x x x

x x x x x x x x x

It is axiomatic that void judgments never become final and executory and cannot be the source of any right whatsoever. x x x

x x x x x x x x x

Thus, since the PARAD had no subject-matter jurisdiction over the complaint for annulment of CLOAs brought before it, the PARAD's decision dated 10 July 2000 invalidating the compulsory coverage on the land of [Simeon] and annulling the CLOAs issued to private respondents has not yet attained finality.

It should be made clear that this Court is constrained to limit the resolution of this petition [to] the key issue of which, as between the DARAB and the DAR Secretary, has jurisdiction to resolve the merits of DARAB Case No. 10403. Having recognized the DAR Secretary's exclusive jurisdicition over that case, the Court believes that the merits of the case are best left for the DAR Secretary to

determine. The DAR Secretary is in a better position to resolve the issues on the validity of the coverage, and the qualification of private respondents as the identified farmer[s]-beneficiaries for the subject properties, being the agency lodged with such authority inasmuch as it possesses the necessary expertise on the matter. The Court adopts such attitude of restraint in deference to a co-equal branch, the Executive Branch of Government, [to] which the DAR Secretary belongs.

ACCORDINGLY, the petition is DENIED. The Court AFFIRMS the decision of the DARAB in Case No. 10403 WITH MODIFICATION. The dismissal of DARAB Reg. Case No. XI-1589-DC-99 for lack of jurisdiction is without prejudice to its re-filing in accordance with DAR Administrative Order No. 6, Series of 2000, within thirty (30) days from the finality of this Decision.

SO ORDERED.[21]

Petitioners' motion for reconsideration was denied by the CA in its Resolution[22] of April 18, 2012.

Proceedings before this Court

Hence, the present recourse, with petitioners now contending that:

THE COURT OF APPEALS COMMITTED A REVERSIBLE ERROR WHEN IT RULED THAT IT IS THE DAR SECRETARY AND NOT THE [DARAB] WHICH HAS JURISDICTION OVER CASES INVOLVING CANCELLATION OF CLOAS[,] JUST COMPENSATION, ETC. SAID RULING IS DIAMETRICALLY OPPOSITE [THE] EXPRESS PROVISIONS OF SECTION 50 OF REPUBLIC ACT 6657 AND THE JURISPRUDENCE PROMULGATED BY [THE] HONORABLE SUPREME COURT, WHICH EXPRESSLY CONFERRED EXCLUSIVE ORIGINAL JURISDICTION UPON THE DARAB TO HEAR CASES OF THIS NATURE.[23]

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[21] *Id*. at 39-43. Emphasis supplied.

[22] *Id*. at 46-47.

[23] *Id*. at 13-14.

Petitioners' Arguments

In their Petition[24] and Memorandum,[25] petitioners contend that the CA erred in ruling that the DAR Secretary has jurisdiction over the instant controversy given that Section 50 of the Comprehensive Agrarian Reform Law, Sections 1 and 2, Rule II of the 1994 DARAB Rules of Procedure, and jurisprudence all clearly confer such jurisdiction upon the DARAB; that the instant case is already beyond the coverage of DAR Administrative Order (AO) 06-00, cited by the CA and the DARAB, since the subject CLOAs had already been registered; that a statute must prevail over an administrative regulation; that since the DARAB had already validly acquired jurisdiction over the case at the time of the filing of the complaint, then the jurisdiction so acquired is not affected by any subsequent law or rule that grants another body or tribunal jurisdiction; that the resolution of the issue of just compensation in agrarian reform land cases is a judicial function hence, the CA erred in concluding that the issues at hand "[partake] the nature of agrarian law, which [is] purely administrative in nature." Petitioners thus pray for the reversal of the assailed dispositions. They also pray that the DARAB be ordered to assume jurisdiction over the instant case and resolve the same.

Respondents' Arguments

In their Comment[26] and Appeal Memorandum,[27] respondents maintain that the instant case does not pertain to the fixing of just compensation; that the cancellation by the PARAD of Simeon's certificates of title to the subject lots and the issuance of CLOAs in favor of the aforenamed farmers-beneficiaries involved questions regarding the validity of the coverage of the subject lots under the CARP, *vis-a-vis* the qualifications of the identified farmers-beneficiaries, hence, within the DAR

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[24] *Id*. at 5-28.

[25] *Id*. at 98-114.

[26] *Id*. at 68-80.

[27] *Id*. at 116-141.

Secretary's exclusive and primary jurisdiction; that the issue of jurisdiction may be raised at any stage of the proceedings, even for the first time on appeal; that the DAR Secretary has jurisdiction over the instant case pursuant to Section 2, Rule I and Section 6, Rule II of DAR AO 06-00 in relation to Sections 49 and 50 of the CARP; that indeed as held in *Heirs of Julian Dela Cruz v. Heirs of Alberto Cruz*,[28] cases involving cancellation of CLOAs issued to non-agricultural tenants or lessees are within the jurisdiction of the DAR Secretary; that the case law rulings cited by petitioners are inapplicable to this case, as Simeon's original case did not pertain to tenancy relations, nor to any intra-corporate controversy, much less to a joint venture agreement; and finally, that *Magno v. Francisco*[29] cited by petitioners actually declared that it is the DAR Secretary that has jurisdiction over issues relating to landowners' retention rights and land exemptions from agrarian reform coverage.

This Court's Ruling

This Petition will not prosper.

The jurisdiction of a court or tribunal over the nature and subject matter of an action is conferred by law. The court or tribunal must look at the material allegations in the complaint, the issues or questions that are the subject of the controversy, and the character of the relief prayed for in order to determine whether the nature and subject matter of the complaint is within its jurisdiction. If the issues between the parties are intertwined with the resolution of an issue within the exclusive jurisdiction of a court or tribunal, the dispute must be addressed and resolved by the said court or tribunal.[30]

The Amended Complaint filed with the PARAD on January 31, 2000, contained the following averments:

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[28] 512 Phil. 389 (2005).

[29] 630 Phil. 391 (2010).

[30] *Valcurza v. Tamparong, Jr.,* G.R. No. 189874, September 4, 2013, 705 SCRA 128, 135, citing *Heirs of Julian Dela Cruz v. Heirs of Alberto Cruz*, *supra* note 30 at 400-401, and *Soriano v. Bravo*, 653 Phil. 72, 89-90 (2010).

5. That [Simeon's] titles were unilaterally and arbitrarily cancel[l]ed by the [PARO, MARO, DAR Regional Director, and [the] Register of Deeds] in favor of [respondents] by granting them two (2) Certificate[s] of Land Ownership Award (CLOA) Nos. CL-3731 and CL-3729 under the [CARP], but without the actual consent, notice, fixing of just compensation, and payment to the landowner, to the latter's prejudice.

x x x x x x x x x

a. That the **fixing of just compensation** by the DAR was not expressly consented to by [Simeon] who, as the landowner, was without actual and personal notice that the entire area of TCT Nos. T-14201 and T-14202 were placed under the CARP. Hence, the x x x summary actions in cancel[l]ing the two (2) titles of [Simeon] should not be sanctioned by this Board.

6. That the [respondents] were **never** in occupation of any part or portion of the area covered by TCT Nos. T-14201 and T-14202 as the alleged farmer[s-] beneficiaries of the land or as farmworkers who have farmed or developed the area in any manner and by reason of which they have to be regarded by the DAR as qualified beneficiaries under the CARP.

[a]. Admittedly, the entire area of the land has been fully developed and leased as a commercial farm such that there was **never** an occasion that [respondents] had, by themselves, made any agricultural improvements inside the entire area which would qualify them as farmers-beneficiaries.

[b]. The most of what may be said of the [respondents' claims] as farmers-beneficiaries is that they are **illegal occupants** of the area who are not the qualified farmers-beneficiaries x x x [contemplated] under the agrarian laws.

[c]. The truth is that the entire area of the said two (2) titles comprising 23.1488 hectares is already fully and comprehensively developed by [Simeon] and his family into an agro-industrial estate by way of tilling, cultivating and preparing the land and planting and devoting [the] same, on rotation basis, to papaya, banana and pineapple, and putting up or allowing the putting up of a packing plant inside the said area, and with the entire area leased by [Simeon] and his family to [STFI], long before [respondents'] incredible and preposterous claim of being farmers-beneficiaries inside the area [covered by] TCT Nos. T-14201 and T-14202.

x x x x x x x x x

[c]. That [respondents] who, all along, merely intended to succeed to [Simeon's] improvements have, in fact, just wanted to continue the existing lease of the STFI over the entire area covered by the said two (2) titles, to the actual detriment and prejudice of [Simeon] and his family.

x x x x x x x x x

7. That the [PARO, MARO, DAR Regional Director, and Register of Deeds], in applying the CARP to the entire area of the subject titles under TCT Nos. T-14201 and T-14202, have exceeded or otherwise abused their authority.

a. The entire area covered by said titles is beside the road and/or within the 1,000 meter strip from the highway, already existing and fully developed as an agro-industrial estate or land which is virtually EXCLUDED from the application of the CARP by virtue of [PD 399], the pertinent provision of which provides, to quote:

x x x x x x x x x

LIMITING THE USE OF A STRIP OF ONE THOUSAND METERS OF LAND ALONG ANY EXISTING, PROPOSED OR ON-GOING PUBLIC HIGHWAY OR ROAD UNTIL THE GOVERNMENT SHALL HAVE [MADE] A COMPETENT STUDY AND HAVE FORMULATED A COMPREHENSIVE AND INTEGRATED LAND USE AND DEVELOPMENT PLAN.

x x x x x x x x x

Section 3. Likewise, all lands owned by private persons within the strip of one thousand meters along existing, proposed or on-going public highways or road shall first be available for human settlement sites, land reform, relocation of squatters from congested urban areas, tourism development, agro-industrial estates, environmental protection and improvement, infrastructure and other vital projects in support of the socio-economic development program of the government. The owners of these lands shall not develop or otherwise introduce improvements thereon without previous approval from the proper government agency, who shall in this case be the Chairman of the Human Settlements and Planning Commission.

x x x x x x x x x

b. That the above-cited law clearly provides [for] the applicable instances under which private lands located within the strip of one thousand meters along existing, proposed or on-going public highways or road shall first be devoted or made available for.

c. Admittedly, the entire adjoining and contiguous area covered by TCT Nos. T-14201 and T-14202 which comprises x x x about 23.1488 is already [a] fully developed agro-industrial estate, complete with packing plant, and as evidenced by the continuing [lease] of the entire area to [STFI] in consonance [with] such purpose[s] and no other.

d. That the entire area of TCT Nos. T-14201 and T-14202 which is beside the road and/or within the 1,000 meter strip from the highway and, at the same time, a fully developed agro-industrial estate cannot, therefore, be subjected to CARP anymore, by sheer force of provision of law under [PD 399], and should be deemed to be EXCLUDED from the **coverage** of the CARP.[31]

In essence, Simeon's Amended Complaint sets forth the following: (1) that he was not notified that the subject lots had been placed under the CARP; (2) that he did not expressly consent to the fixing of just compensation; (3) that the DAR had no justifiable basis for considering the respondents as farmers-beneficiaries since the latter were neither in occupation of the subject lots nor farmworkers who farmed or developed the pertinent area; (4) that with his family (the present petitioners), he (Simeon) had fully developed the subject lots into a commercial farm and agro-industrial estate and had leased the same to STFI; (5) that respondents are illegal occupants or squatters thereon, and are not qualified farmers-beneficiaries; that respondents merely intended to enjoy the improvements he (Simeon) introduced thereon, and to continue his lease with STFI; (6) that the Provincial Agrarian Reform Officer (PARO), the Municipal Agrarian Reform Officer (MARO), the DAR Regional Director, and the Register of Deeds abused their authority by applying the CARP to the entirety of the subject lots; (7) that the subject lots are excluded from CARP coverage pursuant to Presidential Decree (PD) No. 399 because these lots are located beside the road

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[31] DARAB records, pp. 23-27. Emphasis supplied.

and/or within the 1,000-meter strip from the highway, apart from being an already existing and fully developed agro-industrial estate. What is more, Simeon's Amended Complaint did not raise the issue of tenurial relationship between him and the aforenamed respondents. Significantly, the Amended Complaint concluded with this prayer –

> WHEREFORE, premises considered and in view of the foregoing, it is respectfully prayed that a writ of preliminary mandatory injunction be ordered issued by the Honorable Board after the posting of the necessary bond sufficient in amount by the complainant as determined by the Honorable Adjudicator, during the pendency of the above-entitled case, in order to preserve the status quo or the last peaceful circumstance prior to the controversial issuance of the questionable two (2) [CLOAs] by [the PARO, MARO, DAR Regional Director, and Register of Deeds] in favor of [respondents], and also in order not to render moot and academic the final judgment of the Honorable Board in the instant case; and that after trial on the merits and/or due evaluation of the facts and laws involved in this case, that –
>
> 1. The pertinent CLOA Nos. CL-3731 and CL-3729 be CANCEL[L]ED, RECALLED, NULLIFIED, VOIDED or otherwise SET ASIDE and with the previous two (2) titles which are TCT Nos. T – 14201 and T – 14202, covering the entire area of 23.1488 hectares involved in this instant case, be ordered declared REINSTATED, REVIVED or otherwise RESTORED in full legal force and effect.
>
> Complainant prays for reliefs as may be deem[ed] just and equitable under the premises.[32]

Considering that herein petitioners' predecessor-in-interest (i.e. Simeon) sought to cancel respondents' registered CLOAs on the grounds: (1) that no agrarian dispute was involved in this case; (2) that the subject lots are exempt from CARP coverage, and (3) that due process of law was not observed when the original petitioner (Simeon) was divested of the ownership of the subject lots: it thus stands to reason that it is the DAR Secretary that has jurisdiction to resolve the controversy pursuant to applicable law, rules, and jurisprudence.

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[32] *Id*. at 28-29.

Both illuminating and instructive are these pronouncements by this Court that bear with particular relevance on the petition at bench –

Section 1, Rule II of the 1994 DARAB Rules of Procedure, the rule in force at the time of the filing of the petition, provides:

> Section 1. *Primary and Exclusive Original and Appellate Jurisdiction.* — The Board shall have primary and exclusive jurisdiction, both original and appellate, to determine and adjudicate all agrarian disputes involving the implementation of the [CARP] under [RA 6657], Executive Order Nos. 228, 229 and 129-A, [RA 3844] as amended by [RA 6389], [PD 27] and other agrarian laws and their implementing rules and regulations. Specifically, such jurisdiction shall include but not be limited to cases involving following:
>
> x x x x x x x x x
>
> f) Those involving the issuance, correction and cancellation of [CLOAs] and Emancipation Patents (EPs) which are registered with the Land Registration Authority;
>
> x x x x x x x x x

While the DARAB may entertain petitions for cancellation of CLOAs, as in this case, its jurisdiction is, however, confined only to agrarian disputes. As explained in the case of *Heirs of Dela Cruz v. Heirs of Cruz* and reiterated in the recent case of *Bagongahasa v. Spouses Cesar Caguin*, for the DARAB to acquire jurisdiction, the controversy must relate to an agrarian dispute between the landowners and tenants in whose favor CLOAs have been issued by the DAR Secretary x x x

> x x x x x x x x x

As defined in Section 3 (d) of [RA 6657], an agrarian dispute relates to "any controversy relating to tenurial arrangements, whether leasehold, tenancy, stewardship, or otherwise, over lands devoted to agriculture, including disputes concerning farmworkers' associations or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of such tenurial arrangements. It includes any controversy relating to compensation of lands acquired under the said Act and other terms and conditions of transfer of ownership from landowners to

farmworkers, tenants and other agrarian reform beneficiaries, whether the disputants stand in the proximate relation of farm operator and beneficiary, landowner and tenant, or lessor and lessee."

x x x x x x x x x

To be sure, the tenurial, leasehold, or agrarian relations referred to may be established with the concurrence of the following: 1) the parties are the landowner and the tenant or agricultural lessee; 2) the subject matter of the relationship is an agricultural land; 3) there is consent between the parties to the relationship; 4) the purpose of the agricultural relationship is to bring about agricultural production; 5) there is personal cultivation on the part of the tenant or agricultural lessee; and 6) the harvest is shared between the landowner and the tenant or agricultural lessee. x x x

In this case, a punctilious examination reveals that petitioner's allegations are solely hinged on the erroneous grant by the DAR Secretary of CLOA No. 00122354 to private respondents on the grounds that she is the lawful owner and possessor of the subject lot and that it is exempt from the CARP coverage. In this regard, petitioner has not alleged any tenurial arrangement between the parties, negating the existence of any agrarian dispute and consequently, the jurisdiction of the DARAB. Indisputably, the controversy between the parties is not agrarian in nature and merely involves the administrative implementation of the agrarian reform program which is cognizable by the DAR Secretary. Section 1, Rule II of the 1994 DARAB Rules of Procedure clearly provides that "matters involving strictly the administrative implementation of [RA 6657], and other agrarian reform laws and pertinent rules, shall be the exclusive prerogative of and cognizable by the DAR Secretary."

Furthermore, it bears to emphasize that under the new law, [RA 9700], x x x which took effect on July 1, 2009, all cases involving the cancellation of CLOAs and other titles issued under any agrarian reform program are now within the exclusive and original jurisdiction of the DAR Secretary. Section 9 of the said law provides:

Section 9. Section 24 of [RA 6657], as amended, is further amended to read as follows:

x x x x x x x x x

All cases involving the cancellation of registered emancipation patents, certificates of land ownership award,

and other titles issued under any agrarian reform program are within the exclusive and original jurisdiction of the Secretary of the DAR.

Consequently, the DARAB is bereft of jurisdiction to entertain the herein controversy, rendering its decision null and void. Jurisdiction lies with the Office of the DAR Secretary to resolve the issues of classification of landholdings for coverage (whether the subject property is a private or government[-]owned land), and identification of qualified beneficiaries. Hence, no error can be attributed to the CA in dismissing the case without prejudice to its re-filing x x x.[33]

And while this Court does indeed seek to expeditiously resolve the case at bench in compliance with its constitutionally–mandated duty, the well-settled principle of primary jurisdiction, as stressed in *Bagongahasa v. Romualdez,*[34] must likewise be observed thus:

While it is true that the PARAD and the DARAB lack jurisdiction in this case due to the absence of any tenancy relations between the parties, lingering essential issues are yet to be resolved as to the alleged lack of notice of coverage to respondents as landowners and their deprivation of just compensation. Let it be stressed that while these issues were discussed by the PARAD in his decision, the latter was precisely bereft of any jurisdiction to rule particularly in the absence of any notice of coverage for being an ALI case. Let it also be stressed that these issues were not met head-on by petitioners. At this juncture, the issues should not be left hanging at the expense and to the prejudice of respondents.

However, this Court refuses to rule on the validity of the CARP coverage of the subject properties and the issuance of the assailed CLOAs. The doctrine of primary jurisdiction precludes the courts from resolving a controversy over which jurisdiction was initially lodged with an administrative body of special competence. The doctrine of primary jurisdiction does not allow a court to arrogate

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[33] See *Sutton v. Lim*, G.R. No. 191660, December 3, 2012, 686 SCRA 745, 752-754, 756-757, citing *Heirs of Julian Dela Cruz v. Heirs of Alberto Cruz*, *supra* note 30, and *Bagongahasa v. Romualdez*, 661 Phil. 686, 695-698 (2011). Emphasis supplied.

[34] *Id*. at 696-697.

unto itself authority to resolve a controversy, the jurisdiction over which is initially lodged with an administrative body of special competence. The Office of the DAR Secretary is in a better position to resolve the particular issue of non-issuance of a notice of coverage — an ALI case — being primarily the agency possessing the necessary expertise on the matter. The power to determine such issue lies with the DAR, not with this Court.

Hence, even as this Court affirms the CA's dismissal of the instant case without prejudice, this Court also sees fit to delete the qualification that petitioners' re-filing of this case be made "in accordance with [DAR AO 06-00], within 30 days from the finality of [the] decision.[35]" In the event that petitioners shall indeed opt to re-file this case, the DAR Secretary shall resolve the matter pursuant to the laws, rules, and jurisprudence applicable at the time of the commencement of the action.

IN VIEW OF ALL OF THE FOREGOING, the Petition is **DENIED**. The Decision dated April 29, 2011 and Resolution dated April 18, 2012, of the Court of Appeals in CA-G.R. SP No. 02756-MIN dismissing without prejudice DARAB Case No. XI-1589-DC-99 due to lack of jurisdiction of the Department of Agrarian Reform Adjudication Board is **AFFIRMED with MODIFICATION** that the condition that its re-filing be made in accordance with Department of Agrarian Reform Administrative Order No. 6, Series of 2000, be **DELETED**.

SO ORDERED.

Velasco, Jr.,[***] *Perez,*[****] *Mendoza,* and *Leonen, JJ.,* concur.

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[35] *Rollo*, p. 43.

[***] Per Special Order No. 2282 dated November 13, 2015.

[****] Per Special Order No. 2301 dated December 1, 2015.

FIRST DIVISION

[G.R. No. 203918. December 2, 2015]

SPOUSES AMADOR C. CAYAGO, JR. and ERMALINDA B. CAYAGO, *petitioners, vs.* **SPOUSES EVELITO CANTARA and SOLEDAD CANTARA**, *respondents*.

SYLLABUS

1. REMEDIAL LAW; APPEALS; PETITION FOR REVIEW FROM THE REGIONAL TRIAL COURTS TO THE COURT OF APPEALS; THE ORIGINAL 15-DAY PERIOD TO APPEAL IS EXTENDIBLE FOR AN ADDITIONAL 15 DAYS UPON THE FILING OF A PROPER MOTION AND THE PAYMENT OF DOCKET FEES WITHIN THE REGLEMENTARY PERIOD OF APPEAL, AND NON-COMPLIANCE THEREWITH RENDERS THE PETITION FOR REVIEW DISMISSIBLE.— As a general rule, appeals are perfected when it is filed within the period prescribed under the Rules of Court. Specifically, Section 1, Rule 42 of the Rules of Court provides that appeals to the CA taken from a decision of the RTC rendered in the exercise of its appellate jurisdiction should be filed and served within fifteen (15) days, counted from notice of the judgment appealed from or from the denial of petitioner's motion for reconsideration. The original 15-day period to appeal is ***extendible for an additional 15 days*** upon the filing of a proper motion and the payment of docket fees within the reglementary period of appeal. Failure to successfully comply with the aforementioned procedure, especially in filing the appeal within the prescribed period, renders the petition for review dismissible.

2. ID.; ID.; FAILURE TO STRICTLY COMPLY WITH THE PROVISIONS ON REGLEMENTARY PERIODS RENDERS THE REMEDY OF APPEAL UNAVAILABLE BUT WHERE STRONG CONSIDERATIONS OF SUBSTANTIAL JUSTICE ARE PRESENT, THE STRINGENT APPLICATION OF TECHNICAL RULES COULD BE RELAXED IN THE EXERCISE OF EQUITY JURISDICTION AS IN CASES WHERE PARTIES SHOWED NO INTENT TO DELAY THE FINAL DISPOSITION OF THE CASE.— It bears

stressing that Sps. Cayago's motion for extension of time, as well as their petition for review, was physically in the CA's possession long before the issuance of its Decision on April 14, 2011, but for reasons completely beyond their control, the motion for extension of time to file their petition belatedly reached the *ponente*'s office and was therefore not timely acted upon. As a result, the same was unceremoniously dismissed on procedural grounds. As in the *Zaulda* case, it is a travesty of justice to dismiss outright a petition for review which complied with the rules only because of reasons not attributable to the petitioners – Sps. Cayago in this case – such as delay on the part of the personnel of the CA in transmitting case records to their respective *ponentes*. Procedural rules were established primarily to provide order and prevent needless delays for the orderly and speedy discharge of judicial business. The Court has long declared that the right to appeal is merely a statutory privilege, subject to the court's discretion by virtue of which no party can assume that its motion for extension would be granted. Being discretionary in nature, it behooves upon the appellants to follow up on their motions and ascertain its status, as the failure to strictly comply with the provisions on reglementary periods renders the remedy of appeal unavailable. Further, as a purely statutory right, the appellant must strictly comply with the requisites laid down by the Rules of Court. However, where strong considerations of substantial justice are present, the stringent application of technical rules could be relaxed in the exercise of equity jurisdiction as in cases where petitioners showed no intent to delay the final disposition of the case. Accordingly, in the interest of substantial justice, the Court holds that Sps. Cayago's petition for review should be resolved on the merits, taking into consideration that the findings of fact and conclusions of law by the RTC were in complete contrast to those of the MTC.

APPEARANCES OF COUNSEL

Elmer C. Solidon for petitioners.
Cenesio C. Gavan for respondents.

R E S O L U T I O N

PERLAS-BERNABE, *J.*:

Before the Court is a petition for review on *certiorari*[1] assailing the Decision[2] dated April 14, 2011 and the Resolution[3] dated September 17, 2012 of the Court of Appeals (CA) in CA-G.R. S.P. No. 05273, which dismissed the petition for review filed by herein petitioners-spouses Amador C. Cayago, Jr. and Ermalinda B. Cayago (Sps. Cayago) for having been belatedly filed.

The Facts

The instant case stemmed from a complaint[4] for forcible entry with preliminary mandatory injunction and damages filed by herein respondents-spouses Evelito and Soledad Cantara (Sps. Cantara) against Sps. Cayago on January 17, 2008.

In their complaint, Sps. Cantara alleged that they are the rightful and legitimate owners and actual possessors of a 1,722-square meter parcel of agricultural land (riceland) located at So. Can-awak, Brgy. Surok, Borongan, Eastern Samar (subject land) covered by Tax Declaration (TD) No. 10520[5] in the name of one Asteria Rubico (Asteria).[6] Sometime in 1993, they purchased the subject land from Asteria as evidenced by a Deed of Absolute Sale[7] dated November 1993. Asteria, in turn, acquired it in 1979 from Justina Alegre, daughter of the original owner

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[1] *Rollo*, pp. 8-17.

[2] *Id*. at 19-22. Penned by Associate Justice Eduardo B. Peralta, Jr. with Associate Justices Pampio A. Abarintos and Gabriel T. Ingles concurring.

[3] *Id*. at 24-25. Penned by Associate Justice Pampio A. Abarintos with Associate Justices Gabriel T. Ingles and Zenaida T. Galapate-Laguilles concurring.

[4] CA *rollo*, pp. 42-46.

[5] *Id*. at 47; including dorsal portion.

[6] *Id*. at 42.

[7] *Id*. at 50.

Simona Capito, as evidenced by a Sale of Riceland[8] dated June 11, 1979. Since then, Sps. Cantara have been in actual possession thereof through their tenants, spouses Pedro Amoyo Segovia (Pedro) and Leonila Segovia, who have been religiously cultivating the land, planting *palay,* and delivering the produce to them.[9]

However, sometime during the second week of December 2007, Sps. Cayago, using hired hands and without the knowledge of Sps. Cantara or their tenants, by means of force, intimidation, strategy, threats, or stealth, entered the subject land, cleared it up, and planted *palay*, effectively depriving the latter and their tenants of access thereto.[10] Hence, Sps. Cantara demanded that Sps. Cayago vacate and surrender possession of the subject land, but to no avail, thus, prompting the filing of the present complaint before the Municipal Trial Court of Borongan, Eastern Samar (MTC), docketed as Civil Case No. (2008-02)764.[11]

In their defense,[12] Sps. Cayago claimed to be the real owners of the subject land and possessors thereof since 1948, as evidenced by TD No. 68161[13] in the name of one Sabina Cayago (Sabina), as well as *Katibayan ng Orihinal na Titulo Blg.* (OCT No.) P-7694[14] issued on December 28, 2006 in the name of the Heirs of Amador P. Cayago, Sr., represented by Sabina. Furthermore, they averred that the deed of sale presented by Sps. Cantara to prove their ownership over the subject land was not registered, hence, not binding or valid against them.[15]

During the preliminary conference on March 31, 2008, the parties agreed to conduct a relocation survey with Engineer Roel

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[8] *Id*. at 51.

[9] See *id*. at 42-43.

[10] *Id*. at 43.

[11] See *id*. at 44.

[12] See Answer dated February 9, 2008; *id*. at 54-56.

[13] *Id*. at 57; including dorsal portion.

[14] *Id*. at 58; including dorsal portion.

[15] See *id*. at 55.

M. Suyot (Engr. Suyot) as the appointed commissioner.[16] The Commissioner's Report dated May 27, 2008 stated, among others:

> Lot 12224, Cad 434-D, a riceland, with OCT No. P-7694 in the name of Heirs of Amador Cayago represented by Sabina Cayago with an area of 2,9333 (sic) sq. m. is the lot being claimed by the defendant Mr. Jun Cayago. The southern portion of lot 12224, Cad 434-D is the portion being claimed by the plaintiff Soledad C. Cantara with an area of **1,809 sq. m.** (on site area) with a boundary line in green color dividing lot 12224, Cad 434-D into two x x x the boundary owners appearing in the tax declaration of appellees Jun Cayago are consistent with DENR records contrary to the tax declaration of appellants. On the other hand, the names of adjoining owners appearing in the deed of sale between Asteria A. Rubico (vendor) and Soledad C. Cantara (vendee) is consistent on many parts of the southern portion of lot 12224, Cad 434-D x x x, that a portion of this Lot 12224, Cad 434-D southern portion is also being claimed by the plaintiff Soledad C. Cantara.[17]

The MTC Ruling

In a Decision[18] dated February 27, 2009, the MTC dismissed the complaint for lack of merit, finding Sps. Cayago to have sufficiently proven, by a preponderance of evidence, their ownership and prior physical possession of the subject land. It gave credence to OCT No. P-7694, the Tax Declarations, and the Commissioner's Report which supported Sps. Cayago's claim of ownership over the subject land. It likewise recognized that Sps. Cayago underwent the tedious government process to be able to secure OCT No. P-7694 under their name, which required actual and continuous possession of the subject land.[19]

Dissatisfied, Sps. Cantara appealed the matter before the Regional Trial Court of Borongan, Eastern Samar, Branch 1 (RTC), docketed as Civil Case No. 4134.

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[16] *Id*. at 23.

[17] *Id*. at 23-24.

[18] *Id*. at 59-65. Penned by Presiding Judge Nathaniel E. Baldono.

[19] See *id*. at 62-65.

The RTC Ruling

In a Decision[20] dated August 14, 2009, the RTC reversed the MTC's Decision declaring Sps. Cantara to have the better right to possess the subject land over Sps. Cayago and, accordingly, ordered the latter, their agents, and persons acting in their behalf to surrender its possession and pay the amount of ₱500.00 per month as reasonable rent for its use from December 2007 until its actual surrender.[21]

The RTC found that Sps. Cantara were able to discharge the burden of proving prior physical possession of the subject land of which they were illegally deprived. It gave probative weight to the notarized Deed of Sale between Sps. Cantara and Asteria which proves that the former have been occupying the subject land since 1993, as corroborated by the sworn statements of the present tenants thereof. On this score, the RTC noted that Sps. Cayago failed to adduce evidence to discredit the validity of the said Deed of Sale. Further, it observed that the MTC overlooked the finding of Engr. Suyot in the Commissioner's Report that Sps. Cantara possess the southern portion of Lot 12224 acquired by purchase since 1993.[22]

Finally, the RTC pointed out that the MTC erred in giving consideration and weight to the documentary evidence submitted by Sps. Cayago, which included OCT No. P-7694 and the Tax Declarations in support of their claim, the same not having been formally offered in the proceedings before it.[23]

Aggrieved, Sps. Cayago filed a motion for reconsideration[24] on September 14, 2009,[25] which was denied by the RTC in an

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[20] *Id*. at 22-34. Penned by Presiding Judge Elvie P. Lim.

[21] *Id*. at 34.

[22] See *id*. at 30-32.

[23] See *id*. at 33.

[24] Dated September 12, 2009. *Id*. at 37-40.

[25] See *id*. at 12. Date indicated in the Motion for Reconsideration is September 12, 2009, but being a Saturday, the said Motion was filed on September 14, 2009.

Order[26] dated July 6, 2010. Sps. Cayago, through counsel, received such order of denial on July 15, 2010.[27] Pursuant to Section 1,[28] Rule 42 of the Rules of Court, Sps. Cayago had fifteen (15) days, or until July 30, 2010 within which to file a petition for review before the CA. On July 29, 2010,[29] or a day before the expiration of the period within which to file said petition, Sps. Cayago filed a motion for extension of time[30] praying for an additional period of fifteen (15) days, or until August 14, 2010, within which to file their petition for review.

Since August 14, 2010 fell on a Saturday, Sps. Cayago filed their petition for review[31] with the CA on August 16, 2010.[32]

The CA Ruling

In a Decision[33] dated April 14, 2011, the CA dismissed the petition outright for having been filed out of time, ruling that motions for extension to file pleadings are not granted as a matter of right but in the sound discretion of the court. In this regard,

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[26] *Id*. at 36.

[27] *Id*. at 12.

[28] Section 1. *How appeal taken; time for filing.* – x x x The petition shall be filed and served within fifteen (15) days from notice of the decision sought to be reviewed or of the denial of petitioner's motion for new trial or reconsideration filed in due time after judgment. Upon proper motion and the payment of the full amount of the docket and other lawful fees and the deposit for costs before the expiration of the reglementary period, the Court of Appeals may grant an additional period of fifteen (15) days only within which to file the petition for review. No further extensions shall be granted except for the most compelling reason and in no case to exceed fifteen (15) days.

[29] CA *rollo,* p. 4. July 29, 2010 is the date indicated in the Registry Receipt of the Motion for Extension of Time to File Petition dated July 27, 2010.

[30] *Id*. at 3-5.

[31] Dated August 14, 2010. *Id*. at 10-20.

[32] Registry Receipt indicates date of receipt as August 16, 2010; see *id*. at 20. See also *rollo,* p. 12.

[33] *Rollo,* pp. 19-22.

it pronounced that lawyers should never presume that their motions for extension or postponement will be granted.[34]

Moreover, it found that the petition suffered from the following infirmities: (1) the notarial certificate on the Verification did not indicate the province or city where the notary public was commissioned, the serial number of the commission and its office address were likewise not indicated, in violation of Section 2 (b) and (c), Rule VIII of the 2004 Rules on Notarial Practice; and (2) there was no explanation as to why personal filing was not done.[35]

Dissatisfied, Sps. Cayago filed a motion for reconsideration,[36] which was denied in a Resolution[37] dated September 27, 2012; hence, the instant petition.

The Issue Before the Court

The sole issue advanced for the Court's resolution is whether or not the CA erred in dismissing the petition for review for failure of Sps. Cayago to file the same within the reglementary period.

The Court's Ruling

The petition is meritorious.

As a general rule, appeals are perfected when it is filed within the period prescribed under the Rules of Court. Specifically, Section 1,[38] Rule 42 of the Rules of Court provides that appeals

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[34] See *id*. at 20-21.

[35] See *id*. at 21.

[36] Dated May 15, 2011. CA *rollo,* pp. 71-75.

[37] *Rollo*, pp. 24-25.

[38] Section 1. *How appeal taken; time for filing*.– A party desiring to appeal from a decision of the Regional Trial Court rendered in the exercise of its appellate jurisdiction may file a verified petition for review with the Court of Appeals, paying at the same time to the clerk of said court the corresponding docket and other lawful fees, depositing the amount of ₱500.00 for costs, and furnishing the Regional Trial Court and the adverse party

to the CA taken from a decision of the RTC rendered in the exercise of its appellate jurisdiction should be filed and served within fifteen (15) days, counted from notice of the judgment appealed from or from the denial of petitioner's motion for reconsideration. The original 15-day period to appeal is ***extendible for an additional 15 days*** upon the filing of a proper motion and the payment of docket fees within the reglementary period of appeal.[39] Failure to successfully comply with the aforementioned procedure, especially in filing the appeal within the prescribed period, renders the petition for review dismissible.[40]

In dismissing Sps. Cayago's petition for review for being belatedly filed, the CA held that the mere filing of a motion for extension to file a petition for review is not enough as Sps. Cayago are obligated to exercise due diligence to verify from the Division Clerks of Court of the appellate court the action on their motion for extension, considering that time may run out on them, as it did in this case.[41] It explained that the case was raffled to the *ponente* on August 10, 2010 and the *rollo* or case record was forwarded to his office only on January 5, 2011. As such, he could not have acted on the motion on or before July 30, 2010, the last day for filing the petition for review.[42]

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with a copy of the petition. The petition shall be filed and served within fifteen (15) days from notice of the decision sought to be reviewed or of the denial of petitioner's motion for new trial or reconsideration filed in due time after judgment. Upon proper motion and the payment of the full amount of the docket and other lawful fees and the deposit for costs before the expiration of the reglementary period, the Court of Appeals may grant an additional period of fifteen (15) days only within which to file the petition for review. No further extension shall be granted except for the most compelling reason and in no case to exceed fifteen (15) days.

[39] See Section 1, Rule 42 of the Rules of Court. See also *Go v. BPI Finance Corporation*, G.R. No. 199354, June 26, 2013, 700 SCRA 125, 130-133.

[40] See *Republic v. CA*, 379 Phil. 92, 97-101 (2000).

[41] *Rollo*, p. 20.

[42] See *id*.

In the case of *Heirs of Amado A. Zaulda v. Zaulda*,[43] the petitioners therein filed a motion for extension of time to file their petition for review on August 24, 2010, a day before the last day to appeal the decision of the RTC. However, the CA dismissed their appeal, ratiocinating that the *ponente*'s office received the motion for extension of time only on January 5, 2011, at which time the period to appeal had long expired. In giving due course to the petition for review and considering it to have been timely filed, the Court ruled that it was the height of injustice for the CA to dismiss a petition just because the motion for extension reached the *ponente*'s office beyond the last date prayed for. It found that the delay cannot be attributed to petitioners, who were unreasonably deprived of their right to be heard on the merits and were fatally prejudiced by the delay in the transmittal of records attributable to the court's inept or irresponsible personnel.[44]

In light of the foregoing, the Court therefore finds that the CA committed reversible error when it dismissed Sps. Cayago's petition on the ground that it was belatedly filed.

It bears stressing that Sps. Cayago's motion for extension of time, as well as their petition for review, was physically in the CA's possession long before the issuance of its Decision on April 14, 2011, but for reasons completely beyond their control, the motion for extension of time to file their petition belatedly reached the *ponente*'s office and was therefore not timely acted upon. As a result, the same was unceremoniously dismissed on procedural grounds. As in the *Zaulda* case, it is a travesty of justice to dismiss outright a petition for review which complied with the rules only because of reasons not attributable to the petitioners – Sps. Cayago in this case – such as delay on the part of the personnel of the CA in transmitting case records to their respective *ponentes*.

Procedural rules were established primarily to provide order and prevent needless delays for the orderly and speedy discharge

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[43] G.R. No. 201234, March 17, 2014, 719 SCRA 308.

[44] See *id*. at 318-319.

of judicial business.[45] The Court has long declared that the right to appeal is merely a statutory privilege, subject to the court's discretion by virtue of which no party can assume that its motion for extension would be granted. Being discretionary in nature, it behooves upon the appellants to follow up on their motions and ascertain its status,[46] as the failure to strictly comply with the provisions on reglementary periods renders the remedy of appeal unavailable. Further, as a purely statutory right, the appellant must strictly comply with the requisites laid down by the Rules of Court.[47] However, where strong considerations of substantial justice are present, the stringent application of technical rules could be relaxed in the exercise of equity jurisdiction as in cases where petitioners showed no intent to delay the final disposition of the case.[48]

Accordingly, in the interest of substantial justice, the Court holds that Sps. Cayago's petition for review should be resolved on the merits, taking into consideration that the findings of fact and conclusions of law by the RTC were in complete contrast to those of the MTC.

WHEREFORE, the petition is **GRANTED.** The Decision dated April 14, 2011 and the Resolution dated September 17, 2012 of the Court of Appeals (CA) in CA-G.R. S.P. No. 05273 dismissing petitioners-spouses Amador C. Cayago, Jr. and Ermalinda Cayago's petition for review before the CA are hereby **SET ASIDE**. Accordingly, the case is **REMANDED** to the CA for further proceedings.

SO ORDERED.

Sereno, C.J. (Chairperson), Leonardo-de Castro, Bersamin, and *Perez, JJ.,* concur.

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[45] See *Mejillano v. Lucillo*, 607 Phil. 660, 668-669 (2009).

[46] See *Videogram Regulatory Board v. CA*, 332 Phil. 820, 831 (1996).

[47] *Mejillano v. Lucillo*, *supra* note 45, at 669.

[48] See *Heirs of Amada A. Zaulda v. Zaulda*, *supra* note 43, at 320-321; citation omitted.

FIRST DIVISION

[G.R. No. 206972. December 2, 2015]

PEOPLE OF THE PHILIPPINES, *plaintiff-appellee, vs.* **PAMUEL A. MAGNO,** *accused-appellant.*

SYLLABUS

1. CRIMINAL LAW; KIDNAPPING; ELEMENTS; ESTABLISHED. — The elements of kidnapping under Article 267, paragraph 4 of the Revised Penal Code are: (1) the offender is a private individual; (2) he kidnaps or detains another, or in any other manner deprives the latter of his or her liberty; (3) the act of detention or kidnapping is illegal; and (4) the person kidnapped or detained is a minor, female or a public officer. The prosecution has satisfied the constitutionally required proof that the accused-appellant is a private individual; that accused-appellant took AAA, a baby, without the knowledge or consent of her parents; and that AAA was only five-months old at the time of the kidnapping. In a prosecution for kidnapping, the intent of the accused to deprive the victim of the latter's liberty, in any manner, needs to be established by indubitable proof. And in this case, the actual taking of the baby without the consent of her parents is clear proof of appellant's intent to deprive AAA of her liberty.

2. ID.; KIDNAPPING WITH RAPE; ACCUSED-APPELLANT FOUND GUILTY THEREOF; PROPER PENALTY.— Aside from the testimony of the eyewitness, rape was also proven by the medical findings on AAA. As attested to by her physician, the Medico-Legal Report confirmed that AAA suffered injuries in her vagina. x x x There is no dispute that rape was committed against AAA considering that her hymen had fresh laceration and the edges are "sharp, reddened and edematous." Article 267 of the Revised Penal Code, as amended by Republic Act (R.A.) No. 7659, states that when the victim is killed or dies as a consequence of the detention or is raped, or is subjected to torture or dehumanizing acts, the maximum penalty shall be imposed. It has been established that appellant committed kidnapping and on the occasion thereof, he raped AAA. He is thus found guilty beyond reasonable doubt of the complex

crime of kidnapping with rape, warranting the penalty of death. However, in view of R.A. No. 9346 entitled "An Act Prohibiting the Imposition of Death Penalty in the Philippines," the penalty of death is hereby reduced to *reclusion perpetua*, without eligibility for parole.

3. ID.; ID.; CIVIL LIABILITY OF ACCUSED-APPELLANT.— In accordance with prevailing jurisprudence, the award of civil indemnity, moral and exemplary damages is modified. AAA is thus entitled to ₱100,000.00 as civil indemnity, ₱100,000.00 as moral damages and ₱100,000.00 as exemplary damages. Finally, all damages awarded shall earn interest at the rate of 6% per *annum* from date of finality of this judgment until fully paid.

APPEARANCES OF COUNSEL

The Solicitor General for plaintiff-appellee.
Public Attorney's Office for accused-appellant.

R E S O L U T I O N

PEREZ, *J.*:

For review is the Decision[1] promulgated by the Court of Appeals (CA), affirming the Regional Trial Court's (RTC) Decision[2] in Criminal Case No. 2000-02-160 finding accused-appellant Pamuel A. Magno guilty of rape.

Accused-appellant was charged with the crime of kidnapping with rape in an Information which reads:

That on or about the 20th day of February, 2000, in the City of Tacloban, [Leyte,] Philippines and within the jurisdiction of this Honorable Court, the above-named accused, being then a private individual did, then and there, willfully, unlawfully and feloniously

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[1] *Rollo*, pp. 5-20; Penned by Associate Justice Gabriel T. Ingles with Associate Justices Pampio A. Abarintos and Eduardo B. Peralta, Jr. concurring.

[2] Records, pp. 117-131; Presided by Judge Crisostomo L. Garrido.

kidnap, detain and deprive the minor [AAA],[3] a 5-month old baby girl, by surreptitiously taking said minor with him without the consent and against the will of BBB (mother), bringing said minor to unknown places and whereabouts and did, then and there willfully, unlawfully and feloniously have carnal knowledge with said [AAA] a 5-month old baby girl, against her will.[4]

The arguments of the prosecution at the trial was that on 20 February 2000, BBB left her 5-month old baby, AAA to the care of her eldest daughter CCC while she went to her mother's house to boil water. When BBB came back, AAA has gone missing. A neighbor informed them that he saw an ice cream vendor carrying a baby around the time when AAA went missing.

The incident was reported to the police. Meanwhile, a cargo truck driver narrated that while on his way home, he saw a man abusing a baby on a bench in Plaza Libertad, Tacloban City. He noticed that the baby's private parts were bloodied. He beckoned four bystanders but when they returned to the plaza, the man had already fled and left the baby lying on the bench.

The police proceeded to Plaza Libertad and found AAA thereat. Police Officer 2 Raul De Lima (PO2 Delima) informed BBB of a possible sighting of AAA in the plaza. He then accompanied BBB to the plaza. BBB confirmed that the baby lying on the bench is AAA. She then brought AAA to the hospital.

Acting on a tip, the police proceeded to *Barangay* 37 in Seawall Area to apprehend accused-appellant. The cargo truck driver positively identified accused-appellant as the assailant.

For his part, accused-appellant claimed that he was sleeping inside the house when the police came, manhandled and arrested

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[3] Pursuant to Republic Act No. 9262 (Anti-Violence Against Women and Their Children Act of 2004), and its implementing rules, the real names of the victim and of the members of her immediate family or household are withheld, and fictitious initials are used instead to represent them in order to protect their privacy. See *People v. Cabalquinto*, G.R. No. 167693, September 19, 2006, 502 SCRA 419, 422.

[4] Records, p. 1.

him. He denied raping AAA and claimed that he only came to know the charges against him during arraignment.

On 3 September 2002, the trial court rendered a Decision finding appellant guilty of the crime charged, thus:

> **WHEREFORE,** premises considered, applying Article 267 and Article 266-A and 266-B of the Revised Penal Code as amended, and further amended by R.A. No. 8353, otherwise known as the Anti-Rape law of 1997, the [c]ourt found accused PAMUEL MAGNO, **GUILTY** for the Crime of KIDNAPPING WITH RAPE beyond reasonable doubt and sentenced to suffer the maximum penalty of DEATH and to indemnify AAA the sum of **FIFTY THOUSAND [PESOS] (₱50,000.00)**, pay moral damages in the amount of **FIFTY THOUSAND PESOS (₱50,000.00)** and pay the cost.[5]

In convicting accused-appellant, the trial court relied heavily on the testimony of the cargo truck driver who positively identified accused-appellant as the perpetrator of the crime.

On appeal, the appellate court rendered the assailed decision affirming with modification accused-appellant's conviction, to wit:

> **WHEREFORE**, the appeal is **DENIED**. The Decision of the Regional Trial Court (RTC), Eight Judicial Region, Branch 7, Tacloban City, in Criminal Case No. 2000-02-160 is hereby **AFFIRMED with MODIFICATION**. Accused Pamuel A. Magno is found guilty beyond reasonable doubt of the special complex crime of kidnapping with rape and is sentenced to suffer the penalty of *reclusion perpetua*, without eligibility for parole, and to pay the offended party AAA, the amounts of ₱75,000.00 as civil indemnity *ex delicto*, ₱75,000.00 as moral damages, and ₱30,000.00 as exemplary damages.[6]

In a Resolution[7] dated 29 July 2013, the Court required the parties to simultaneously file their respective supplemental briefs.

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[5] *Id*. at 131.

[6] *Rollo*, p. 20.

[7] *Id*. at 39-40.

Both parties however manifested that they are adopting their briefs filed before the CA.[8]

In his Brief,[9] accused-appellant maintains that the prosecution failed to prove his guilt beyond reasonable doubt. He asserts that there was no proof that he intended to restrain the victim of her liberty, which is an element of kidnapping. Moreover, accused-appellant insists that the eyewitness did not see him inserting his penis on the victim's vagina hence carnal knowledge, as an element of rape, was not established. At most, accused-appellant concedes, that he may be held liable for rape under the second paragraph of Article 266-A in relation to Article 266-B.

The issue devolves on whether accused-appellant has been proven guilty beyond reasonable doubt of rape.

The evidence of the prosecution overwhelmingly establishes accused-appellant's guilt beyond reasonable doubt of the special complex crime of kidnapping with rape.

The testimony of the eyewitness, which was given full faith and credit by the lower courts, clearly points to accused-appellant as the perpetrator.

The elements of kidnapping under Article 267, paragraph 4 of the Revised Penal Code are: (1) the offender is a private individual; (2) he kidnaps or detains another, or in any other manner deprives the latter of his or her liberty; (3) the act of detention or kidnapping is illegal; and (4) the person kidnapped or detained is a minor, female or a public officer.

The prosecution has satisfied the constitutionally required proof that the accused-appellant is a private individual; that accused-appellant took AAA, a baby, without the knowledge or consent of her parents; and that AAA was only five-months old at the time of the kidnapping.

In a prosecution for kidnapping, the intent of the accused to deprive the victim of the latter's liberty, in any manner, needs

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[8] *Id*. at 41-45.

[9] CA *rollo*, pp. 47-48.

to be established by indubitable proof.[10] And in this case, the actual taking of the baby without the consent of her parents is clear proof of appellant's intent to deprive AAA of her liberty.

Aside from the testimony of the eyewitness, rape was also proven by the medical findings on AAA. As attested to by her physician, the Medico-Legal Report confirmed that AAA suffered injuries in her vagina, thus:

> O. **Pelvic Exam**
>
> Ext. Gen. 1st degree perineal laceration
> Int: - not examined due to resistance
> S/E: - not examined due to resistance
> I/E: - not examined due to resistance
> Intra-Operative Findings
>
> Pelvic Exam under general anesthesia
>
> External Genitalia – 1st degree perineal laceration (including the fourchette, vaginal mucosa and skin of perineum)
>
> Introitus
>
> Hymen: (+) complete circumferential fresh laceration (edges are sharp, reddened and edematous)
> S/E: Admits virginal speculum with ease
> Cervix small, hyperemic
> (+) 1.5 cm. vaginal mucosal laceration lateral wall, (L)
> I/E: Cervix small, firm
> U= small
> A= small
> D- (+) moderate bloody discharge with blood clots
> Intervention: Repair of vaginal laceration
> x x x x x x x x x
>
> REMARKS:
>
> CONCLUSION: 1. The above described physical injuries are found in the body of the subject, the age of which is compatible to the alleged date of infliction. [11]

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[10] *People v. Ubongen*, 409 Phil. 140, 150 (2001).

[11] Records, p. 9.

x x x x x x x x x

There is no dispute that rape was committed against AAA considering that her hymen had fresh laceration and the edges are "sharp, reddened and edematous."[12]

Article 267 of the Revised Penal Code, as amended by Republic Act (R.A.) No. 7659, states that when the victim is killed or dies as a consequence of the detention or is raped, or is subjected to torture or dehumanizing acts, the maximum penalty shall be imposed.

It has been established that appellant committed kidnapping and on the occasion thereof, he raped AAA. He is thus found guilty beyond reasonable doubt of the complex crime of kidnapping with rape, warranting the penalty of death. However, in view of R.A. No. 9346 entitled "An Act Prohibiting the Imposition of Death Penalty in the Philippines," the penalty of death is hereby reduced to *reclusion perpetua*, without eligibility for parole.

In accordance with prevailing jurisprudence,[13] the award of civil indemnity, moral and exemplary damages is modified. AAA is thus entitled to ₱100,000.00 as civil indemnity, ₱100,000.00 as moral damages and ₱100,000.00 as exemplary damages. Finally, all damages awarded shall earn interest at the rate of 6% per *annum* from date of finality of this judgment until fully paid.[14]

WHEREFORE, the 23 February 2012 Decision of the Court of Appeals finding accused-appellant Pamuel A. Magno guilty of the complex crime of kidnapping with rape and sentencing him to suffer the penalty of *reclusion perpetua* without eligibility for parole is **AFFIRMED** with the following **MODIFICATIONS:**

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[12] *Id*.

[13] *People v. Gambao*, G.R. No. 172707, 1 October 2013, 706 SCRA 508, 533.

[14] *People v. Colantava*, G.R. No. 190348, 9 February 2015.

1. Appellant is ordered to pay the victim AAA ₱100,000.00 as civil indemnity, ₱100,000.00 as moral damages, and ₱100,000.00 as exemplary damages; and

2. All damages awarded shall earn interest at the rate of 6% per annum from the date of finality of this resolution until fully paid.

SO ORDERED.

Sereno, C.J. (Chairperson), Leonardo-de Castro, Bersamin, and *Perlas-Bernabe, JJ.*, concur.

FIRST DIVISION

[G.R. No. 208113. December 2, 2015]

DOLORES DIAZ, *petitioner, vs.* **PEOPLE OF THE PHILIPPINES and LETICIA S. ARCILLA,** *respondents*.

SYLLABUS

1. CRIMINAL LAW; PENALTY; THE EXTINCTION OF THE PENAL ACTION DOES NOT CARRY WITH IT THE EXTINCTION OF THE CIVIL LIABILITY WHERE THE ACQUITTAL IS BASED ON REASONABLE DOUBT AS ONLY PREPONDERANCE OF EVIDENCE, OR GREATER WEIGHT OF THE CREDIBLE EVIDENCE IS REQUIRED.— [I]t is noteworthy to mention that the extinction of the penal action does not carry with it the extinction of the civil liability where the acquittal is based on reasonable doubt as only preponderance of evidence, or "greater weight of the credible evidence," is required. Thus, an accused acquitted of *estafa* may still be held civilly liable where the facts established by the evidence so warrant, as in this case.

2. REMEDIAL LAW; EVIDENCE; BURDEN OF PROOF; HE WHO ALLEGES A FACT HAS THE BURDEN OF PROVING IT AND A MERE ALLEGATION IS NOT EVIDENCE.— Petitioner's claim that she was required to sign two (2) one-half sheets of paper and a trust receipt in blank during her transactions with respondent, which she allegedly failed to retrieve after paying her obligations, is a bare allegation that cannot be given credence. It is well-settled that "[h]e who alleges a fact has the burden of proving it and a mere allegation is not evidence."

3. ID.; ID.; DISPUTABLE PRESUMPTIONS; THE EFFECT OF A PRESUMPTION UPON THE BURDEN OF PROOF IS TO CREATE THE NEED OF PRESENTING EVIDENCE TO OVERCOME THE *PRIMA FACIE* CASE CREATED, THEREBY WHICH, IF NO CONTRARY PROOF IS OFFERED, WILL PREVAIL.— [T]he CA correctly found that respondent was able to prove by preponderance of evidence the fact of the transaction, as well as petitioner's failure to remit the proceeds of the sale of the merchandise worth ₱32,000.00, or to return the same to respondent in case such merchandise were not sold. This was established through the presentation of the acknowledgment receipt dated February 20, 1996, which, as the document's name connotes, shows that petitioner acknowledged receipt from respondent of the listed items with their corresponding values, and assumed the obligation to return the same on March 20, 1996 if not sold. In this relation, it should be pointed out that under Section 3 (d), Rule 131 of the Rules of Court, the legal presumption is that a person takes ordinary care of his concerns. To this, case law dictates that the natural presumption is that one does not sign a document without first informing himself of its contents and consequences. Further, under Section 3 (p) of the same Rule, it is equally presumed that private transactions have been fair and regular. This behooves every contracting party to learn and know the contents of a document before he signs and delivers it. The effect of a presumption upon the burden of proof is to create the need of presenting evidence to overcome the *prima facie* case created, thereby which, if no contrary proof is offered, will prevail. In this case, petitioner failed to present any evidence to controvert these presumptions. Also, respondent's possession of the document pertaining to the obligation strongly buttresses her claim that the same has not

been extinguished. Preponderance of evidence only requires that evidence be greater or more convincing than the opposing evidence. All things considered, the evidence in this case clearly preponderates in respondent's favor.

4. CIVIL LAW; INTERESTS; AWARD OF INTERESTS MODIFIED FROM TWELVE PERCENT (12 %) PER ANNUM TO SIX PERCENT (6%) INTEREST PER ANNUM.— [T]he CA's ruling on petitioner's civil liability is hereby sustained. In line, however, with the amendment introduced by the Bangko Sentral ng Pilipinas Monetary Board in BSP-MB Circular No. 799, series of 2013, there is a need to partially modify the same in that the interest accruing from the time of the finality of this Decision should be imposed at the lower rate of six percent (6%) p.a., and not twelve percent (12%) p.a. as imposed by the CA.

APPEARANCES OF COUNSEL

The Solicitor General for public respondent.

D E C I S I O N

PERLAS-BERNABE, *J.*:

Before the Court is a petition for review on *certiorari*[1] assailing the Decision[2] dated January 30, 2013 and the Resolution[3] dated July 10, 2013 of the Court of Appeals (CA) in CA-G.R. CV No. 97571, which directed petitioner Dolores Diaz (petitioner) to pay respondent Leticia S. Arcilla, (respondent) the amount of ₱32,000.00, with legal interest at the rate of six percent (6%) per annum (p.a.) from July 28, 1998 until finality of the decision and thereafter, interest at the rate of twelve percent (12%) p.a. on the outstanding balance until full satisfaction.

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[1] *Rollo*, pp. 10-24.

[2] *Id*. at 37-43. Penned by Associate Justice Franchito N. Diamante with Associate Justices Celia C. Librea-Leagogo and Melchor Q.C. Sadang concurring.

[3] *Id*. at 45-46.

The Facts

On March 11, 1999, an Information[4] for *estafa* was filed against petitioner before the Regional Trial Court of Manila, Branch 5 (RTC) for her alleged failure to return or remit the proceeds from various merchandise valued at ₱32,000.00 received by her in trust – *i.e.*, on consignment basis – from respondent.[5] During arraignment, petitioner entered a negative plea. Thereafter, trial on the merits ensued.[6]

The prosecution anchored its case on the testimony of respondent who claimed to be a businesswoman engaged in the business of selling goods/merchandise through agents (one of whom is petitioner) under the condition that the latter shall turn over the proceeds or return the unsold items to her a month after they were entrusted. Respondent averred that on February 20, 1996, she entrusted merchandise consisting of umbrellas and bath towels worth ₱35,300.00 to petitioner[7] as evidenced by an acknowledgment receipt[8] dated February 20, 1996 duly signed by the latter. However, on March 20, 1996, petitioner was only able to remit the amount of ₱3,300.00[9] and thereafter, failed to make further remittances and ignored respondent's demands to remit the proceeds or return the goods.[10]

In her defense, petitioner admitted having previous business dealings with respondent but not as an agent. She clarified that she was a client who used to buy purchase order cards (POCs) and gift checks (GCs) from respondent on installment basis and that, during each deal, she was made to sign a blank sheet of paper prior to the issuance of POCs and GCs. She further claimed

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[4] Records, pp. 1-2.

[5] *Rollo,* p. 33.

[6] *Id*. at 13.

[7] *Id*. at 38.

[8] Records, p. 92.

[9] *Id*.

[10] See demand letter dated July 28, 1998; *id*. at 93.

that their last transaction was conducted in 1995, which had long been settled. However, she denied having received ₱32,000.00 worth of merchandise from respondent on February 20, 1996.[11]

The RTC Ruling

In a Decision[12] dated June 29, 2011, the RTC acquitted petitioner of the charge of *estafa* but held her civilly liable to pay respondent the amount of ₱32,000.00, with interest from the filing of the Information on March 11, 1999 until fully paid, and to pay the costs.

The RTC found that the prosecution failed to establish any intent on the part of the petitioner to defraud respondent and, thus, could not be held criminally liable.[13] However, it adjudged petitioner civilly liable "having admitted that she received the [GCs] in the amount of ₱32,000.00." In this relation, it further considered the relationship of respondent and petitioner as in the nature of a principal-agent which renders the agent civilly liable only for damages which the principal may suffer due to the non-performance of his duty under the agency.[14]

With the foregoing pronouncement, petitioner elevated the civil aspect of the case before the CA on appeal, docketed as CA-G.R. CV No. 97571.

The CA Ruling

In a Decision[15] dated January 30, 2013, the CA upheld petitioner's civil liability.

It ruled that respondent was able to establish by preponderance of evidence her transaction with petitioner, as well as the latter's failure to remit the proceeds of the sale of the merchandise worth

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[11] *Rollo*, p. 39.

[12] *Id*. at 31-35. Penned by Acting Judge Amor A. Reyes.

[13] *Id*. at 34.

[14] *Id*. at 35.

[15] *Id*. at 37-43.

₱32,000.00, or to return the same to respondent in case the items were not sold, the fact of which having been substantiated by the acknowledgment receipt dated February 20, 1996.[16] To this, the CA rejected petitioner's attempt to discredit the said receipt which she denied executing on the ground that she was only made to sign blank documents, finding that even if petitioner was indeed made to sign such blank documents, such was merely a safety precaution employed by respondent in the event the former reneges on her obligation.[17]

However, the CA modified the award of interests by reckoning the same from the time of extrajudicial demand on July 28, 1998.[18] Accordingly, it directed petitioner to pay respondent the amount of ₱32,000.00 with legal interest at the rate of 6% p.a. from July 28, 1998 until finality of the decision and thereafter, at the rate of 12% p.a. on the outstanding balance until full satisfaction.

Dissatisfied, petitioner filed a motion for reconsideration[19] which was denied in a Resolution[20] dated July 10, 2013; hence, this petition.

The Issue Before the Court

The essential issue for the Court's resolution is whether or not the CA committed reversible error in finding petitioner civilly liable to respondent.

The Court's Ruling

The petition lacks merit.

At the outset, it is noteworthy to mention that the extinction of the penal action does not carry with it the extinction of the civil liability where the acquittal is based on reasonable doubt

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[16] *Id*. at 40-41.

[17] *Id*. at 40-41.

[18] *Id*. at 42.

[19] CA *rollo*, pp. 45-49.

[20] *Rollo*, pp. 45-46.

as only preponderance of evidence, or "greater weight of the credible evidence," is required.[21] Thus, an accused acquitted of *estafa* may still be held civilly liable where the facts established by the evidence so warrant,[22] as in this case.

In upholding the civil liability of petitioner, the CA did not dwell into the purported admission of petitioner anent her receipt of GCs in the amount of ₱32,000.00 as found by the RTC. Instead, the CA hinged its ruling[23] on the acknowledgment receipt[24] dated February 20, 1996, the documentary evidence that respondent had duly identified[25] and formally offered[26] in the course of these proceedings.

For her part, petitioner denied having entered into the subject transaction with respondent, claiming that she: (*a*) had not transacted with respondent as to other goods, except GCs[27] and POCs;[28] (*b*) was made to sign two (2) one-half sheets of paper and a trust receipt in blank prior to the issuance of the GCs and POCs,[29] and (*c*) was not able to retrieve the same after paying her obligation to respondent.[30]

The Court agrees with the CA.

Petitioner's claim that she was required to sign two (2) one-half sheets of paper and a trust receipt in blank[31] during her

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[21] *Lim v. Mindanao Wines & Liquor Galleria*, G.R. No. 175851, July 4, 2012, 675 SCRA 628, 639-640.

[22] *Tabaniag v. People*, 607 Phil. 429, 445 (2009).

[23] *Rollo*, pp. 40-41.

[24] Records, p. 92.

[25] Transcript of Stenographic Notes (TSN), July 18, 2000, pp. 7-8.

[26] *Id*. at 7.

[27] TSN, April 29, 2002, pp. 9 and 12.

[28] *Id*. at 4.

[29] *Id*. at 3-4.

[30] TSN, June 17, 2002, p. 12.

[31] TSN, April 29, 2002, p. 4.

transactions with respondent, which she allegedly failed to retrieve after paying her obligations,[32] is a bare allegation that cannot be given credence. It is well-settled that "[h]e who alleges a fact has the burden of proving it and a mere allegation is not evidence."[33]

On the contrary, the CA correctly found that respondent was able to prove by preponderance of evidence the fact of the transaction, as well as petitioner's failure to remit the proceeds of the sale of the merchandise worth ₱32,000.00, or to return the same to respondent in case such merchandise were not sold. This was established through the presentation of the acknowledgment receipt[34] dated February 20, 1996, which, as the document's name connotes, shows that petitioner acknowledged receipt from respondent of the listed items with their corresponding values, and assumed the obligation to return the same on March 20, 1996 if not sold.[35]

In this relation, it should be pointed out that under Section 3 (d), Rule 131 of the Rules of Court, the legal presumption is that a person takes ordinary care of his concerns. To this, case law dictates that the natural presumption is that one does not sign a document without first informing himself of its contents and consequences.[36] Further, under Section 3 (p) of the same Rule, it is equally presumed that private transactions have been fair and regular.[37] This behooves every contracting party to learn and know the contents of a document before he signs and delivers it.[38] The effect of a presumption upon the burden of proof is to create the need of presenting evidence to overcome the *prima facie* case created, thereby which, if no contrary proof

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[32] TSN, June 17, 2002, p. 12.

[33] *Luxuria Homes, Inc. v. CA*, 361 Phil. 989, 1000 (1999).

[34] Records, p. 92.

[35] *Id*.

[36] *Allied Banking Corp. v. CA*, 527 Phil. 46, 56-57 (2006).

[37] *Id*.

[38] *Olbes v. China Banking Corporation*, 519 Phil. 315, 322 (2006).

is offered, will prevail.[39] In this case, petitioner failed to present any evidence to controvert these presumptions. Also, respondent's possession of the document pertaining to the obligation strongly buttresses her claim that the same has not been extinguished.[40] Preponderance of evidence only requires that evidence be greater or more convincing than the opposing evidence.[41] All things considered, the evidence in this case clearly preponderates in respondent's favor.

In fine, the CA's ruling on petitioner's civil liability is hereby sustained. In line, however, with the amendment introduced by the Bangko Sentral ng Pilipinas Monetary Board in BSP-MB Circular No. 799,[42] series of 2013, there is a need to partially modify the same in that the interest accruing from the time of the finality of this Decision should be imposed at the lower rate of six percent (6%) p.a., and not twelve percent (12%) p.a. as imposed by the CA.

WHEREFORE, the petition is **DENIED.** The Decision dated January 30, 2013 and the Resolution dated July 10, 2013 of the Court of Appeals in CA-G.R. CV No. 97571 are hereby **AFFIRMED** with **MODIFICATION**, directing petitioner Dolores Diaz to pay respondent Leticia S. Arcilla the amount of ₱32,000.00 with legal interest at the rate of six percent (6%) per annum from July 28, 1998 until full payment.

SO ORDERED.

Sereno, C.J. (Chairperson), Leonardo-de Castro, Bersamin, and *Perez, JJ.,* concur.

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[39] *Lastrilla v. Granda*, 516 Phil. 667, 686 (2006).

[40] See *Bank of the Phil. Islands v. Sps. Royeca*, 581 Phil. 188, 197 (2008).

[41] *Duarte v. Duran*, 673 Phil. 241, 243 (2011).

[42] Rate of interest in the absence of stipulation; dated June 21, 2013.

THIRD DIVISION

[G.R. No. 209689. December 2, 2015]

MARISSA B. QUIRANTE, *petitioner, vs.* **OROPORT CARGO HANDLING SERVICES, INC., ET AL.,** *respondents*.

SYLLABUS

1. LABOR AND SOCIAL LEGISLATION; LABOR RELATIONS; APPEAL; APPEAL TO THE NLRC FROM A JUDGMENT OF A LABOR ARBITER WHICH INVOLVES A MONETARY AWARD NOT PERFECTED WHERE THE EMPLOYER SUBMITTED BEFORE THE NLRC A BANK CERTIFICATION, INSTEAD OF POSTING A CASH OR SURETY BOND, AS THE FILING OF THE BOND IS NOT ONLY MANDATORY BUT ALSO A JURISDICTIONAL REQUIREMENT THAT MUST BE COMPLIED WITH IN ORDER TO CONFER JURISDICTION UPON THE NLRC.— In *Mindanao Times Corporation v. Confesor*, the employer, instead of posting a cash or surety bond, submitted to the NLRC a Deed of Assignment and a passbook. The Court is emphatic in its ruling that the employer's appeal was not perfected, hence, rendering the LA's decision final and executory, *viz*: Article 223 of the Labor Code provides that an appeal by the employer to the NLRC from a judgment of a labor arbiter which involves a monetary award may be perfected only upon the posting of a cash or surety bond issued by a reputable bonding company duly accredited by the NLRC, in an amount equivalent to the monetary award in the judgment appealed from. x x x. Clearly, an appeal from a judgment as that involved in the present case is perfected "**only**" upon the posting of a cash or surety bond. *Accessories Specialist, Inc. v. Alabanza* enlightens: **The posting of a bond is indispensable to the perfection of an appeal in cases involving monetary awards from the decision of the LA**. xxx. **The word "*only*" makes it perfectly plain that the lawmakers intended the posting of a cash or surety bond by the employer to be the essential and exclusive means by which an employer's appeal may be perfected.** x x x. **The filing of the bond is not only mandatory but also a**

jurisdictional requirement that must be complied with in order to confer jurisdiction upon the NLRC. Non-compliance therewith renders the decision of the LA final and executory. x x x. Prescinding from the above, OROPORT's submission before the NLRC of a Bank Certification, in lieu of posting a cash or surety bond, cannot be considered as substantial compliance with Article 223 of the Labor Code. The filing of the appeal bond is a jurisdictional requirement and the rules thereon mandate no less than a strict construction. For failure to properly post a bond, OROPORT's appeal was not perfected.

2. **ID.; ID.; ID.; LABOR TRIBUNALS ARE NOT PRECLUDED FROM RECEIVING EVIDENCE SUBMITTED ON APPEAL AS TECHNICAL RULES ARE NOT BINDING IN CASES SUBMITTED BEFORE THEM, BUT ANY DELAY IN THE SUBMISSION OF EVIDENCE SHOULD BE ADEQUATELY EXPLAINED, AS FAILURE TO AMPLY EXPLAIN THE REASON FOR THE DELAY CASTS DOUBT UPON THE CREDIBILITY OF THE EVIDENCE OFFERED.—** Anent the submission of evidence for the first time during appeal, *Misamis Oriental II Electric Service Cooperative (MORESCO II) v. Cagalawan* instructs: Labor tribunals, such as the NLRC, are not precluded from receiving evidence submitted on appeal as technical rules are not binding in cases submitted before them. However, any delay in the submission of evidence should be adequately explained and should adequately prove the allegations sought to be proven. In the present case, MORESCO II did not cite any reason why it had failed to file its position paper or present its cause before the Labor Arbiter despite sufficient notice and time given to do so. x x x To our mind, however, the belated submission of the said letter-request without any valid explanation casts doubt on its credibility, specially so when the same is not a newly discovered evidence. x x x In the instant petition, LA Magbanua resolved Quirante's complaint on the basis of the evidence the latter submitted because the respondents failed to file their respective position papers despite the lapse of seven months from the conduct of the final mediation conference. The respondents did not amply explain the reason for their delay. Hence, doubt is cast upon the credibility of the evidence offered.

3. ID.; LABOR RELATIONS; TERMINATION OF EMPLOYMENT; PENALTY OF SUSPENSION IMPOSED INSTEAD OF DISMISSAL FROM SERVICES AS THE FORMER IS SUFFICIENT AND MORE COMMENSURATE TO THE GRAVITY OF THE EMPLOYEE'S OFFENSE.— [F]rom the allegations and evidence submitted by the parties, it can be inferred that Quirante was not actually faultless. She took two trays of eggs without following the standard procedure laid down regarding claims and disposition of damaged goods. However, what the standard procedure exactly is and what the proper penalty should be for its breach were not clearly established. The respondents made no explicit references to the employees' handbook or code of conduct, if they exist at all. There was no adequate proof that the breach committed by Quirante merits her dismissal from service, especially if the transgression was made without wrongful intent. Quirante deserves to be penalized, but dismissal is just too harsh. The Court finds that a suspension for one month would have been sufficient and more commensurate to the gravity of Quirante's offense.

4. ID.; ID.; ID.; AN ILLEGALLY DISMISSED EMPLOYEE IS ENTITLED TO REINSTATEMENT WITHOUT BACKWAGES WHEN THE DISMISSAL OF THE EMPLOYEE WOULD BE TOO HARSH OF A PENALTY AND THE EMPLOYER WAS IN GOOD FAITH IN TERMINATING THE EMPLOYEE.— [A]s Quirante indeed had an infraction, albeit not properly punishable with dismissal from service, bad faith cannot be attributed to the respondents when they acted to protect the interest of OROPORT from what appeared to be dishonest conduct. Thus, LA Magbanua's award of moral damages and full backwages should be deleted in view of the Court's pronouncement in *Pionilla*, *viz*: As a general rule, an illegally dismissed employee is entitled to reinstatement (or separation pay, if reinstatement is not viable) and payment of full backwages. In certain cases, however, the Court has carved out an exception to the foregoing rule and thereby ordered the reinstatement of the employee without backwages on account of the following: (*a*) the fact that dismissal of the employee would be too harsh of a penalty; and *(b)* that the employer was in good faith in terminating the employee.

5. ID.; ID.; ID.; SEPARATION PAY SHALL BE AWARDED, IN LIEU OF REINSTATEMENT, WHERE THE PASSAGE OF A LONG PERIOD OF TIME RENDERED REINSTATEMENT INFEASIBLE, IMPRACTICABLE AND HARDLY IN THE BEST INTEREST OF THE PARTIES.— Quirante was dismissed in 2007. LA Magbanua ordered her reinstatement. However, due to the passage of a long period of time rendering reinstatement infeasible, "*impracticable and hardly in the best interest of the parties*," the Court now finds the propriety of awarding separation pay instead. Separation pay is equivalent to at least one month pay, or one month pay for every year of service, whichever is higher (with a fraction of at least six months being considered as one whole year), computed from the time of employment or engagement up to the finality of the decision.

6. ID.; ID.; ID.; INTEREST OF SIX PERCENT (6%) *PER ANNUM* IMPOSED ON THE MONETARY AWARD.— [L]A Magbanua failed to impose an interest on the monetary award at the rate of six percent (6%) *per annum* from the date of finality of this decision until full payment in accordance with *Nacar v. Gallery Frames*.

7. ID.; ID.; ID.; AN EMPLOYEE IS ENTITLED TO THE PAYMENT OF ATTORNEY'S FEES EQUIVALENT TO TEN PERCENT (10%) OF THE MONETARY AWARD WHERE HE OR SHE IS FORCED TO LITIGATE IN ORDER TO SEEK REDRESS OF HIS OR HER GRIEVANCES.— The Court, however, finds LA Magbanua's award of attorney's fees as proper. In labor cases, when an employee is forced to litigate in order to seek redress of his or her grievances, entitlement to the payment of attorney's fees equivalent to ten percent (10%) of the monetary award is justified.

APPEARANCES OF COUNSEL

Seno Mendoza & Associates for petitioner.
Kho Roa and Partners for respondents.

D E C I S I O N

REYES, *J.*:

Before the Court is the Petition for Review on *Certiorari*[1] filed by Marissa B. Quirante (Quirante) to assail the Decision[2] rendered on March 14, 2013 and Resolution[3] issued on September 30, 2013 by the Court of Appeals (CA) in CA-G.R. SP No. 03109-MIN. The CA affirmed the Resolution[4] dated December 24, 2008 of the National Labor Relations Commission's (NLRC) Fifth Division, which declared that Quirante was validly dismissed from employment by Oroport Cargo Handling Services, Inc. (OROPORT). Felicisimo C. Cañete, Jr. (Cañete) and Venus S. Cabaraban (Cabaraban) are OROPORT's Human Resources Division Head and Superintendent, respectively (the three are to be referred collectively as the respondents). The CA and NLRC rulings reversed the Decision[5] dated October 17, 2007 of Executive Labor Arbiter Noel Augusto S. Magbanua (LA Magbanua), who found Quirante's termination from service as illegal and directed payment of full backwages, moral damages and attorney's fees.

Antecedents

Quirante was employed by Gold City Integrated Port Services, Inc. (INPORT) from 1984 to 1996. From 1997 to 1999, she worked for Continental Arrastre and Stevedoring Company (CASCO). In March of 1999, INPORT and CASCO merged to form OROPORT. Thenceforth, Quirante served as a Claims Staff of OROPORT, with a monthly salary of ₱9,775.33.[6]

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[1] *Rollo*, pp. 10-26.

[2] Penned by Associate Justice Marie Christine Azcarraga-Jacob with Associate Justices Romulo V. Borja and Ma. Luisa C. Quijano-Padilla concurring; *id.* at 28-40.

[3] *Id*. at 42-43.

[4] Penned by Presiding Commissioner Salic B. Dumarpa with Commissioners Proculo T. Sarmen and Dominador Medroso, Jr. concurring, *id*. at 246-253.

[5] *Id*. at 123-126.

[6] *Id*. at 123-124.

Quirante's employment with OROPORT was essentially uneventful. However, on November 5, 2006, a carton, which contained eight trays of eggs, was mishandled. Three trays of eggs were totally damaged, while the remaining five were rejected by the shipper.[7]

Arthur Sabellina (Sabellina), a truck helper, acknowledged liability for the damage and authorized the deduction from his salaries of the amount corresponding to the value of the eggs.[8] Sabellina likewise wrote a letter addressed to Rico T. Evasco, Jr. (Evasco), Senior Finance Officer of OROPORT, requesting for the release of the eggs.[9]

According to Evasco, Sabellina filed a complaint alleging that despite repeated requests which he made on November 6, 2006, the Claims Section personnel did not release to him the five undamaged trays of eggs. On November 7, 2006, Quirante disposed the five trays of eggs even when she had no information about who was responsible for the damage and without Evasco's approval, in violation of the standard procedure in handling claims. Quirante got two trays and paid ₱60.00 therefor. Inbound Cargo Supervisor Jaime Hynson (Hynson) also took two trays and paid ₱60.00. Billing Clerk Yolanda Countian obtained a tray for ₱30.00.[10]

On November 27, 2006, Administrative Memo No. 137-2006, signed by Cabaraban and Cañete, was issued against Quirante. Quirante was directed to show cause in writing within 24 hours from the memo's receipt why she should not be dismissed for serious misconduct in disposing without authority property under her custody and unjustifiably withholding collections related thereto.[11]

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[7] *Id*. at 247; please also *see* Finance Memo No. 06-11-58 dated November 13, 2006, *id*. at 110-111.

[8] Please *see* Statement of Acceptance of Liability, *id*. at 109.

[9] *Id*. at 108.

[10] *Id*. at 110.

[11] *Id*. at 112.

In Quirante's answer to the memo, she narrated having initially seen the subject five trays of eggs on top of a table at the Open Transit Shed in the afternoon of November 6, 2006. Some of the eggs were cracked and red ants feasted on them. She admitted taking two trays of eggs. She, however, claimed that the five undamaged trays of eggs were never formally endorsed or turned over to the Claims Section, but were sent to her office by Hynson. Besides, the trays of eggs were perishable items and Hynson merely intended to save them from becoming useless so as to lessen the amount for which the employee responsible for the damage would be liable.[12]

Administrative Memo No. 138-2006[13] dated December 4, 2006, directed Quirante to appear before the Administrative Investigation Board (AIB) to answer the charges against her of serious misconduct allegedly committed through unauthorized disposal of property and withholding collections related thereto. During the proceedings before the AIB, Quirante was assisted by two officers of the Phase II Port Workers Union – Associated Labor Unions (Union).[14]

On January 12, 2007, the AIB recommended to OROPORT's President the dismissal of Quirante from service for serious misconduct. The AIB found inconsistent Quirante's claim that she had no custody over the five trays of eggs, which were in fact brought to her office. Quirante failed to justify her acceptance without proper documentation and disposal without approval from her immediate supervisor, of the trays of eggs in violation of standard procedures. The AIB, however, found that Quirante did not withhold any collections.[15]

On the same day, OROPORT's President adopted the AIB's recommendation. Quirante was formally notified of her termination from employment, effective January 15, 2007, on

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[12] *Id*. at 113-115.

[13] *Id*. at 116.

[14] *Id*. at 117.

[15] Please *see* Administrative Memo No. 2007-007; *id*. at 118-120.

grounds of (a) "*implied transgression of established policy and definite rule of action regarding the processing standard in handling claims*;" and (b) "*unauthorized disposal of property entrusted to [OROPORT] under its custody without justifiable reason and/or approval by [an] immediate superior*."[16]

The Proceedings Before the LA

On January 22, 2007, Quirante filed before the NLRC a complaint for illegal dismissal with prayer for reinstatement and payment of full backwages, damages and attorney's fees.[17] Quirante alleged that the infractions ascribed to her were mere excuses to justify her dismissal from service. OROPORT magnified the incident because Quirante was a stockholder belonging to the minority block and an active Union officer as well.[18]

The respondents jointly filed a Position Paper[19] dated November 9, 2007. However, earlier, on October 17, 2007, LA Magbanua had already resolved Quirante's complaint through a Decision, the dispositive portion of which reads as follows:

> WHEREFORE, premises considered, judgment is hereby rendered declaring the dismissal of [Quirante] as illegal; ordering [OROPORT] to immediately reinstate [Quirante] within ten (10) days from receipt of this decision; further ordering [OROPORT] to pay [Quirante] full back wages inclusive of other benefits in the amount of ₱97,941.28, moral damages in the amount of ₱50,000.00 and ten (10%) percent attorney's fees in the amount of ₱14,794.12, a total sum of ₱162,735.40.
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> SO ORDERED.[20]

LA Magbanua stated that the respondents failed to submit their respective position papers despite the lapse of seven months.

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[16] Please *see* Administrative Memo No. 2007-008; *id*. at 121.

[17] *Id*. at 86-87.

[18] Please *see* Position Paper for Complainant; *id*. at 88-95, at 89-90.

[19] *Id*. at 98-107.

[20] *Id*. at 125-126.

Hence, he resolved the complaint solely on the basis of evidence submitted by Quirante.

The Proceedings Before the NLRC

The respondents filed an appeal[21] before the NLRC. They contended that Quirante was guilty of serious misconduct and due process was observed in terminating her from employment. They also claimed that LA Magbanua rendered a mere perfunctory decision, without reviewing and analyzing the available evidence. They likewise insisted that the NLRC is not precluded from receiving evidence offered for the first time during appeal. However, the respondents, in lieu of a cash or surety bond, submitted before the NLRC a Bank Certification[22] issued by the Metropolitan Bank and Trust Company (Metrobank) stating that OROPORT has a cash deposit of ₱97,941.28 in a regular savings account. The said deposit would be held by Metrobank pending the final disposition of Quirante's complaint before the NLRC.

Quirante did not file an answer or a comment to the respondents' appeal.[23]

On December 24, 2008, the NLRC's Fifth Division issued a Resolution reversing LA Magbanua's decision and dismissing Quirante's complaint citing the following as grounds:

> We take judicial notice, as moved by [the respondents], of the fact that [OROPORT] is a duly licensed cargo handling contractor operating at the Port of Cagayan de Oro City, offering its services to the public. As it is duly licensed by the Philippine Ports Authority (PPA), a government instrumentality, then OROPORT may be properly classified as a public utility and not just an ordinary business entity. As such[,] it is akin to a common carrier which has to exercise extraordinary diligence in the handling and safekeeping of the goods which come into its custody.

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[21] Please *see* Memorandum on Appeal; *id* at 127-140.

[22] *Id*. at 141.

[23] *Id*. at 246.

We, therefore, rule that the investigation proceedings conducted by [the respondents] with respect to [Quirante] and which led to her dismissal is thus part of [OROPORT's] mandated duty under the law to observe extraordinary diligence in the vigilance over the goods which is inherent from the nature of its business and for reasons of public policy.

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While the law imposes many obligations on the employer, such as providing just compensation to workers, observance of procedural requirements of notice and hearing in the termination of employment, it also recognizes the right of the employer to expect from its workers not only good performance, adequate work and diligence, but also good conduct and loyalty. The employer may not be compelled to continue to employ such persons whose continuance in the service will patently be inimical to his interests. The law protecting the rights of the laborer authorizes neither oppression nor self-destruction of the employer.

x x x x x x x x x

[Quirante's] claims that management has all the reasons not to like her and that her dismissal is arbitrary and whimsical are not supported by the records of the case and remains to be disputed as the [respondents] categorically denied the same. x x x.

x x x [T]he dismissal of [Quirante] is for a just cause (dishonesty) which was committed when she disposed the damaged cargo (one carton hatching eggs) without the approval of her division head on November 7, 2006. As absolute honesty is required in the handling of goods accepted from the public by a cargo handling contractor like OROPORT, we find furthermore that the amount involved is not an issue but *whether the act was actually committed or not*.[24]

Quirante filed a Motion for Reconsideration[25] before the NLRC alleging that the NLRC had no jurisdiction to give due course to the respondents' appeal as no cash or surety bond was posted

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[24] *Id*. at 251-253.

[25] *Id*. at 156-161.

in violation of the requirement under paragraph 2, Article 223[26] of the Labor Code. The NLRC denied Quirante's motion through the Resolution issued on February 27, 2009.

The Proceedings Before the CA

Quirante thereafter filed before the CA a Petition for *Certiorari*[27] essentially anchored on the issues of (1) OROPORT's failure to post a cash or surety bond when it filed its appeal before the NLRC, and (2) the arbitrariness on the part of OROPORT in dismissing her from service.

On March 14, 2013, the CA rendered the herein assailed Decision denying Quirante's petition. The CA ratiocinated that:

> [T]he Supreme Court articulated, in no uncertain terms, that labor tribunals, such as the NLRC, are not precluded from receiving evidence submitted on appeal as technical rules are not binding in cases submitted before them.
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> x x x x x x x x x
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> x x x [T]he NLRC therefore did not gravely abuse its discretion when it admitted and considered OROPORT's evidence on appeal, as the former is [not] bound by the technical rules on evidence and may validly admit them, aside from the fact that [Quirante] herself failed to file any pleading in order to refute the allegations and evidence presented by OROPORT.
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> x x x x x x x x x
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> ***Did [Quirante's] act of failing to properly account for and document the damaged eggs in line with the standard procedure set forth by OROPORT, and her consequent appropriation of the same, constitute serious misconduct to warrant her dismissal from service?***

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[26] In case of a judgment involving a monetary award, an appeal by the employer may be perfected only upon the posting of a cash or surety bond issued by a reputable bonding company duly accredited by the Commission in the amount equivalent to the monetary award in the judgment appealed from.

[27] *Rollo*, pp. 50-76.

x x x x x x x x x

x x x [T]he records disclose that the investigation of [Quirante] was instigated by a complaint filed by [Sabellina] x x x as the latter wanted to acquire the damaged eggs for liquidation in order to offset the corresponding deduction in his payroll for the value of the goods he negligently handled.

x x x x x x x x x

x x x [Quirante's] deviation from the standard procedure for the documentation and disposition of damaged cargo, and her consequent act of arbitrarily appropriating the damaged eggs, and dolling them out to others the remaining to her co-employees for them to take home, despite the obvious criminal implications, constituted serious misconduct on her part.

In fact, a perusal of the records reveals that [Quirante] herself even casually admitted to bringing home the damaged eggs, and even sanctioned her co-employees' similar act.

[Quirante] therefore committed two serious offenses, *first* for failing to follow the standard procedure for the documentation and disposition of damaged goods in line with her task as claims officer, and *second*, for appropriating the eggs, and allowing her co-employees to do the same, without the knowledge and consent of her superiors.

This Court cannot countenance the contentions of [Quirante] that her dismissal form OROPORT was deeply rooted in her participation of labor union activities, as the records are bereft of any evidence to support these allegations. Neither can [Quirante] advance the argument that the damaged eggs were never officially endorsed to her office, as the bottom line remains that she admitted to being in possession of the same, took home 2 trays with her, and even sanctioned her co-employees' similar act. The fact that the damaged eggs were not officially endorsed to her office neither absolved her from failing to document the same, no[r] justified her act of appropriation.[28] (Citations omitted)

The CA denied Quirante's motion for reconsideration through the Resolution issued on September 30, 2013.

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[28] *Id*. at 36-39.

Issues

Aggrieved, Quirante is now before the Court raising the issues of whether or not:

(1) the NLRC erred in (a) giving due course to the respondents' appeal despite the latter's failure to post a bond, and (b) admitting evidence not presented before LA Magbanua; and

(2) the alleged mishandling of trays of cracked eggs constitutes just cause to dismiss an employee, who happened to be an active union officer with a long and spotless service record.[29]

In support of the instant petition, Quirante invokes Article 223 of the Labor Code, which clearly states that an appeal by the employer may only be perfected upon the posting of a cash or surety bond in the amount equivalent to the award in the judgment appealed from. The respondents failed to comply with the bond requirement, hence, it was jurisdictional error for the CA to give due course to an unperfected appeal.[30] Quirante also cites *Filipinas Systems, Inc. v. NLRC*[31] to emphasize that the practice of offering evidence for the first time during appeal before the NLRC should not be tolerated as it smacks of unfairness and runs counter to the principle of speedy administration of justice.[32] Quirante further claims that the alleged mishandling of the trays of eggs was an isolated blemish in her otherwise immaculate service record. Hence, the penalty of dismissal is too harsh especially since the acts ascribed to her were not performed with any wrongful intent.[33]

In their Comment,[34] the respondents contend that the Bank Certification which they submitted before the NLRC substantially

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[29] *Id*. at 10.

[30] *Id*. at 18-19.

[31] 463 Phil. 813 (2003).

[32] *Rollo*, p. 18.

[33] *Id*. at 20-21.

[34] *Id*. at 258-270.

complied with the appeal bond requirement under Article 223 of the Labor Code.[35] Moreover, Quirante's argument that dismissal is too harsh a penalty for her infraction was initially presented before the CA. Her change of theory violates due process.[36] Further, bad faith cannot be attributed to the respondents in dismissing Quirante.[37] Citing *Integrated Microelectronics, Inc. v. Pionilla*,[38] the respondents point out that as an exception to the general rule, employees can be reinstated *sans* an award of backwages in cases where the dismissal would be too harsh a penalty and the employer was not motivated by bad faith in ordering the dismissal.[39] Anent the substantial issue of the alleged illegality of the dismissal, the respondents reiterate that as found in the proceedings below, Quirante took two trays of eggs. Regardless of their actual monetary value, Quirante committed a dishonest act, which justified her dismissal from service.[40]

Ruling of the Court

There is merit in the instant petition.

There was no compliance with the appeal bond requirement.

In *Mindanao Times Corporation v. Confesor*,[41] the employer, instead of posting a cash or surety bond, submitted to the NLRC a Deed of Assignment and a passbook. The Court is emphatic in its ruling that the employer's appeal was not perfected, hence, rendering the LA's decision final and executory, *viz*:

Article 223 of the Labor Code provides that an appeal by the employer to the NLRC from a judgment of a labor arbiter which

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[35] *Id*. at 265.

[36] *Id*. at 266-267.

[37] *Id*. at 267.

[38] G.R. No. 200222, August 28, 2013, 704 SCRA 362.

[39] *Rollo*, pp. 267-268.

[40] *Id*. at 265-266.

[41] 625 Phil. 589 (2010).

involves a monetary award may be perfected only upon the posting of a cash or surety bond issued by a reputable bonding company duly accredited by the NLRC, in an amount equivalent to the monetary award in the judgment appealed from. x x x

x x x x x x x x x

Further, Sec. 6 of the [New Rules of Procedure of the NLRC] provides:

> **SECTION 6. BOND.** *In case the decision of the Labor Arbiter or the Regional Director involves a monetary award,* ***an appeal by the employer may be perfected only upon the posting of a cash or surety bond****. The appeal bond shall either be in cash or surety in an amount equivalent to the monetary award, exclusive of damages and attorney[']s fees.*
>
> x x x x x x x x x
>
> No motion to reduce bond shall be entertained except on meritorious grounds and upon the posting of a bond in a reasonable amount in relation to the monetary award.
>
> The filing of the motion to reduce bond without compliance with the requisites in the preceding paragraph shall not stop the running of the period to perfect an appeal. x x x

Clearly, an appeal from a judgment as that involved in the present case is perfected "**only**" upon the posting of a cash or surety bond. *Accessories Specialist, Inc. v. Alabanza* enlightens:

> **The posting of a bond is indispensable to the perfection of an appeal in cases involving monetary awards from the decision of the LA**. The intention of the lawmakers to make the bond a mandatory requisite for the perfection of an appeal by the employer is clearly limned in the provision that an appeal by the employer may be perfected "*only upon the posting of a cash or surety bond*." **The word "*only*" makes it perfectly plain that the lawmakers intended the posting of a cash or surety bond by the employer to be the essential and exclusive means by which an employer's appeal may be perfected.** The word "*may*" refers to the perfection of an appeal as optional on the part of the defeated party, but not to the compulsory posting of an appeal bond, if he desires to appeal. The meaning and the intention of the legislature in enacting a statute must be determined from the language employed; and where there

is no ambiguity in the words used, then there is no room for construction.

The filing of the bond is not only mandatory but also a jurisdictional requirement that must be complied with in order to confer jurisdiction upon the NLRC. Non-compliance therewith renders the decision of the LA final and executory. This requirement is intended to assure the workers that if they prevail in the case, they will receive the money judgment in their favor upon the dismissal of the employer's appeal. It is intended to discourage employers from using an appeal to delay or evade their obligation to satisfy their employees' just and lawful claims. x x x[42] (Citations omitted and emphasis, italics and underscoring in the original)

Prescinding from the above, OROPORT's submission before the NLRC of a Bank Certification, in lieu of posting a cash or surety bond, cannot be considered as substantial compliance with Article 223 of the Labor Code. The filing of the appeal bond is a jurisdictional requirement and the rules thereon mandate no less than a strict construction. For failure to properly post a bond, OROPORT's appeal was not perfected.

Delay in the submission of evidence should be adequately explained.

Anent the submission of evidence for the first time during appeal, *Misamis Oriental II Electric Service Cooperative (MORESCO II) v. Cagalawan*[43] instructs:

Labor tribunals, such as the NLRC, are not precluded from receiving evidence submitted on appeal as technical rules are not binding in cases submitted before them. However, any delay in the submission of evidence should be adequately explained and should adequately prove the allegations sought to be proven.

In the present case, MORESCO II did not cite any reason why it had failed to file its position paper or present its cause before the Labor Arbiter despite sufficient notice and time given to do so. Only

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[42] *Id*. at 592-595.

[43] G.R. No. 175170, September 5, 2012, 680 SCRA 127.

after an adverse decision was rendered did it present its defense and rebut the evidence of Cagalawan by alleging that his transfer was made in response to the letter-request of the area manager of the Gingoog sub-office asking for additional personnel to meet its collection quota. To our mind, however, the belated submission of the said letter-request without any valid explanation casts doubt on its credibility, specially so when the same is not a newly discovered evidence. x x x Why it was not presented at the earliest opportunity is a serious question which lends credence to Cagalawan's theory that it may have just been fabricated for the purpose of appeal.[44] (Citations omitted and underscoring ours)

In the instant petition, LA Magbanua resolved Quirante's complaint on the basis of the evidence the latter submitted because the respondents failed to file their respective position papers despite the lapse of seven months from the conduct of the final mediation conference.[45] The respondents did not amply explain the reason for their delay. Hence, doubt is cast upon the credibility of the evidence offered.

Despite the non-perfection of the appeal before the NLRC, compelling reasons exist justifying the modification of LA Magbanua's decision.

The Court thus concludes that (1) for failure to properly post a bond, the respondents' appeal were not perfected, and (2) the NLRC erroneously admitted evidence presented for the first time during appeal when there was no ample justification provided for their belated submission.

Be that as it may, this Court, for reasons discussed below, deems it proper to modify LA Magbanua's decision.

First. The basis of LA Magbanua's decision was unclear. He made a mere recital of Quirante's factual allegations, then

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[44] *Id*. at 139-140.

[45] *Rollo*, p. 123. Technically though, only six months and seven days had lapse from April 10, 2007, the date of the final mediation conference, until October 17, 2007, the date of LA Magbanua's Decision.

proceeded to rule that for failure of the respondents to controvert the claims, there was no alternative but to declare the dismissal as illegal.[46]

Second. From the allegations and evidence submitted by the parties, it can be inferred that Quirante was not actually faultless. She took two trays of eggs without following the standard procedure laid down regarding claims and disposition of damaged goods. However, what the standard procedure exactly is and what the proper penalty should be for its breach were not clearly established. The respondents made no explicit references to the employees' handbook or code of conduct, if they exist at all. There was no adequate proof that the breach committed by Quirante merits her dismissal from service, especially if the transgression was made without wrongful intent. Quirante deserves to be penalized, but dismissal is just too harsh. The Court finds that a suspension for one month would have been sufficient and more commensurate to the gravity of Quirante's offense.

Third. As Quirante indeed had an infraction, albeit not properly punishable with dismissal from service, bad faith cannot be attributed to the respondents when they acted to protect the interest of OROPORT from what appeared to be dishonest conduct. Thus, LA Magbanua's award of moral damages and full backwages should be deleted in view of the Court's pronouncement in *Pionilla*,[47] *viz*:

> As a general rule, an illegally dismissed employee is entitled to reinstatement (or separation pay, if reinstatement is not viable) and payment of full backwages. In certain cases, however, the Court has carved out an exception to the foregoing rule and thereby ordered the reinstatement of the employee without backwages on account of the following: (*a*) the fact that dismissal of the employee would be too harsh of a penalty; and *(b)* that the employer was in good faith in terminating the employee. x x x.[48] (Underscoring ours)

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[46] *Id*. at 125.

[47] *Supra* note 38.

[48] *Id*. at 367.

Fourth. Quirante was dismissed in 2007. LA Magbanua ordered her reinstatement. However, due to the passage of a long period of time rendering reinstatement infeasible, "*impracticable and hardly in the best interest of the parties*,"[49] the Court now finds the propriety of awarding separation pay instead. Separation pay is equivalent to at least one month pay, or one month pay for every year of service, whichever is higher (with a fraction of at least six months being considered as one whole year), computed from the time of employment or engagement up to the finality of the decision.[50]

Fifth. LA Magbanua failed to impose an interest on the monetary award at the rate of six percent (6%) *per annum* from the date of finality of this decision until full payment in accordance with *Nacar v. Gallery Frames*.[51]

The Court, however, finds LA Magbanua's award of attorney's fees as proper. In labor cases, when an employee is forced to litigate in order to seek redress of his or her grievances, entitlement to the payment of attorney's fees equivalent to ten percent (10%) of the monetary award is justified.[52]

Be it noted that LA Magbanua's decision is silent on the personal liabilities of Cañete and Cabaraban. The Court finds no reason to disturb such silence considering that Quirante offered no ample evidence to prove that the two officers acted wantonly and maliciously in directing her dismissal from service.

WHEREFORE, the instant petition is **GRANTED**. The Decision rendered on March 14, 2013 and Resolution issued on September 30, 2013 by the Court of Appeals in CA-G.R. SP No. 03109-MIN finding that petitioner Marissa B. Quirante

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[49] *Park Hotel v. Soriano*, G.R. No. 171118, September 10, 2012, 680 SCRA 328, 343.

[50] *Univac Development, Inc. v. Soriano*, G.R. No. 182072, June 19, 2013, 699 SCRA 88, 102; *Uy v. Centro Ceramica Corp. and/or Sy, et al.*, 675 Phil. 670, 685-686 (2011).

[51] G.R. No. 189871, August 13, 2013, 703 SCRA 439.

[52] *Univac Development, Inc. v. Soriano*, *supra* note 50.

was validly dismissed from service are **REVERSED and SET ASIDE**. Oroport Cargo Handling Services, Inc. is **DIRECTED TO PAY** Marissa B. Quirante the following:

(1) separation pay, in lieu of reinstatement, equivalent to one month pay for every year of service, with a fraction of at least six months being considered as one whole year, computed from the time of employment or engagement up to the finality of this decision;

(2) attorney's fees equivalent to ten percent (10%) of the total separation pay; and

(3) interest on all monetary awards at the rate of six percent (6%) *per annum* from the finality of this Decision until full payment.

The case is **REMANDED** to the National Labor Relations Commission, which is hereby **DIRECTED to COMPUTE** the monetary benefits awarded in accordance with this Decision and to submit its compliance thereon within thirty (30) days from notice hereof.

SO ORDERED.

Velasco, Jr. (Chairperson), Peralta, Bersamin,[*] and *Villarama, Jr., JJ.,* concur.

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[*] Designated as Acting Member per Special Order No. 2289 dated November 16, 2015 *vice* Associate Justice Francis H. Jardeleza.

FIRST DIVISION

[G.R. No. 211210. December 2, 2015]

RADAR SECURITY & WATCHMAN AGENCY, INC., *petitioner, vs.* **JOSE D. CASTRO,** *respondent*.

SYLLABUS

1. **REMEDIAL LAW; APPEALS; ABSENT GRAVE ABUSE OF DISCRETION, THE FACTUAL FINDINGS OF THE LABOR ARBITER AND THE NATIONAL LABOR RELATIONS COMMISSION (NLRC) ARE ENTITLED NOT ONLY TO RESPECT, BUT TO FINAL RECOGNITION IN THE APPELLATE REVIEW.—** Time and again, we have held that this Court is not a trier of facts. In the absence of any attendant grave abuse of discretion, the factual findings of the LA and the NLRC are entitled not only to respect, but to our final recognition in this appellate review. In the case at bench, based on the factual findings of both the LA and the NLRC, we agree with the CA's pronouncement that there was no dismissal that took place, more so constructive dismissal, in the present case, since it was shown that petitioner issued detail orders in favor of respondent for his new assignments. Hence, there was no intention on its part to dismiss respondent, legally or otherwise.

2. **LABOR AND SOCIAL LEGISLATION; LABOR RELATIONS; TERMINATION OF EMPLOYMENT; IN LABOR CASES, THE EMPLOYER HAS THE BURDEN OF PROVING THAT THE EMPLOYEE WAS NOT DISMISSED OR IF DISMISSED, THAT THE DISMISSAL WAS NOT ILLEGAL, AND FAILURE TO DISCHARGE THE SAME WOULD MEAN THAT THE DISMISSAL IS NOT JUSTIFIED AND THEREFORE ILLEGAL.—** In *Abad v. Roselle Cinema*, we found it well settled that in labor cases, the employer has the burden of proving that the employee was *not dismissed* or if dismissed, that the dismissal was not illegal, and failure to discharge the same would mean that the dismissal is not justified and therefore illegal. Thus: x x x The Court ruled in *Great Southern Maritime Services Corp. v. Acuña*, to wit: Time and again we have ruled that **in illegal dismissal**

cases like the present one, the onus of proving that the employee was not dismissed or if dismissed, that the dismissal was not illegal, rests on the employer and failure to discharge the same would mean that the dismissal is not justified and therefore illegal. Thus, petitioners must not only rely on the weakness of respondents' evidence but must stand on the merits of their own defense. A party alleging a critical fact must support his allegation with substantial evidence for any decision based on unsubstantiated allegation cannot stand as it will offend due process.

3. **ID.; ID.; ID.; CONSTRUCTIVE DISMISSAL; THE TRANSFER OF AN EMPLOYEE WOULD ONLY AMOUNT TO CONSTRUCTIVE DISMISSAL WHEN SUCH IS UNREASONABLE, INCONVENIENT, OR PREJUDICIAL TO THE EMPLOYEE, AND WHEN IT INVOLVES A DEMOTION IN RANK OR DIMINUTION OF SALARIES, BENEFITS AND OTHER PRIVILEGES.—** It must be noted, however, that in the employment of personnel, the employer has management prerogatives subject only to limitations imposed by law. The transfer of an employee would only amount to constructive dismissal when such is unreasonable, inconvenient, or prejudicial to the employee, and when it involves a demotion in rank or diminution of salaries, benefits and other privileges. In the case at bench, it appears that the transfer or re-assignment was done in good faith and in the best interest of the business enterprise. This is the factual finding of the LA, and such finding was affirmed by the NLRC and the CA. Without any showing of unfairness and arbitrariness, this Court will not disturb the affirmance, especially when the petition assailing the findings raises no new arguments but merely reiterates those already raised in the proceedings below. In other words, we find in order the factual finding that respondent was not dismissed. The employer in this case has discharged the burden of proving that respondent was not dismissed.

4. **ID.; ID.; ID.; ID.; NO LEGAL BASIS TO AWARD SEPARATION PAY AND BACKWAGES WHERE AN EMPLOYEE WAS NOT DISMISSED FROM SERVICE.—** The focal provision is Article 279 of the Labor Code of the Philippines which provides that "[i]n cases of regular employment, the employer shall not terminate the services of an employee except for a just cause or when authorized by

this Title. **An employee who is unjustly dismissed from work shall be entitled to reinstatement without loss of seniority rights and other privileges and to his full backwages, inclusive of allowances, and to his other benefits or their monetary equivalent computed from the time his compensation was withheld from him up to the time of his actual reinstatement.**" Undoubtedly, there being no dismissal of respondent in the present case, the appellate court has no legal basis to award respondent separation pay and backwages.

5. **ID.; ID.; ID.; AN EMPLOYEE HAS A RIGHT TO SECURITY OF TENURE, BUT THIS DOES NOT GIVE HIM SUCH A VESTED RIGHT IN HIS POSITION AS WOULD DEPRIVE HIS EMPLOYER OF ITS PREROGATIVE TO CHANGE HIS ASSIGNMENT OR TRANSFER HIM WHERE HIS SERVICE, AS SECURITY GUARD, WILL BE MOST BENEFICIAL TO THE CLIENT.—** In our jurisdiction, an employee has a right to security of tenure, but this does not give him such a vested right in his position as would deprive petitioner of its prerogative to change his assignment or transfer him where his service, as security guard, will be most beneficial to the client. **Thus, we disagree with the CA's position since there was no basis to order the award of separation pay and backwages inasmuch as respondent was not dismissed**. Neither is respondent entitled to the award of money claims for underpayment, absent evidence to substantiate the same. As similarly determined by the LA and the NLRC, other than respondent's self-serving allegations, there was no evidence presented to establish that he had rendered any compensable overtime work other than that as appearing in the general payroll, nor was there any documentary evidence to show his entitlement to any unpaid wages, holiday pay, service incentive leave pay, and proportionate 13th month pay.

6. **ID.; ID.; ID.; SEPARATION PAY; INCONSISTENT WITH A FINDING THAT THERE WAS NO ILLEGAL DISMISSAL; WHEN PROPER.—** Worthy of emphasis is that **the award of separation pay is likewise inconsistent with a finding that there was no illegal dismissal. Separation pay becomes due if an employee is dismissed without just cause and without due process and is therefore entitled to backwages and reinstatement**. And, in instances **where reinstatement is no longer feasible because of *strained***

***relations* between the employee and the employer, separation pay is granted in lieu thereof**. An illegally dismissed employee is entitled to either reinstatement, if viable, or separation pay if reinstatement is no longer viable. Notably, under the *doctrine of strained relations*, the payment of separation pay is considered an acceptable alternative to reinstatement when the latter option is no longer desirable or viable. **However, strained relations must be demonstrated as a fact to be adequately supported by evidence – substantial evidence to show that the relationship between the employer and the employee is indeed *strained* as a necessary consequence of the judicial controversy**.

7. ID.; ID.; ID.; ID.; WHERE THE EMPLOYEE'S FAILURE TO WORK WAS OCCASIONED NEITHER BY HIS ABANDONMENT NOR BY A TERMINATION, THE BURDEN OF ECONOMIC LOSS IS NOT RIGHTFULLY SHIFTED TO THE EMPLOYER, BUT EACH PARTY MUST BEAR HIS OWN LOSS.— [T]he CA attempted to justify its ruling for the entitlement of separation pay and backwages on the ground that the relationship between petitioner and respondent appears *strained*, and that the instant controversy was merely a clear case of "misunderstanding" between petitioner and respondent. However, the undisputed factual finding is that there was no dismissal to speak of, and therefore, we cannot find the legal basis of his entitlement to such separation pay and backwages. As we have previously pronounced, in a case where the employee's failure to work was occasioned neither by his abandonment nor by a termination, **the burden of economic loss is not rightfully shifted to the employer; each party must bear his own loss**. Hence, based on the circumstances of this case, the employer should not be made to suffer the consequences of the employee's failure to report for duty.

APPEARANCES OF COUNSEL

Antonio Gerardo B. Collando for petitioner.
Public Attorney's Office for respondent.

D E C I S I O N

PEREZ, *J.*:

This is a Petition for Review on *Certiorari* under Rule 45 of the Rules of Court assailing the Decision[1] and Resolution[2] of the Court of Appeals (CA) in CA-G.R. SP No. 130088 dated 24 October 2013 and 29 January 2014, respectively.

The Facts

The factual antecedents of the case reveal that, in May of 2008, respondent was employed by petitioner to work as a security guard. Since then, covered by various detail orders, he was assigned to watch and secure various branches of petitioner's client, Planters Development Bank, until his alleged dismissal on 12 September 2011. Admittedly though, respondent subsequently received a letter dated 27 January 2012 from petitioner's Vice- President for Operations assigning him to render duty work at Banco De Oro branch in GMA, Cavite, but allegedly without any corresponding detail order. Thus, respondent filed a complaint against petitioner alleging that he was illegally dismissed without just cause and due process, with claims for the payment of his separation pay, backwages, and other money claims.

On the other hand, petitioner countered that there was actually no dismissal and further explained that the dispute arose only on 12 October 2011 when a verbal altercation ensued between the respondent and his immediate superior regarding a complaint from the Senior Manager of Planters Development Bank. An investigation thereafter followed which resulted in his order of transfer with which respondent allegedly refused to comply.[3]

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[1] *Rollo*, pp. 51-59; Penned by Associate Justice Franchito N. Diamante with Associate Justices Elihu A. Ybañez and Melchor Q.C. Sadang concurring.

[2] *Id*. at 61-62.

[3] *Id*. at 51-52.

The Rulings of the Labor Arbiter and National Labor Relations Commission

On 31 August 2012, the Labor Arbiter (LA) denied the complaint for lack of merit and declared that there was no dismissal in the first place; hence, there could be no illegal dismissal to speak of. Consequently, all monetary claims of respondent were also denied.[4] Said LA's Decision was later on affirmed by the National Labor Relations Commission (NLRC) in its 29 January 2013 Decision which emphasized that: (a) respondent was not constructively dismissed since he never mentioned any specific incident showing any discrimination, disdain, or insensibility, which would result in the nature of his work as well as his regular duties as security guard being substantially removed from him; and (b) respondent merely complained about petitioner's alleged refusal to give him new assignments yet records revealed that the former was twice directed to report to the latter's office for his new assignment. Hence, if indeed petitioner never intended to give respondent any other duty work, the former would not have exerted any effort to inform him of his new assignment in GMA, Cavite. Pertinent portions of the ruling state:

> A perusal of the subject October 27, 2011 Detail Order issued by the [petitioner] reveals that the [respondent] was one of the several security guards deployed by the [petitioner] to its various clients. While the letter accompanying the order appeared that the [respondent] was told to report to the Detachment Commander as an "OJT", **there was no evidence on record showing that the [respondent] was actually demoted to an "OJT" status. The [respondent] never made (sic) any specific incident indicating the nature of his work as well as his regular duties as security guard were substantially removed from him**. In fact, the [respondent] even admitted that he worked with Planters Development Bank until September 12, 2011. **He never complained about any significant decrease of salary, duties and responsibilities and other incidents indicating discrimination, disdain or insensibility. He merely complained about [petitioner's] alleged refusal to give him new assignments**.
>
> In this connection, we also do not subscribe to [respondent's] insistence that he was no longer given new assignments since his

[4] *Id*. at 176-182; LA Decision.

alleged dismissal on September 12, 2011. **Records clearly show that the [respondent] was twice directed to report to the [petitioner's] office for his new assignment. The [respondent] duly acknowledged receipt of said directives and admitted the authenticity and due execution thereof. [Respondent] cannot take solace to his misplaced argument that the [petitioner] never issued a detail order to implement the directive. If indeed the [petitioner] never intended to give the [respondent] any other duty work, we find it difficult to understand on why the [petitioner] would still exert effort to inform the [respondent] of his new assignment in GMA Cavite.** The [petitioner's] argument that it was the [respondent] who refused to accept the new assignment is supported by the fact that the [respondent] was twice issued letters informing him of his new assignments. The first one was the October 27, 2011 letter and the second was the January 27, 2012 letter (Exhibits "3", "3-A" and "4" of the [Petitioner's] Position Paper). **Thus, we agree with the Labor Arbiter when he ruled that the [respondent] was not dismissed from his employment**. (Emphases supplied)

Considering that the [respondent] was not illegally dismissed, his claims for the payment of backwages and separation pay are denied for lack of factual and legal basis. Similarly, his claim for holiday pay, overtime pay and rest day pay must be denied given the fact that it lacks the required particularities to prove his entitlement. We also do not find basis for the award of 13th month pay. *The basic rule is that mere allegation is not evidence and is not equivalent to proof* (Dr. Castor C. De Jesus v. Rafael D. Gurerro III Et Al., G.R. No. 171491 September 4, 2009; See also: *Manalabe v. Cabie*, 526 SCRA 582, 589).

WHEREFORE, the appeal filed by the [respondent] is hereby **DISMISSED** for lack of merit.

Accordingly, the Decision dated August 31, 2012 of Labor Arbiter Eduardo J. Carpio is **AFFIRMED**.[5]

The Ruling of the Court of Appeals

On appeal, the CA ruled and affirmed in its 24 October 2013 Decision[6] that there was indeed no dismissal actual or construction

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[5] *Id*. at 192-193; NLRC Decision.

[6] *Id*. at 51-59.

in the present case. Petitioner was able to present evidence in support of its claim that there were two (2) detail orders issued in favor of respondent for his new assignments. However, it explained that since there was no showing that said detail orders were actually received by respondent, the latter cannot be blamed into thinking that petitioner had no intention of posting him. Consequently, the appellate court made its own pronouncement that the instant controversy was a clear case of "misunderstanding" between the parties, triggered by the letter designating respondent to be a trainee only which prompted him to believe that he was demoted from being a regular employee to a mere trainee, thus, his refusal to report for duty. It therefore concluded that since there was neither dismissal nor abandonment in the present case, and considering further that the factual milieu of the case suggested *strained* relations between the parties, respondent is entitled to separation pay instead of reinstatement, including his entitlement to backwages, 13th month pay, holiday pay, and service incentive leave pay. The dispositive portion of which states:

> **WHEREFORE**, in view of the foregoing, the instant Petition is **partially GRANTED**. The assailed Decision dated January 29, 2013 and Resolution dated March 20, 2013 rendered by public respondent NLRC (FIRST DIVISION) in NLRC NCR Case No. NCR-03-03828-12/NLRC LAC No. 11-003222-12 are hereby **AFFIRMED WITH MODIFICATION**. [Respondent] Jose D. Castro is hereby **DECLARED** to be entitled to separation pay, unpaid wages from September 13, 2011-October 26, 2011, holiday pay and service incentive leave pay for the years 2008-2011, proportionate 13th month pay for the year 2011 and attorney's fees.
>
> The case is **REMANDED** to the arbitration Branch of origin for the determination and detailed computation of the monetary benefits due [respondent] JOSE D. CASTRO which [petitioner] RADAR SECURITY & WATCHMAN AGENCY (INC.) should pay without delay.[7]

Petitioner's Partial Motion for Reconsideration of said Decision was subsequently denied for lack of merit in the Resolution of 29 January 2014.[8]

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[7] *Id*. at 59.

[8] *Id*. at 61-62.

Hence, this appeal.

In support thereof, petitioner raises the following grounds: (1) the CA committed grave abuse of discretion amounting to lack of or in excess of jurisdiction in awarding separation pay to respondent even after it affirmed the unanimous findings of the NLRC and the LA that there was no illegal dismissal in this case; and (2) the CA committed grave abuse of discretion amounting to lack of or in excess of jurisdiction in reversing the rulings of the NLRC regarding the denial of award of money claims and thereafter resolved to granting in favor of respondent his money claims and attorney's fees despite the same having attained finality as it was not raised in the motion for reconsideration filed with the NLRC.[9]

Respondent, in his Comment filed on 22 September 2014,[10] maintains that the CA correctly ruled in his favor, positing that from the very beginning, he "prayed for his separation pay and no longer wish to remain with the company" considering that petitioner's manifestations show "disinterest on keeping the respondent under its employ."

The Issue

Whether or not the CA erred in affirming the decisions of the LA and NLRC that there was indeed no constructive dismissal, but with the modification that respondent is instead entitled to separation pay, backwages, 13th month pay, holiday pay, and service incentive leave pay.

Our Ruling

Time and again, we have held that this Court is not a trier of facts. In the absence of any attendant grave abuse of discretion, the factual findings of the LA and the NLRC are entitled not only to respect, but to our final recognition in this appellate review.

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[9] *Id*. at 22-23.

[10] *Id*. at 225-235; Respondent's Comment (On the Petition for Review on *Certiorari*) dated 19 September 2014.

In the case at bench, based on the factual findings of both the LA and the NLRC, we agree with the CA's pronouncement that there was no dismissal that took place, more so constructive dismissal, in the present case, since it was shown that petitioner issued detail orders in favor of respondent for his new assignments. Hence, there was no intention on its part to dismiss respondent, legally or otherwise.

In *Abad v. Roselle Cinema*,[11] we found it well settled that in labor cases, the employer has the burden of proving that the employee was *not dismissed* or if dismissed, that the dismissal was not illegal, and failure to discharge the same would mean that the dismissal is not justified and therefore illegal.[12] Thus:

x x x The Court ruled in *Great Southern Maritime Services Corp. v. Acuña*, to wit:

> Time and again we have ruled that **in illegal dismissal cases like the present one, the onus of proving that the employee was not dismissed or if dismissed, that the dismissal was not illegal, rests on the employer and failure to discharge the same would mean that the dismissal is not justified and therefore illegal**. Thus, petitioners must not only rely on the weakness of respondents' evidence but must stand on the merits of their own defense. A party alleging a critical fact must support his allegation with substantial evidence for any decision based on unsubstantiated allegation cannot stand as it will offend due process. x x x[13] (Emphasis supplied)

It must be noted, however, that in the employment of personnel, the employer has management prerogatives subject only to limitations imposed by law. The transfer of an employee would only amount to constructive dismissal when such is unreasonable, inconvenient, or prejudicial to the employee, and when it involves a demotion in rank or diminution of salaries, benefits and other privileges.

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[11] 520 Phil. 135, 142 (2006).

[12] See also *AFI International Trading Corp. (Zamboanga Buying Station)*, 561 Phil. 451, 452 (2007).

[13] *Abad v. Roselle Cinema*, *supra* note 11 at 142 citing *Pascua v. National Labor Relations Commission*, 351 Phil. 48, 62 (1998).

In the case at bench, it appears that the transfer or re-assignment was done in good faith and in the best interest of the business enterprise. This is the factual finding of the LA, and such finding was affirmed by the NLRC and the CA. Without any showing of unfairness and arbitrariness, this Court will not disturb the affirmance, especially when the petition assailing the findings raises no new arguments but merely reiterates those already raised in the proceedings below. In other words, we find in order the factual finding that respondent was not dismissed. The employer in this case has discharged the burden of proving that respondent was not dismissed.

Now, given that respondent was not dismissed, we find it imperative to reverse the CA's pronouncement and rule instead that he is not entitled to an award of separation pay and backwages.

The focal provision is Article 279 of the Labor Code of the Philippines which provides that "[i]n cases of regular employment, the employer shall not terminate the services of an employee except for a just cause or when authorized by this Title. **An employee who is unjustly dismissed from work shall be entitled to reinstatement without loss of seniority rights and other privileges and to his full backwages, inclusive of allowances, and to his other benefits or their monetary equivalent computed from the time his compensation was withheld from him up to the time of his actual reinstatement.**" Undoubtedly, there being no dismissal of respondent in the present case, the appellate court has no legal basis to award respondent separation pay and backwages.

In our jurisdiction, an employee has a right to security of tenure, but this does not give him such a vested right in his position as would deprive petitioner of its prerogative to change his assignment or transfer him where his service, as security guard, will be most beneficial to the client. **Thus, we disagree with the CA's position since there was no basis to order the award of separation pay and backwages inasmuch as respondent was not dismissed**. Neither is respondent entitled to the award of money claims for underpayment, absent evidence

to substantiate the same.[14] As similarly determined by the LA and the NLRC, other than respondent's self-serving allegations, there was no evidence presented to establish that he had rendered any compensable overtime work other than that as appearing in the general payroll, nor was there any documentary evidence to show his entitlement to any unpaid wages, holiday pay, service incentive leave pay, and proportionate 13th month pay.

Worthy of emphasis is that **the award of separation pay is likewise inconsistent with a finding that there was no illegal dismissal. Separation pay becomes due if an employee is dismissed without just cause and without due process and is therefore entitled to backwages and reinstatement**. And, in instances **where reinstatement is no longer feasible because of *strained relations* between the employee and the employer, separation pay is granted in lieu thereof**. An illegally dismissed employee is entitled to either reinstatement, if viable, or separation pay if reinstatement is no longer viable.[15] Notably, under the *doctrine of strained relations*, the payment of separation pay is considered an acceptable alternative to reinstatement when the latter option is no longer desirable or viable. **However, strained relations must be demonstrated as a fact to be adequately supported by evidence – substantial evidence to show that the relationship between the employer and the employee is indeed *strained* as a necessary consequence of the judicial controversy**.[16]

Applying the foregoing discussion in the present case, the CA attempted to justify its ruling for the entitlement of separation pay and backwages on the ground that the relationship between petitioner and respondent appears *strained*, and that the instant controversy was merely a clear case of "misunderstanding"

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[14] See *OSS Security & Allied Services, Inc. v. NLRC*, 382 Phil. 35, 45 (2000).

[15] *Macasero v. Southern Industrial Gases Philippines*, G.R. No. 178524, 30 January 2009, 577 SCRA 500, 507.

[16] See *Coca Cola Phils., Inc. v. Daniel*, 499 Phil. 491, 510 (2005) and *Paguio Transport Corporation v. NLRC*, 356 Phil. 158, 171 (1998).

between petitioner and respondent. However, the undisputed factual finding is that there was no dismissal to speak of, and therefore, we cannot find the legal basis of his entitlement to such separation pay and backwages. As we have previously pronounced, in a case where the employee's failure to work was occasioned neither by his abandonment nor by a termination, **the burden of economic loss is not rightfully shifted to the employer; each party must bear his own loss**.[17] Hence, based on the circumstances of this case, the employer should not be made to suffer the consequences of the employee's failure to report for duty. There was no allegation much less proof that the employer intentionally made vague the notices sent to the employee. There was, therefore, no fault on the part of the employer even if it were true that respondent misunderstood the letter which prompted him to believe that he was being demoted. The supposed "misunderstanding" cannot be an excuse for not reporting for work. Indeed there were subsequent notices of his assignment/detail orders. There can be no justification for his claim for separation pay and backwages.

By way of reiteration, we declare that in labor cases, where there is neither termination nor abandonment involved, there is no occasion to grant separation pay and backwages, nor to allow collection of any other monetary claims absent evidence to substantiate the same. The employer and the employee do not have any obligation one to the other.

WHEREFORE, the petition is **GRANTED.** The Decision dated 24 October 2013 and Resolution dated 29 January 2014 of the Court of Appeals in CA-G.R. SP No. 130088 are hereby **REVERSED** and **SET ASIDE**. Accordingly, the 29 January 2013 Decision of the National Labor Relations Commission is hereby **AFFIRMED *in toto***.

SO ORDERED.

Sereno, C.J. (Chairperson), Leonardo-de Castro, Bersamin, and *Perlas-Bernabe, JJ.,* concur.

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[17] *Danilo Leonardo v. NLRC*, 389 Phil. 118, 128 citing *Chong Guan Trading v. NLRC*, 254 Phil. 835, 844-845 (1989).

FIRST DIVISION

[G.R. No. 213814. December 2, 2015]

RAFAEL B. QUILLOPA, *petitioner, vs*. **QUALITY GUARDS SERVICES AND INVESTIGATION AGENCY and ISMAEL BASABICA, JR.**, *respondents*.

SYLLABUS

1. REMEDIAL LAW; SPECIAL CIVIL ACTIONS; *CERTIORARI*; GRAVE ABUSE OF DISCRETION; IN LABOR DISPUTES, GRAVE ABUSE OF DISCRETION MAY BE ASCRIBED TO THE NLRC WHEN ITS FINDINGS AND THE CONCLUSIONS REACHED THEREBY ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.— "To justify the grant of the extraordinary remedy of *certiorari*, petitioners must satisfactorily show that the court or quasi-judicial authority gravely abused the discretion conferred upon it. Grave abuse of discretion connotes judgment exercised in a capricious and whimsical manner that is tantamount to lack of jurisdiction. To be considered 'grave,' discretion must be exercised in a despotic manner by reason of passion or personal hostility, and must be so patent and gross as to amount to an evasion of positive duty or a virtual refusal to perform the duty enjoined by or to act at all in contemplation of law." "In labor disputes, grave abuse of discretion may be ascribed to the NLRC when, *inter alia,* its findings and the conclusions reached thereby are not supported by substantial evidence. This requirement of substantial evidence is clearly expressed in Section 5, Rule 133 of the Rules of Court which provides that '[i]n cases filed before administrative or quasi-judicial bodies, a fact may be deemed established if it is supported by substantial evidence, or that amount of relevant evidence which a reasonable mind might accept as adequate to justify a conclusion.'" Guided by the foregoing considerations, the Court finds that the CA erred in ascribing grave abuse of discretion on the part of the NLRC when it ruled that petitioner was constructively dismissed by respondents, considering that the same is supported by substantial evidence and in accord with prevailing law and jurisprudence x x x.

2. LABOR AND SOCIAL LEGISLATION; LABOR RELATIONS; TERMINATION OF EMPLOYMENT; WAIVER/ QUITCLAIM AND RELEASE; THE *RES JUDICATA* EFFECT OF THE SETTLEMENT AGREEMENT SHOULD ONLY PERTAIN TO THE CAUSES OF ACTION IN THE FIRST COMPLAINT AND NOT TO ANY OTHER UNRELATED CAUSES OF ACTION ACCRUING IN THE EMPLOYEE'S FAVOR AFTER THE EXECUTION OF SUCH SETTLEMENT; THE WAIVER/QUITCLAIM AND RELEASE CANNOT BE CONSTRUED TO SEVER THE EMPLOYER-EMPLOYEE RELATIONSHIP IN CASE AT BAR.— It cannot be pretended that the x x x Waiver/Quitclaim and Release only pertained to the First Complaint, which had for its causes of action the following: (*a*) underpayment of wages; (*b*) non-payment of overtime pay, holiday pay, rest day pay, night shift differentials, 13th month pay, and service incentive leave pay; and (*c*) refund of cash bond. Hence, the *res judicata* effect of this settlement agreement should only pertain to the aforementioned causes of action and not to any other unrelated cause/s of action accruing in petitioner's favor after the execution of such settlement, *i.e.*, illegal dismissal. Further, the Waiver/Quitclaim and Release cannot be construed to sever the employer-employee relationship between respondents and petitioner, as the CA would put it, simply because there is nothing therein that would operate as such. Perforce, the CA erred in dismissing the Second Complaint on the ground that there is no more employer-employee relationship between respondents and petitioner upon the filing of the same.

3. ID.; ID.; ID.; TEMPORARY "OFF-DETAIL" OR "FLOATING STATUS" OF SECURITY GUARDS, CONCEPT THEREOF; A SECURITY GUARD PLACED ON A "FLOATING STATUS" DOES NOT RECEIVE ANY SALARY OR FINANCIAL BENEFIT PROVIDED BY LAW, AS SUCH CIRCUMSTANCE IS GENERALLY OUTSIDE THE CONTROL OF THE EMPLOYER-SECURITY AGENCY. — Case law provides that the concept of temporary "off-detail" or "floating status" of security guards employed by private security agencies – a form of a temporary retrenchment or lay-off – relates to the period of time when security guards are in between assignments or when they are made to wait after being relieved from a previous post until they are transferred

to a new one. This takes place when the security agency's clients decide not to renew their contracts with the agency, resulting in a situation where the available posts under its existing contracts are less than the number of guards in its roster. It also happens in instances where contracts for security services stipulate that the client may request the agency for the replacement of the guards assigned to it, even for want of cause, such that the replaced security guard may be placed on temporary "off-detail" if there are no available posts under the agency's existing contracts. As the circumstance is generally outside the control of the security agency or employer, the Court has ruled that when a security guard is placed on a "floating status," he or she does not receive any salary or financial benefit provided by law.

4. ID.; ID.; ID.; ID.; PLACING A SECURITY GUARD IN TEMPORARY "OFF-DETAIL" OR "FLOATING STATUS" IS PART OF MANAGEMENT PREROGATIVE OF THE EMPLOYER-SECURITY AGENCY AND DOES NOT, *PER SE*, CONSTITUTE A SEVERANCE OF THE EMPLOYER-EMPLOYEE RELATIONSHIP, BUT THE SAME MUST BE EXERCISED IN GOOD FAITH, AND THE EMPLOYER-SECURITY AGENCY BEARS THE BURDEN OF PROVING THAT THERE ARE NO POSTS AVAILABLE TO WHICH THE SECURITY GUARD TEMPORARILY OUT OF WORK CAN BE ASSIGNED.— To clarify, placing a security guard in temporary "off-detail" or "floating status" is part of management prerogative of the employer-security agency and does not, *per se*, constitute a severance of the employer-employee relationship. However, being an exercise of management prerogative, it must be exercised in good faith – that is, one which is intended for the advancement of the employer's interest and not for the purpose of defeating or circumventing the rights of the employees under special laws or under valid agreements. Moreover, due to the grim economic consequences to the security guard in which he does not receive any salary while in temporary "off-detail" or "floating status," the employer-security agency should bear the burden of proving that there are no posts available to which the security guard temporarily out of work can be assigned. Furthermore, the security guard must not remain in such status for a period of more than six (6) months; otherwise, he is deemed terminated.

5. ID.; ID.; ID.; ID.; AN EMPLOYER-SECURITY AGENCY IS LIABLE FOR CONSTRUCTIVE DISMISSAL WHERE IT UNJUSTIFIABLY FAILS TO PLACE THE SECURITY GUARD BACK IN ACTIVE DUTY WITHIN THE ALLOWABLE SIX (6)-MONTH PERIOD AND PROVES THAT THERE IS NO POST AVAILABLE TO WHICH THE SECURITY GUARD CAN BE ASSIGNED.— The Court's ruling in *Nationwide Security and Allied Services, Inc. v. Valderama* is instructive on this matter, to wit: In cases involving security guards, a relief and transfer order in itself does not sever employment relationship between a security guard and his agency. An employee has the right to security of tenure, but this does not give him a vested right to his position as would deprive the company of its prerogative to change his assignment or transfer him where his service, as security guard, will be most beneficial to the client. **Temporary off-detail or the period of time security guards are made to wait until they are transferred or assigned to a new post or client does not constitute constructive dismissal, so long as such status does not continue beyond six months. The *onus* of proving that there is no post available to which the security guard can be assigned rests on the employer** x x x. In the case at bar, it is undisputed that from September 28, 2010 until he filed the Second Complaint on September 14, 2011, or a total of more than 11 months, petitioner was placed on a temporary "off-detail" or "floating status" without any salary or benefits whatsoever. In fact, despite repeated follow-ups at the QGSIA Office, he failed to get a new post or assignment from respondents purportedly for lack of vacancy. However, records are bereft of any indication or proof that there was indeed no posts available to which petitioner may be assigned. Therefore, in view of their unjustified failure to place petitioner back in active duty within the allowable six (6)-month period and to discharge the burden placed upon it by prevailing jurisprudence, the Court is constrained to hold respondents liable for petitioner's constructive dismissal.

APPEARANCES OF COUNSEL

Public Attorney's Office for petitioner.
Calpito Law Office for respondents.

D E C I S I O N

PERLAS-BERNABE, *J.*:

Assailed in this petition for review on *certiorari*[1] are the Decision[2] dated February 19, 2014 and the Resolution[3] dated July 25, 2014 of the Court of Appeals (CA) in CA-G.R. SP No. 127275, which reversed and set aside the Decision[4] dated May 31, 2012 and the Resolution[5] dated August 14, 2012 of the National Labor Relations Commission (NLRC) in NLRC LAC No. 02-000760-12 / NLRC RAB-CAR Case No. 09-0346-11, and accordingly, dismissed the complaint for illegal dismissal filed by petitioner Rafael B. Quillopa (petitioner) against respondents Quality Guards Services and Investigation Agency (QGSIA) and Ismael Basabica, Jr. (Ismael; collectively, respondents).

The Facts

On March 14, 2003, QGSIA hired petitioner as a security guard and gave him various assignments, the last of which was at the West Burnham Place Condominium in Baguio City. On September 28, 2010, the deputy manager of QGSIA, Rhegan Basabica, visited petitioner at his post and told the latter that he would be placed on a floating status, but was assured that he would be given a new assignment. At the same time, petitioner was ordered to report to the QGSIA Office the next day for further instructions. Despite such assurance and his repeated trips for follow up to the QGSIA Office, petitioner was not

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[1] *Rollo*, pp. 11-26.

[2] *Id*. at 32-39. Penned by Associate Justice Danton Q. Bueser with Associate Justices Rebecca De Guia-Salvador and Ramon R. Garcia concurring.

[3] *Id*. at 41-45.

[4] *Id*. at 66-72. Penned by Commissioner Isabel G. Panganiban-Ortiguerra with Presiding Commissioner Joseph Gerard E. Mabilog and Commissioner Nieves E. Vivar-Castro concurring.

[5] *Id*. at 86-87.

given any new assignment as there was allegedly no vacancy yet.[6] Hence, he remained on floating status.

On November 11, 2010, petitioner filed a complaint[7] for money claims such as wages, overtime pay, premium pay for holidays and rest days, night shift differentials, 13th month pay, and service incentive leave pay against respondents before the NLRC, docketed as NLRC RAB-CAR Case No. 11-0542-10 (First Complaint).[8] However, the parties were able to amicably settle the controversy, as evidenced by a Waiver/Quitclaim and Release[9] dated February 3, 2011, which provides, among others, that petitioner is withdrawing his complaint against respondents and that he received a total of ₱10,000.00 from respondents "for and [in] consideration of the settlement of all [petitioner's] claims which might have arisen as consequence of [petitioner's] employment."[10] On even date, the Labor Arbiter (LA) issued an Order[11] approving and granting the amicable settlement and ordering the dismissal of the First Complaint with prejudice.[12]

However, on September 14, 2011, petitioner filed another complaint,[13] this time, for illegal dismissal with prayer for payment of full backwages, separation pay, and attorney's fees, against respondents before the NLRC, docketed as NLRC RAB-CAR Case No. 09-0346-11 (Second Complaint).[14] In his Position Paper,[15] petitioner alleged that after the settlement of the First Complaint, he waited for a new posting or assignment, but to

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[6] See *id*. at 33.

[7] *Id*. at 96.

[8] *Id*. at 33.

[9] *Id*. at 97.

[10] *Id*.

[11] *Id*. at 98. Penned by Executive Labor Arbiter Vito C. Bose.

[12] See *id*. at 33-34.

[13] *Id*. at 88.

[14] *Id*. at 34 and 103.

[15] Dated October 20, 2011. *Id*. at 99-104.

no avail. In this relation, petitioner contended that respondents' continued failure to reinstate him to his previous assignment or to give him a new one should be construed as a termination of his employment, considering that he had been on floating status for almost one (1) year.[16]

In their defense,[17]respondents essentially countered that the Waiver/Quitclaim and Release already terminated the employer-employee relationship between them and petitioner, and thus, the latter had no more ground to file the Second Complaint.[18]

The LA Ruling

In a Decision[19] dated January 30, 2012, the LA ruled in petitioner's favor, and accordingly, ordered respondents to pay the aggregate sum of ₱205,436.00 broken down as follows: (*a*) ₱63,648.00 as separation pay; (*b*) ₱123,112.00 as backwages; and (*c*) ₱18,676.00 as attorney's fees.[20]

The LA found that the settlement of the First Complaint through the execution of a Waiver/Quitclaim and Release dated February 3, 2011 cannot bar petitioner from filing the Second Complaint against respondents, since such settlement referred only to petitioner's money claims reflected in the First Complaint, and does not cover the complaint for illegal dismissal which is the crux of the Second Complaint.[21] In this relation, the LA added that the issues in the Second Complaint cannot be subsumed under the First Complaint given that the facts which gave rise to the former only occurred after the settlement of the latter. Further, the LA ruled that while security guards, such as petitioner, may be placed in an "off-detail" or "floating status," such status should not exceed a period of six (6) months;

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[16] See *id*. at 100 and 111.

[17] See Respondents' Position Paper dated October 14, 2011; *id*. at 89-95.

[18] *Id*. at 34-35. See also *id*. at 111-112.

[19] *Id*. at 110-115. Penned by Labor Arbiter Monroe C. Tabingan.

[20] *Id*. at 115.

[21] *Id*. at 114.

otherwise, he is deemed to be constructively dismissed without just cause and without due process.[22]

Dissatisfied, respondents appealed[23] to the NLRC, docketed as NLRC LAC No. 02-000760-12.

The NLRC Ruling

In a Decision[24] dated May 31, 2012, the NLRC affirmed the LA ruling. It held that since illegal dismissal was not included as a cause of action in the First Complaint, the execution of the Waiver/Quitclaim and Release did not preclude petitioner from filing the Second Complaint for illegal dismissal.[25] It further held that petitioner was indeed constructively dismissed from service given that he was placed on floating status beyond the allowable period under the law.[26]

Respondents moved for reconsideration[27] which was, however, denied in a Resolution[28] dated August 14, 2012. Undaunted, they filed a petition for *certiorari*[29] before the CA.

The CA Ruling

In a Decision[30] dated February 19, 2014, the CA reversed and set aside the NLRC ruling, and accordingly, dismissed the Second Complaint.[31] Contrary to the findings of the LA and the NLRC, the CA held that the Waiver/Quitclaim and Release

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[22] See *id*. at 113-115.

[23] See Notice of Appeal with Incorporated Memorandum of Appeal dated February 13, 2012; *id*. at 116-129.

[24] *Id*. at 66-72.

[25] *Id*. at 69.

[26] *Id*. at 69-70.

[27] See motion for reconsideration dated June 29, 2012; *id*. at 73-84.

[28] *Id*. at 86-87.

[29] Dated October 24, 2012; *id*. at 46-64.

[30] *Id*. at 32-39.

[31] *Id*. at 38.

operated to sever the employer-employee relationship between respondents and petitioner. As such, petitioner had no more cause of action against respondents when he filed the Second Complaint more than seven (7) months later, or on September 14, 2011.[32]

Aggrieved, petitioner moved for reconsideration,[33] but was denied in a Resolution[34] dated July 25, 2014; hence, this petition.

The Issue Before the Court

The issue for the Court's resolution is whether or not the CA correctly ruled that the Waiver/Quitclaim and Release precluded petitioner from filing the Second Complaint for illegal dismissal against respondents.

The Court's Ruling

The petition is meritorious.

"To justify the grant of the extraordinary remedy of *certiorari*, petitioners must satisfactorily show that the court or quasi-judicial authority gravely abused the discretion conferred upon it. Grave abuse of discretion connotes judgment exercised in a capricious and whimsical manner that is tantamount to lack of jurisdiction. To be considered 'grave,' discretion must be exercised in a despotic manner by reason of passion or personal hostility, and must be so patent and gross as to amount to an evasion of positive duty or a virtual refusal to perform the duty enjoined by or to act at all in contemplation of law."[35]

"In labor disputes, grave abuse of discretion may be ascribed to the NLRC when, *inter alia,* its findings and the conclusions reached thereby are not supported by substantial evidence. This

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[32] *Id*. at 36-38.

[33] See motion for reconsideration dated March 25, 2014; *id*. at 169-176.

[34] *Id*. at 41-45.

[35] *Omni Hauling Services, Inc. v. Bon*, G.R. No. 199388, September 3, 2014, 734 SCRA 270, 277, citing *Ramos v. BPI Family Savings Bank, Inc.*, G.R. No. 203186, December 4, 2013, 711 SCRA 598, 596-597.

requirement of substantial evidence is clearly expressed in Section 5, Rule 133 of the Rules of Court which provides that '[i]n cases filed before administrative or quasi-judicial bodies, a fact may be deemed established if it is supported by substantial evidence, or that amount of relevant evidence which a reasonable mind might accept as adequate to justify a conclusion.'"[36]

Guided by the foregoing considerations, the Court finds that the CA erred in ascribing grave abuse of discretion on the part of the NLRC when it ruled that petitioner was constructively dismissed by respondents, considering that the same is supported by substantial evidence and in accord with prevailing law and jurisprudence, as will be explained hereunder.

A judicious review of the records reveals the following timeline: (*a*) on September 28, 2010, petitioner was placed on floating status by respondents; (*b*) on November 11, 2010, petitioner filed the First Complaint for money claims such as wages, overtime pay, premium pay for holidays and rest days, night shift differentials, 13th month pay, and service incentive leave pay, against respondents; (*c*) on February 3, 2011, petitioner executed a Waiver/Quitclaim and Release in settlement of the First Complaint; and (*d*) on September 14, 2011, or more than 11 months from the time petitioner was placed on floating status, he filed the Second Complaint, this time for illegal dismissal, against respondents. Pertinent portions of the Waiver/Quitclaim and Release read:

a) I withdraw my complaint against above-named respondent/s;

b) I received the amount of cash - ₱5,000.00 and Industry Bank Check No. 1074928 dtd. 2/15/ (*sic*) - ₱5,000.00 in the total amount of Ten Thousand Pesos (₱10,000.00) for and [in] consideration of the settlement of all my claims, which might have arisen as consequence of my employment;

c) I am aware of the effects and consequences of this instrument;

d) I was not forced, threatened, intimidated, coerced nor was I subjected to undue influence or violence to agree to an amicable settlement of this case;

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[36] *Id*. at 277-278.

e) I am freely and voluntarily signing this document.[37]

It cannot be pretended that the foregoing Waiver/Quitclaim and Release only pertained to the First Complaint, which had for its causes of action the following: (*a*) underpayment of wages; (*b*) non-payment of overtime pay, holiday pay, rest day pay, night shift differentials, 13th month pay, and service incentive leave pay; and (*c*) refund of cash bond.[38] Hence, the *res judicata* effect[39] of this settlement agreement should only pertain to the aforementioned causes of action and not to any other unrelated cause/s of action accruing in petitioner's favor after the execution of such settlement, *i.e.*, illegal dismissal. Further, the Waiver/Quitclaim and Release cannot be construed to sever the employer-employee relationship between respondents and petitioner, as the CA would put it, simply because there is nothing therein that would operate as such. Perforce, the CA erred in dismissing the Second Complaint on the ground that there is no more employer-employee relationship between respondents and petitioner upon the filing of the same.

On the issue of constructive dismissal, the LA and the NLRC correctly ruled in favor of the petitioner.

Case law provides that the concept of temporary "off-detail" or "floating status" of security guards employed by private security agencies – a form of a temporary retrenchment or lay-off – relates to the period of time when security guards are in between assignments or when they are made to wait after being relieved from a previous post until they are transferred to a new one. This takes place when the security agency's clients decide not to renew their contracts with the agency, resulting in a situation where the available posts under its existing contracts are less than the number of guards in its roster. It also happens

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[37] See *rollo*, p. 97.

[38] *Id*. at 113.

[39] A compromise agreement, once entered into, has the effect and the authority of *res judicata* upon the parties. (See *Magbanua v. Uy*, 497 Phil. 511, 518-519 [2005].)

in instances where contracts for security services stipulate that the client may request the agency for the replacement of the guards assigned to it, even for want of cause, such that the replaced security guard may be placed on temporary "off-detail" if there are no available posts under the agency's existing contracts. As the circumstance is generally outside the control of the security agency or employer, the Court has ruled that when a security guard is placed on a "floating status," he or she does not receive any salary or financial benefit provided by law.[40]

To clarify, placing a security guard in temporary "off-detail" or "floating status" is part of management prerogative of the employer-security agency and does not, *per se*, constitute a severance of the employer-employee relationship. However, being an exercise of management prerogative, it must be exercised in good faith – that is, one which is intended for the advancement of the employer's interest and not for the purpose of defeating or circumventing the rights of the employees under special laws or under valid agreements.[41] Moreover, due to the grim economic consequences to the security guard in which he does not receive any salary while in temporary "off-detail" or "floating status," the employer-security agency should bear the burden of proving that there are no posts available to which the security guard temporarily out of work can be assigned.[42] Furthermore, the security guard must not remain in such status for a period of more than six (6) months; otherwise, he is deemed terminated. The Court's ruling in *Nationwide Security and Allied Services, Inc. v. Valderama*[43] is instructive on this matter, to wit:

In cases involving security guards, a relief and transfer order in itself does not sever employment relationship between a security guard and his agency. An employee has the right to security of tenure,

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[40] See *Exocet Security and Allied Services Corporation v. Serrano*, G.R. No. 198538, September 29, 2014, 737 SCRA 40, 50; citations omitted.

[41] See *Lopez v. Irvine Construction Corp.*, G.R. No. 207253, August 20, 2014, 733 SCRA 589, 602.

[42] See *Pido v. NLRC*, 545 Phil. 507, 516 (2007).

[43] 659 Phil. 362 (2011).

but this does not give him a vested right to his position as would deprive the company of its prerogative to change his assignment or transfer him where his service, as security guard, will be most beneficial to the client. **Temporary off-detail or the period of time security guards are made to wait until they are transferred or assigned to a new post or client does not constitute constructive dismissal, so long as such status does not continue beyond six months.**

The *onus* of proving that there is no post available to which the security guard can be assigned rests on the employer x x x.[44] (Emphases and underscoring supplied)

In the case at bar, it is undisputed that from September 28, 2010 until he filed the Second Complaint on September 14, 2011, or a total of more than 11 months, petitioner was placed on a temporary "off-detail" or "floating status" without any salary or benefits whatsoever. In fact, despite repeated follow-ups at the QGSIA Office, he failed to get a new post or assignment from respondents purportedly for lack of vacancy. However, records are bereft of any indication or proof that there was indeed no posts available to which petitioner may be assigned. Therefore, in view of their unjustified failure to place petitioner back in active duty within the allowable six (6)-month period and to discharge the burden placed upon it by prevailing jurisprudence, the Court is constrained to hold respondents liable for petitioner's constructive dismissal.

WHEREFORE, the petition is **GRANTED.** The Decision dated February 19, 2014 and the Resolution dated July 25, 2014 of the Court of Appeals in CA-G.R. SP No. 127275 are hereby **REVERSED** and **SET ASIDE**. Accordingly, the Decision dated May 31, 2012 and the Resolution dated August 14, 2012 of the National Labor Relations Commission in NLRC LAC No. 02-000760-12/NLRC RAB-CAR Case No. 09-0346-11 are **REINSTATED.**

SO ORDERED.

Sereno, C.J. (Chairperson), Leonardo-de Castro, Bersamin, and *Perez, JJ.,* concur.

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[44] *Id*. at 369-370.

FIRST DIVISION

[G.R. No. 166581. December 7, 2015]

SOLIDBANK CORPORATION, *petitioner, vs.* **COURT OF APPEALS, NATIONAL LABOR RELATIONS COMMISSION, and DANILO H. LAZARO,** *respondents.*

[G.R. No. 167187. December 7, 2015]

DANILO H. LAZARO, *petitioner, vs.* **COURT OF APPEALS, NATIONAL LABOR RELATIONS COMMISSION and SOLIDBANK CORPORATION,** *respondents.*

SYLLABUS

1. REMEDIAL LAW; MOTIONS; MOTION FOR RECONSIDERATION; A MOTION FOR RECONSIDERATION ON THE AMENDED DECISION DOES NOT PARTAKE THE NATURE OF A PROHIBITED PLEADING BECAUSE THE AMENDED DECISION IS AN ENTIRELY NEW DECISION WHICH SUPERSEDES THE ORIGINAL, FOR WHICH A NEW MOTION FOR RECONSIDERATION MAY BE FILED AGAIN; AMENDED JUDGMENT AND SUPPLEMENTAL JUDGMENT, DISTINGUISHED.— Anent the issue of Lazaro's "second" motion for reconsideration, we disagree with the bank's contention that it is disallowed by the Rules of Court. Upon thorough examination of the procedural history of this case, the "second" motion does not partake the nature of a prohibited pleading because the Amended Decision is an entirely new decision which supersedes the original, for which a new motion for reconsideration may be filed again. We pointed out in *Planters Development Bank v. Sps. Lopez* that "[t]here is also no merit to the respondents' argument that Planters Bank's motion for reconsideration is disallowed under Section 2, Rule 52 of the Rules of Court. x x x [T]here is a difference between an amended judgment and a supplemental judgment. In an amended judgment, the lower court makes a thorough study of the original judgment and renders the amended and clarified judgment only after considering all the factual and legal issues. The amended and

clarified decision is an entirely new decision which supersedes or takes the place of the original decision. On the other hand, a supplemental decision does not take the place of the original; it only serves to add to the original decision." We thus rule that the appellate court did not err in not denying Lazaro's Motion for Reconsideration/Clarification on the Amended Decision because its filing is allowed under the rules.

2. LABOR AND SOCIAL LEGISLATION; LABOR RELATIONS; TERMINATION OF EMPLOYMENT; IF REINSTATEMENT IS NOT POSSIBLE, AN ILLEGALLY DISMISSED EMPLOYEE IS ENTITLED TO SEPARATION PAY AND BACKWAGES, COMPUTED USING HIS GROSS MONTHLY PAY, INCLUSIVE OF ALLOWANCES AND OTHER BENEFITS OR THEIR MONETARY EQUIVALENT, BUT SUCH AMOUNTS MUST BE DULY PROVED BEFORE IT MAY BE GRANTED BY THE COURT.— As regards the alleged erroneous computation of Lazaro's monthly pay, it has been settled that if reinstatement is not possible, an illegally dismissed employee is entitled to separation pay and backwages, computed using his gross monthly pay, inclusive of allowances and other benefits or their monetary equivalent. Such amounts however must be duly proved before it may be granted by the Court. We are, however, compelled to deny Lazaro's prayer to include in his gross monthly salary the allowances and benefits outlined in his petition. The records are bereft of evidence to serve as a backbone for the allowances and benefits he desires. We therefore retain the amount of ₱53,962.64 as his gross monthly pay, which remains uncontested by both parties.

3. ID.; ID.; ID.; WHERE REINSTATEMENT IS NO LONGER FEASIBLE, SEPARATION PAY MUST BE AWARDED COMPUTED ONLY UP TO THE TIME THE EMPLOYER CEASED OPERATIONS DUE TO LEGITIMATE BUSINESS REASONS, FOR AN EMPLOYER CANNOT BE HELD LIABLE TO PAY SEPARATION PAY BEYOND SUCH CLOSURE OF BUSINESS BECAUSE EVEN IF THE ILLEGALLY DISMISSED EMPLOYEES WOULD BE REINSTATED, THEY COULD NOT POSSIBLY WORK BEYOND THE TIME OF THE CESSATION OF ITS OPERATION.— [S]eparation pay must be duly awarded to Lazaro because reinstatement is no longer feasible. However, the Court has consistently ruled that the same must be computed

only up to the time the employer ceased operations. It cannot be held liable to pay separation pay beyond such closure of business because even if the illegally dismissed employees would be reinstated, they could not possibly work beyond the time of the cessation of its operation. This is especially true when the closure was "due to legitimate business reasons and not merely an attempt to defeat the order of reinstatement." Considering that Solidbank ceased operations in 2000, Lazaro may then rightfully be considered as covered by the Solidbank-Metrobank Merger-Integration Agreement. The agreement dictates that separation pay will be given to Solidbank employees not absorbed by Metrobank, with the gross monthly pay increased by 150%. x x x. We thus compute Lazaro's separation pay from the time of his employment in 21 December 1992 up to the cessation of Solidbank's business in 31 July 2000 or 7.64 years, multiplied by his gross monthly pay increased by 150%.

4. **ID.; ID.; ID.; BACKWAGES SHOULD BE COMPUTED FROM THE TIME OF DISMISSAL UP TO THE TIME OF CESSATION OF BUSINESS ONLY, FOR TO COMPUTE BACKWAGES BEYOND THE DATE OF THE CESSATION OF BUSINESS WOULD BE UNJUST, CONFISCATORY, AND VIOLATIVE OF THE CONSTITUTION DEPRIVING THE EMPLOYER OF HIS PROPERTY RIGHTS.—** [B]ackwages are computed from the time of dismissal until the finality of the decision ordering separation pay, and not merely until promulgation of the Court's decision. However, considering that Solidbank ceased operations in 31 July 2000, we must compute backwages only up to the time of such cessation. To compute "backwages beyond the date of the cessation of business would not only be unjust, but confiscatory, as well as violative of the Constitution depriving the employer of his property rights." Using this yardstick, we therefore compute Lazaro's backwages from the time of his illegal dismissal on 21 December 1992 up to the time when Solidbank ceased operations on 31 July 2000, or 91.67 months, multiplied by his gross monthly pay earlier determined.

5. **ID.; ID.; ID.; THE AWARD OF MORAL AND EXEMPLARY DAMAGES CANNOT BE JUSTIFIED SOLELY UPON THE PREMISE THAT THE EMPLOYER DISMISSED THE EMPLOYEE WITHOUT AUTHORIZED CAUSE AND DUE PROCESS.—** We have said that while "dismissal

may be contrary to law but by itself alone, it does not establish bad faith to entitle the dismissed employee to moral damages." We must note that "bad faith does not simply connote bad judgment or negligence — it imports a dishonest purpose or some moral obliquity and conscious doing of wrong. It means a breach of a known duty through some motive or interest or ill-will that partakes of the nature of fraud." The award of moral and exemplary damages thus cannot be justified solely upon the premise that the employer dismissed his employee without authorized cause and due process."

6. ID.; ID.; ID.; ATTORNEY'S FEES MAY BE AWARDED ONLY WHEN THE EMPLOYEE IS ILLEGALLY DISMISSED IN BAD FAITH AND IS COMPELLED TO LITIGATE OR INCUR EXPENSES TO PROTECT HIS RIGHTS BY REASON OF THE UNJUSTIFIED ACTS OF HIS EMPLOYER, BUT THERE MUST ALWAYS BE A FACTUAL BASIS FOR THE AWARD THEREOF.— On the matter of attorney's fees, we have established that "attorney's fees may be awarded only when the employee is illegally dismissed in bad faith and is compelled to litigate or incur expenses to protect his rights by reason of the unjustified acts of his employer." However, "[t]here must always be a factual basis for the award of attorney's fees. This is consistent with the policy that no premium should be placed on the right to litigate." After reviewing the records, we see no evidence that Lazaro's dismissal was tainted with bad faith nor is there any basis for the award of attorney's fees. We therefore delete the award of damages and attorney's fees.

APPEARANCES OF COUNSEL

De Jesus Manimtim & Associates for D. Lozaro.

D E C I S I O N

SERENO, *C.J.*:

We resolve the Petitions for Review filed by Solidbank Corporation (Solidbank) in G.R. No. 166581, and Danilo H. Lazaro (Lazaro) in G.R. No. 167187 from the 19 January 2004

Decision,[1] 01 July 2004 Amended Decision,[2] and 14 January 2005 Resolution[3] of the Court of Appeals (CA) in CA-G.R. SP No. 73629.

THE FACTS

As culled from the CA, the antecedent facts are as follows:

Petitioner Danilo H. Lazaro (Lazaro) joined respondent Solidbank Corporation on December 21, 1992. He rose from the ranks until he became Vice President, Head of the Branch Banking Group, Region 6 (Southern Luzon branches).

On August 21, 1995, the Imus branch, one of the bank's branches under Lazaro, was audited for the first time by the bank's internal auditors, known as the Audit and Credit Examination Services (ACES). The audit uncovered certain irregularities committed by the branch manager and the accountant involving loan releases without proper documentation and approval of the Region Head and other appropriate approving bodies. Respondent bank was allegedly defrauded in the amount of P43 million through the fraudulent acts and/or activities allegedly committed by some officers of the said branch office, in connivance with some individual borrowers.

Lazaro immediately tendered his resignation effective February 15, 1996, out of delicadeza, when his name was dragged by the ACES Audit Report into the Imus branch loan anomaly with a sweeping allegation "that he has given blanket authority to all the Branch Managers in his region to commit loans up to P1 Million subject to his confirmation." He was not however included among those criminally charged by the bank.

Lazaro's resignation was not accepted by respondent bank president Vistan who categorically cleared him of any liability on the Imus case with the assurance that he (Vistan) personally, does not believe that petitioner Lazaro has anything to do with the said irregularity. Respondent Vistan persuaded Lazaro to stay and help resolve the

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[1] *Rollo*, (G.R. No. 167187); pp. 79-89, penned by CA Associate Justice Eliezer R. De Los Santos, and concurred by Associate Justices B.A. Adefuin-De La Cruz and Jose C. Mendoza (now a Member of this Court).

[2] *Id*. at 73-77.

[3] *Id*. at 67-71.

Imus case. Thus was then assigned in a special project attached to the office of the legal counsel.

Pursuant to respondent Vistan's instruction to concentrate on the Imus branch loans, Lazaro worked and coordinated closely with the bank's legal counsel. The bank filed criminal charges against several persons including the Imus Branch Manager, the accountant and four borrowers.

Petitioner's Christmas bonus which was credited to his account on November 13, 1996 was ordered reversed by a debit memo from respondent's bank Human Resource Department (HRD) on November 15, 1996. Aggrieved, Lazaro wrote a letter to respondent Vistan seeking clarification. There was no response from respondent Vistan.

On December 13, 1996, petitioner Lazaro was told by Ed Buenaventura of the Motorpool Section to surrender his service car. Later, Lazaro found out that his payroll for December 1-15, 1996 was not credited to his payroll account. He thus wrote another letter to respondent Vistan reiterating his earlier request for clarification. Again, there was no answer.

Lazaro requested for a meeting with respondent Vistan. On January 7, 1997, they met together with respondent SVP Jazmines at the latter's office. Ten (10) months and twenty two (22) days after Lazaro was assigned to special projects, respondent bank president Vistan verbally dismissed petitioner Lazaro upon the recommendation of and after consultation with respondent Senior Vice President Jazmines because his (Lazaro's) continued presence "might be used as a basis to accuse the bank of 'abetting a senior officer who has been implicated by a "customer" in a case of public inquiry." The dismissal was made retroactive November 30, 1996, more that [sic] a month before he was informed of his dismissal.

On April 24, 1997, petitioner Lazaro filed a complaint for illegal dismissal, non-payment of earned wages and bonus, reinstatement, backwages including moral and exemplary damages and attorney's fees.[4]

THE LABOR ARBITER RULING

On 8 November 2001, Labor Arbiter (LA) Geobel Bartolabac issued a Decision[5] dismissing the Complaint filed by Lazaro.

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[4] *Id*. at 81-82.

[5] *Id*. at 184-196.

The LA pointed out that absent any evidence that Lazaro was still performing the functions of a banker is tantamount to the bank's implied acceptance of his voluntary and irrevocable resignation. However, considering that he was "reasonably made to believe that his job would be given back to him by virtue of his earnest effort to recover whatever losses that respondent bank may have incurred as a result of the alleged scam,"[6] and in view of the cessation of the bank's operation, Lazaro was awarded the following amounts:

> WHEREFORE, premises considered, judgment is hereby rendered dismissing the complaint for illegal dismissal.
>
> Respondent Solid Bank Corporation is, however, ordered to pay complainant Danilo H. Lazaro the following:
>
> 1. Separation pay
> From 12/21/92-6/30/2000 (sic):
> (including the imputed service)
> ₱53,962.64 x 8 years = **₱431,701.12**
>
> 2. Compensatory benefit:
> From 11/30/96-6/30/2000 (temporary date)
> ₱53,962.64 x 42 months/2 = **1,133,215.40**
> (But not less than ₱1 million nor more than ₱1.5 Million)
>
> 3. 1996 Christmas bonus: **53,962.64**
>
> 4. Moral and exemplary damages for
> arbitrary reversal of 1996 Christmas bonus. **200,000.00**
>
> **TOTAL** **₱1,818,879.12**
>
> All other claims are also dismissed for lack of merit.
>
> **SO ORDERED.** (Emphasis in the original)

Both parties appealed to the National Labor Relations Commission (NLRC), for which a Decision[7] promulgated on 17 April 2002 was issued. The NLRC affirmed with modifications the Decision rendered by LA Bartolabac, by deleting the award of moral and exemplary damages, as follows:

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[6] *Id*. at 193.

[7] *Rollo* (G.R. No. 166581), pp. 87-98.

WHEREFORE, in the light of the foregoing, the two (2) appeals assailing the Decision in this case are hereby, DISMISSED for lack of merit.

The appealed Decision is hereby, AFFIRMED with MODIFICATION by deleting the award of moral and exemplary damages.

SO ORDERED.

Both parties moved for the reconsideration of the April 2002 Decision, but the motions were denied by the NLRC in a Resolution[8] promulgated on 22 August 2002, as follows:

Accordingly, the motion for reconsideration filed by complainant-appellant and partial motion for reconsideration filed by respondents-appellants are denied for lack of merit.

No further motion for reconsideration shall be entertained.

SO ORDERED.

THE CA RULING

Upon appeal of Lazaro, the CA, in its 19 January 2004 Decision, [9] ruled that reassignment does not sever the tie between the employer and the employee. The fact that Solidbank still exercised control over Lazaro and assigned him to tasks that was deemed necessary for the bank indicates that there was no severance of the employer-employee relationship. Nonetheless, considering the cessation of the bank's operation, the appellate court was constrained to award Lazaro separation pay, backwages and other amounts due him, to wit:

WHEREFORE, the petition is **GRANTED.** The NLRC resolution and decision dated August 22, 2002 and April 17, 2002, respectively, are hereby **SET ASIDE**. Finding petitioner Danilo Lazaro illegally dismissed, the November 8, 2001 decision of the Labor Arbiter is hereby **MODIFIED**. Respondent Solidbank Corporation is hereby ordered to pay petitioner Lazaro the following:

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[8] *Id*. at 99-103.

[9] *Supra* note 1.

1.	Separation pay for every year of service starting December 21, 1992 up to the promulgation of this decision to be computed based on 150% of the gross monthly pay for every year of service per Category 2 of the Solidbank-Metrobank Merger (11 years) ₱80,943.96 x 11	=	₱890,383.56
2.	Backwages computed from the time of illegal dismissal ₱53,962.64 x 6 years	=	323,775.84
3.	Compensatory benefit computed from November 1996 up to June 2000 at the rate of ₱53,962.64 x 42 months/2	=	1,133,215.40
4.	Payment of 1996 Christmas bonus	=	53,962.64
5.	Payment of unpaid salary for December 1996	=	53,962.64
6.	Moral and exemplary damages	=	200,000.00
	TOTAL	=	₱2,655,300.08
7.	Attorneys fees equivalent to ten percent (10%) of the sum of all the above	=	265,530.00
	GRAND TOTAL	=	**₱2,920,830.08**

SO ORDERED. (Emphasis in the original)

On 3 February 2004 and 5 May 2004, Solidbank filed its Motion for Reconsideration[10] and Supplemental Motion for Reconsideration[11] respectively. Lazaro also filed his Motion for Clarification and/or Partial Motion for Reconsideration[12] on 27 January 2004.

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[10] *Rollo* (G.R. No. 167187), pp. 456-465.

[11] *Id*. at 473-483.

[12] *Id*. at 439-448.

On 1 July 2004, the appellate court issued an Amended Decision,[13] correcting the amount of separation pay, backwages and unpaid salary for December 1996, as follows:

[On separation pay]

However, We agree with Solidbank's assertion that petitioner is no longer entitled to an increase in the original award for separation pay given by the NLRC considering that petitioner did not question the same in his petition. Hence, the amount of ₱890,383.56 shown **in Item No. 1 (decretal portion of our January 19, 2004 Decision)** representing petitioner's separation pay starting December 21, 1992 up to the promulgation of this decision is hereby **corrected and reverted** to the sum awarded by the NLRC in the total amount of ₱431,701.12.

x x x x x x x x x

[On backwages]

We hold that petitioner was illegally dismissed and is therefore entitled to backwages. However, We admit error in the computation of the same **(Item No. 2, decretal portion, January 19, 2004 Decision) due to inadvertence.** This Court multiplied his monthly salary of **₱53,962.64** by **6 years instead of 43 months**, thus awarding only **P323,775.84.** To arrive at the correct amount of petitioner's backwages, we have to **multiply his monthly salary by 43 months, *viz*.: ₱53,962.64 x 43 = ₱2,320,993.52 less ₱40,375.10 = *₱2,280,018.42***. This answers petitioner's motion for clarification and/or partial motion for reconsideration.

[On the unpaid salary for December 1996]

This Court also noticed a typographical error in encoding the amount of petitioner's unpaid salary for December 1996 as **₱53,962.64** when it should only be **₱40,375.10** representing his basic salary, as prayed for in the petitioner before Us. (Emphasis in the original)

Lazaro filed another Motion for Reconsideration/Clarification[14] on 26 July 2004, which the CA partially granted in a Resolution[15]

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[13] *Supra* note 2.

[14] *Rollo* (G.R. No. 167187), pp. 512-526.

[15] *Supra* note 3.

promulgated on 14 January 2005. The appellate court again corrected the amount of separation pay, backwages and unpaid salary for December 1996 by reviewing Lazaro's gross monthly pay, including all allowances and benefits due to him:

> We are taking cognizance of the oversight committed in the computation of the separation pay and backwages. However, considering that the Court cannot determine the other benefits allegedly enjoyed regularly by the petitioner to come up with his gross monthly salary, We based the gross monthly salary of petitioner in the amount of **₱53,962.64** according to the submitted evidence which were not contested by the private respondent. It is also noted that petitioner never questioned the computation of his monthly salary at ₱53,962.64 as contained in the decisions and resolutions of the Labor Arbiter, NLRC and this Court. Hence, in Our Amended Decision dated July 1, 2004, a re-computation of the separation pay and backwages due petitioner was made.
>
> x x x x x x x x x
>
> Petitioner correctly argues that in the computation of the separation pay and backwages, the whole amount of his salaries plus benefits, bonuses and general increases to which he would have been entitled shall be included. However, the record is bereft of any evidence showing the other monthly benefits, bonuses, etc., aside from his monthly salary of ₱53,962.64 which is not contested by both parties.
>
> With respect to the 150% gross monthly salary pay for every year of service as separation pay based on the Solidbank-MetroBank Merger Agreement, We believe that the petitioner is not entitled to such benefit. He did not apply for the same and he was not offered said separation benefits by the respondent bank.
>
> The computation of the **separation pay should be based on the petitioner's proven monthly salary (₱53,962.64) from December 21, 1992 up to the promulgation of this resolution** or for such additional years upon final execution. Likewise, petitioner's **backwages should be computed based on petitioner's proven monthly salary (₱53,962.64) from the time of his illegal dismissal on November 30, 1996 up to the promulgation of this resolution**. (Emphasis in the original)

Below is a summary of the *fallo* of the Decision, Amended Decision and Resolution issued by the appellate court:

	19 January 2004 Decision	**1 July 2004 Amended Decision**	**14 January 2005 Resolution**
Separation pay	For every year of service starting From December 21, 1992 up to the promulgation of this Decision to be computed based on 150% of the gross monthly pay for every year of service per Category 2 of the Solidbank-Metrobank Merger at the rate of ₱80,943.96 x 11 years **₱890,383.56**	From December 21, 1992 up to June 30, 2000 (including the imputed service) ₱53,962.64 x 8 years = **₱431,701.12**	From December 21 1992 up to the promulgation of this Decision (January 2005) to be computed by multiplying the monthly salary (₱53,962.64) by 12 years ₱53,962.64 x 12 = **₱647,551.68**
Backwages	Computed from the time of illegal dismissal at the rate of ₱53,962.64 x 6 years **₱323,755.84**	Computed from the time of illegal dismissal on November 30, 1996 up to June 30, 2000 ₱53,962.64 x 43 mos.–₱40,375.10 (representing December 1996 basic salary as prayed and awarded) **₱2,280,018.42**	Computed by multiplying the monthly salary (₱53,962.64) by the number of months from his illegal dismissal on November 30, 1996 up to the promulgation of this decision ₱53,962.64 x 98 months **₱5,288,338.70**
Compensatory benefit	Computed from November 1996 up to June 2000 at the rate of ₱53,962.64 x 42 months/2 **₱1,133,215.40**	Computed from November 1996 up to June 2000 at the rate of ₱53,962.64 x 42 months/2 **₱1,133,215.40**	Computed from November 1996 up to June 2000 at the rate of ₱53,962.64 x 42 months/2 **₱1,133,215.40**

Payment of 1996 Christmas bonus	**₱53,962.64**	**₱53,962.64**	**₱53,962.64**
Payment of unpaid salary for December 1996	**₱53,962.64**	**₱40,375.10**	**None**
Moral and exemplary damages	**₱200,000.00**	**₱200,000.00**	**₱200,000.00**
TOTAL	**₱2,655,300.08**	**₱4,139,272.68**	**₱7,323,068.42**
Attorney's fees equivalent to ten percent (10%) of the sum of all the above	**₱265,530.00**	**₱413,927.26**	**₱732,306.84**
GRAND TOTAL	**₱2,920,830.08**	**₱4,553,199.94**	**₱8,055,375.26**

Hence, these petitions.

Lazaro filed his Comment[16] to Solidbank's petition (G.R. No. 166581) on 15 June 2005, while the latter filed its Reply[17] on 20 July 2005. On the other hand, Solidbank filed its Comment[18] to Lazaro's petition (G.R. No. 167187) on 12 August 2005, while the latter filed his Reply[19] on 24 March 2006.

In **G.R. No. 166581**, Solidbank argues that the CA gravely abused its discretion in not denying Lazaro's "second" Motion for Reconsideration/Clarification because it was filed without leave of court and in clear violation of the prohibition on filing a second motion for reconsideration. Moreover, Solidbank insists that the CA erred in awarding damages and attorney's fees despite the lack of legal, factual or equitable basis for these awards.

In **G.R. No. 167187**, Lazaro argues that there is sufficient evidence on record to prove that all the allowances and benefits

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[16] *Rollo* (G.R. No. 166581), pp. 228-255.

[17] *Id*. at 365-374.

[18] *Rollo* (G.R. No. 167187), pp. 675-684.

[19] *Id*. at 731-739.

(e.g., accruing vacation leave, profit sharing, car benefits) he prays for have been consistently given to him, and thus forms part of his salary. Thus, he asserts that the monetary awards must be based on his gross monthly pay of ₱75,912.00 (basic salary with cost of living allowance, inclusive of all benefits and allowances)[20] instead of only ₱53,962.64 (basic salary with cost of living allowance). He further insists that his separation pay must include other benefits[21] in the total amount of ₱3,270,491.00.

We now rule on the final review of the case.

THE ISSUES

From the foregoing, we reduce the issues to the following:

1. Whether or not the appellate court erred in not denying the "second" Motion for Reconsideration/Clarification filed by Lazaro;

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[20] *Id*. at 56-57. Lazaro arrived at the amount of ₱75,912.00 using the following computation:

Basic Salary	₱28,330.00
Representation/Cost of Living Allowance	25,633.00
Other Benefits:	
Gasoline	2,000.00
Car Maintenance (₱8,000.00/12 mos.)	670.00
Medicine Allowance (₱2,000.00/12 mos.)	167.00
Mid Year Bonus (₱53,953.00 x 2 mos./12)	8,994.00
Christmas Bonus (₱53,963.00 x 2.25 mos./12)	10,118.00
Total Gross Monthly Pay	₱75,912.00

[21] *Id*. at 57.

Total Gross Monthly Pay	₱75,912.00
	x 12 years
	₱910,944.00
Add Other Benefits:	
Accrued Sick/Vacation Leave	₱431,704.00
Car Benefits at ₱600,000.00 every five (5) years from 1996 and 2005	₱1,800,000.00
Profit Sharing (guaranteed 2 months)	971,334.00
Unpaid 1996 Christmas Bonus	67,453.30
Grand Total Separation Pay	₱3,270,494.00
(1.25 mos. differential)	(as of January 2005, the promulgation date)

2. Whether or not the appellate court erred in computing Lazaro's gross monthly pay; and
3. Whether or not the CA rightly awarded damages and attorney's fees to respondent.

OUR RULING

Before we proceed, this Court laments the convoluted procedural mishaps attending these consolidated cases. However, it may not be amiss to point out that in the instant petitions, both parties did not question the appellate court's finding of illegal dismissal. What is before us — the monetary awards — are but a consequence of the finding of illegal dismissal. We shall therefore dispose of the procedural issues first, then proceed to the discussion of the awards.

The Amended Decision is an entirely new decision which supersedes the original decision, for which a new motion for reconsideration may be filed again.

Anent the issue of Lazaro's "second" motion for reconsideration, we disagree with the bank's contention that it is disallowed by the Rules of Court. Upon thorough examination of the procedural history of this case, the "second" motion does not partake the nature of a prohibited pleading because the Amended Decision is an entirely new decision which supersedes the original, for which a new motion for reconsideration may be filed again.

We pointed out in *Planters Development Bank v. Sps. Lopez*[22] that "[t]here is also no merit to the respondents' argument that Planters Bank's motion for reconsideration is disallowed under Section 2, Rule 52 of the Rules of Court. x x x [T]here is a difference between an amended judgment and a supplemental judgment. In an amended judgment, the lower court makes a

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[22] G.R. No. 186332, 23 October 2013, 708 SCRA 481, 492-493, citing *Magdalena Estate, Inc. v. Caluag*, 120 Phil. 338, 342 (1964); See *Lee v. Trocino*, 607 Phil. 690, 696 (2009).

thorough study of the original judgment and renders the amended and clarified judgment only after considering all the factual and legal issues. The amended and clarified decision is an entirely new decision which supersedes or takes the place of the original decision. On the other hand, a supplemental decision does not take the place of the original; it only serves to add to the original decision."

We thus rule that the appellate court did not err in not denying Lazaro's Motion for Reconsideration/Clarification on the Amended Decision because its filing is allowed under the rules.

Separation pay and backwages must include the gross monthly salary of the dismissed employee, inclusive of all the allowances and benefits or their monetary equivalent, subject to evidentiary proof.

As regards the alleged erroneous computation of Lazaro's monthly pay, it has been settled that if reinstatement is not possible, an illegally dismissed employee is entitled to separation pay and backwages, computed using his gross monthly pay, inclusive of allowances and other benefits or their monetary equivalent.[23] Such amounts however must be duly proved before it may be granted by the Court.

We are, however, compelled to deny Lazaro's prayer to include in his gross monthly salary the allowances and benefits outlined in his petition. The records are bereft of evidence to serve as a backbone for the allowances and benefits he desires. We therefore retain the amount of ₱53,962.64 as his gross monthly pay, which remains uncontested by both parties.[24]

a. Separation pay

Consequently, separation pay must be duly awarded to Lazaro because reinstatement is no longer feasible. However, the Court

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[23] *Manila Jockey Club, Inc. v. Trajano*, G.R. No. 160982, 26 June 2013.

[24] *Rollo* (G.R. No. 167187), p. 69.

has consistently ruled that the same must be computed only up to the time the employer ceased operations.[25] It cannot be held liable to pay separation pay beyond such closure of business because even if the illegally dismissed employees would be reinstated, they could not possibly work beyond the time of the cessation of its operation.[26] This is especially true when the closure was "due to legitimate business reasons and not merely an attempt to defeat the order of reinstatement."[27]

Considering that Solidbank ceased operations in 2000, Lazaro may then rightfully be considered as covered by the Solidbank-Metrobank Merger-Integration Agreement.[28] The agreement dictates that separation pay will be given to Solidbank employees not absorbed by Metrobank, with the gross monthly pay increased by 150%.

We disagree with the CA that Lazaro is not covered by the Merger-Integration Agreement because he did not apply for the same and was not offered separation pay.[29] The argument behooves logic, for how can Metrobank offer him the agreement when he was illegally dismissed as early as November 1996 and the merger only took place in June 2000. Following the premise that an illegal dismissal is a void dismissal, then Lazaro is still considered to have been employed until the merger took place. He may therefore be considered as not having received any offer from Metrobank to join the new company.

We thus compute Lazaro's separation pay from the time of his employment in 21 December 1992 up to the cessation of Solidbank's business in 31 July 2000 or 7.64 years, multiplied by his gross monthly pay increased by 150%.

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[25] *Industrial Timber Corporation Stanply Operations v. NLRC*, 323 Phil. 753 (1996).

[26] *Polymer Rubber Corporation v. Salamuding*, G.R. No. 185160, 24 July 2013, 702 SCRA 153, citing *J.A.T. General Services v. NLRC*, 465 Phil. 785, 798-799 (2004).

[27] *Id*., citing *Chronicle Securities Corp. v. NLRC*, 486 Phil. 560 (2004).

[28] *Rollo* (G.R. No. 167187), pp. 315-318.

[29] *Id*. at 70.

b. Backwages

On the other hand, backwages are computed from the time of dismissal until the finality of the decision ordering separation pay, and not merely until promulgation of the Court's decision.[30] However, considering that Solidbank ceased operations in 31 July 2000, we must compute backwages only up to the time of such cessation. To compute "backwages beyond the date of the cessation of business would not only be unjust, but confiscatory, as well as violative of the Constitution depriving the employer of his property rights."[31]

Using this yardstick, we therefore compute Lazaro's backwages from the time of his illegal dismissal on 21 December 1992 up to the time when Solidbank ceased operations on 31 July 2000, or 91.67 months, multiplied by his gross monthly pay earlier determined.

Damages and attorney's fees may only be awarded when the employee is illegally dismissed in bad faith and compelled to litigate to protect his rights by reason of the unjustified acts of the employer.

We have said that while "dismissal may be contrary to law but by itself alone, it does not establish bad faith to entitle the dismissed employee to moral damages."[32] We must note that "bad faith does not simply connote bad judgment or negligence — it imports a dishonest purpose or some moral obliquity and conscious doing of wrong. It means a breach of a known duty through some motive or interest or ill-will that partakes of the

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[30] *Bani Rural Bank, Inc. v. De Guzman*, G.R. No. 170904, 13 November 2013, 709 SCRA 330.

[31] *Retuya v. Dumarpa*, G.R. No. 148848, 5 August 2003, citing *Pizza Inn/Consolidated Foods Corporation v. NLRC*, 162 SCRA 779, 28 June 1988.

[32] *Lambert Pawnbrokers and Jewelry Corporation v. Binamira*, G.R. No. 170464, 12 July 2010, 624 SCRA 705, citing *Manila Water Company, Inc. v. Peña*, 478 Phil. 68, 84 (2004).

nature of fraud."[33] The award of moral and exemplary damages thus cannot be justified solely upon the premise that the employer dismissed his employee without authorized cause and due process."[34]

On the matter of attorney's fees, we have established that "attorney's fees may be awarded only when the employee is illegally dismissed in bad faith and is compelled to litigate or incur expenses to protect his rights by reason of the unjustified acts of his employer."[35] However, "[t]here must always be a factual basis for the award of attorney's fees. This is consistent with the policy that no premium should be placed on the right to litigate."[36]

After reviewing the records, we see no evidence that Lazaro's dismissal was tainted with bad faith nor is there any basis for the award of attorney's fees. We therefore delete the award of damages and attorney's fees.

We will no longer touch upon the award of 1996 Christmas bonus and compensatory benefit as these were not appealed by both parties.

WHEREFORE, the 19 January 2004 Decision, 1 July 2004 Amended Decision and 14 January 2005 Resolution of the CA in CA-G.R. SP No. 73629 are hereby **MODIFIED** in that Lazaro is awarded the following:

(1) separation pay computed from the time of his employment in 21 December 1992 up to the cessation of Solidbank's business in 31 July 2000 or 7.64 years, multiplied by his gross monthly pay of ₱53,962.64 increased by 150%, or a total of ₱618,411.85;

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[33] *Solidbank Corporation v. Gamier*, G.R. Nos. 159460-61, 15 November 2010, 634 SCRA 554, citing *Ford Philippines, Inc. v. CA*, 335 Phil. 1, 9 (1997).

[34] *Supra* note 28.

[35] *Pepsi Cola Products Philippines, Inc. v. Santos*, 574 Phil. 400 (2008), citing *Pascua v. NLRC*, 351 Phil. 48, 74 (1998).

[36] *Id*., citing *German Marine Agencies, Inc. v. NLRC*, 403 Phil. 572, 597 (2001).

(2) backwages computed from the time of his illegal dismissal in 30 November 1996 up to 31 July 2000 (the date Solidbank ceased operations) or 91.67 months, multiplied by his gross monthly pay of ₱53,962.64, or a total of ₱4,946,755.21;

(3) payment of 1996 Christmas bonus in the amount of ₱53,962.64; and

(4) compensatory benefit computed from November 1996 up to June 2000 or 42 months/2, multiplied by his gross monthly pay of ₱53,962.64, or a total of ₱1,133,215.40.

The award of moral and exemplary damages and attorney's fees are deleted for lack of basis.

SO ORDERED.

Leonardo-de Castro, Bersamin, Perez, and *Perlas-Bernabe, JJ.,* concur.

THIRD DIVISION

[G.R. No. 179814. December 7, 2015]

WILFRED N. CHIOK, *petitioner, vs.* **PEOPLE OF THE PHILIPPINES and RUFINA CHUA,** *respondents*.

[G.R. No. 180021. December 7, 2015]

RUFINA CHUA, *petitioner, vs.* **WILFRED N. CHIOK, and THE PEOPLE OF THE PHILIPPINES (as an unwilling co-party petitioner),** *respondents*.

SYLLABUS

1. **REMEDIAL LAW; CRIMINAL PROCEDURE; APPEALS; IT IS ONLY THE OFFICE OF THE SOLICITOR GENERAL, AS REPRESENTATIVE OF THE STATE, WHICH MAY QUESTION THE ACQUITTAL OF THE ACCUSED VIA A PETITION FOR *CERTIORARI* UNDER RULE 65; RATIONALE.—** In *Villareal v. Aliga,* we upheld the doctrine that it is only the OSG, as representative of the State, which may question the acquittal of the accused *via* a petition for *certiorari* under Rule 65, x x x The rationale behind this rule is that in a criminal case, the party affected by the dismissal of the criminal action is the State and not the private complainant. The interest of the private complainant or the private offended party is limited only to the civil liability. In the prosecution of the offense, the complainant's role is limited to that of a witness for the prosecution such that when a criminal case is dismissed by the trial court or if there is an acquittal, an appeal therefrom on the criminal aspect may be undertaken only by the State through the Solicitor General. The private offended party or complainant may not take such appeal, but may only do so as to the civil aspect of the case.

2. **ID.; ID.; RULE ON DOUBLE JEOPARDY; ELEMENTS.—** The 1987 Constitution, as well as its predecessors, guarantees the right of the accused against double jeopardy. Section 7, Rule 117 of the 1985 and 2000 Rules on Criminal Procedure strictly adhere to the constitutional proscription against double jeopardy and provide for the requisites in order for double jeopardy to attach. For double jeopardy to attach, the following elements must concur: (1) a valid information sufficient in form and substance to sustain a conviction of the crime charged; (2) a court of competent jurisdiction; (3) the accused has been arraigned and had pleaded; and (4) the accused was convicted or acquitted or the case was dismissed without his express consent.

3. **ID.; ID.; ID.; FINALITY OF ACQUITTAL RULE; IN ORDER TO GIVE LIFE TO THE RULE ON DOUBLE JEOPARDY, OUR RULES ON CRIMINAL PROCEEDINGS REQUIRE THAT A JUDGMENT OF ACQUITTAL IS FINAL, UNAPPEALABLE, AND IMMEDIATELY EXECUTORY UPON ITS PROMULGATION.—** In order to give life to

the rule on double jeopardy, our rules on criminal proceedings require that a judgment of acquittal, whether ordered by the trial or the appellate court, is final, unappealable, and immediately executory upon its promulgation. This is referred to as the "finality-of-acquittal" rule. The rationale for the rule was explained in *People v. Velasco*: x x x There were cases, however, where we recognized certain exceptions to the rule against double jeopardy and its resultant doctrine of finality-of-acquittal. In *Galman v. Sandiganbayan*, we remanded a judgment of acquittal to a trial court due to a finding of mistrial. In declaring the trial before the *Sandiganbayan* of the murder of former Senator Benigno Simeon "Ninoy" Aquino, Jr., which resulted in the acquittal of all the accused, as a sham, we found that "the prosecution and the sovereign people were denied due process of law with a partial court and biased [*Tanodbayan*] under the constant and pervasive monitoring and pressure exerted by the authoritarian [p]resident to assure the carrying out of his instructions." We considered the acquittal as void, and held that no double jeopardy attached. In *People v. Uy*, we held that by way of exception, a judgment of acquittal in a criminal case may be assailed in a petition for certiorari under Rule 65 of the Rules of Court upon clear showing by the petitioner that the lower court, in acquitting the accused, committed not merely reversible errors of judgment but grave abuse of discretion amounting to lack or excess of jurisdiction or a denial of due process, thus rendering the assailed judgment void.

4. ID.; ID.; APPEALS; THE RULE APPLICABLE AT THE TIME OF APPEAL EXPLICITLY PROVIDES THAT THE RIGHT TO APPEAL IS NOT AUTOMATICALLY FORFEITED WHEN THE ACCUSED FAILS TO APPEAR DURING THE PROMULGATION OF JUDGMENT; EXPLAINED.— Chiok filed his Notice of Appeal on June 18, 1999 at the time when the 1985 Rules on Criminal Procedure was still in effect. Section 6, Rule 120 of the 1985 Rules on Criminal Procedure explicitly provides that the right to appeal is not automatically forfeited when an accused fails to appear during the promulgation of judgment. x x x The aforecited section gives the CA the authority to dismiss an appeal for abandonment if the accused escapes from prison or confinement or jumps bail or flees to a foreign country during the pendency of the appeal. This authority to dismiss an appeal is, nevertheless,

discretionary. When an accused jumps bail during the pendency of his appeal, the appellate court may exercise its discretion whether to proceed with the appeal or dismiss it outright. In several cases, we still proceeded to acquit an accused who remained at large during the pendency of the appeal.

5. ID.; ID.; JUDGMENTS; AS A RULE, IF THE ACQUITTAL IS BASED ON REASONABLE DOUBT, THE ACCUSED IS NOT AUTOMATICALLY EXEMPT FROM CIVIL LIABILITY WHICH MAY BE PROVED BY PREPONDERANCE OF EVIDENCE ONLY; APPLICATION IN CASE AT BAR.— In *Castillo v. Salvador* and several cases before it, we ruled that if the acquittal is based on reasonable doubt, the accused is not automatically exempt from civil liability which may be proved by preponderance of evidence only. In this regard, preponderance of evidence is the weight, credit, and value of the aggregate evidence on either side and is usually considered to be synonymous with the term "greater weight of the evidence" or "greater weight of the credible evidence." Preponderance of evidence is evidence which is more convincing to the court as worthy of belief than that which is offered in opposition thereto. While the CA acquitted Chiok on the ground that the prosecution's evidence on his alleged misappropriation of Chua's money did not meet the quantum of proof beyond reasonable doubt, we hold that the monetary transaction between Chua and Chiok was proven by preponderance of evidence.

6. ID.; CIVIL ACTIONS; DOCTRINE OF *RES JUDICATA*; UNDER THE DOCTRINE, A FINAL JUDGMENT OR DECREE ON THE MERITS BY A COURT OF COMPETENT JURISDICTION IS CONCLUSIVE OF THE RIGHTS OF THE PARTIES OR THEIR PRIVIES IN ALL LATER SUITS ON POINTS AND MATTERS DETERMINED ON THE FORMER SUIT.— The doctrine of *res judicata* under the concept of "conclusiveness of judgment" is found in paragraph (c) of Section 47, Rule 39 of the Revised Rules of Court. Under this doctrine, a final judgment or decree on the merits by a court of competent jurisdiction is conclusive of the rights of the parties or their privies in all later suits on points and matters determined in the former suit. Stated differently, facts and issues actually and directly resolved in a former suit cannot again be raised in any future case between

the same parties, even if the latter suit may involve a different cause of action. This principle of *res judicata* bars the re-litigation of particular facts or issues in another litigation between the same parties on a different claim or cause of action.

7. ID.; ID.; ID.; CIVIL ACTION IN BP 22 CASE IS NOT A BAR TO A CIVIL ACTION IN AN ESTAFA CASE; SUSTAINED; ELUCIDATED; APPLICATION IN CASE AT BAR.— In *Rodriguez v. Ponferrada,* we explained that a civil action in a BP 22 case is not a bar to a civil action in *estafa* case. In rejecting the theory of petitioner therein that the civil action arising from the criminal case for violation of BP 22 precludes the institution of the corresponding civil action in the criminal case for *estafa* pending before the RTC, we ruled that Rule 111 of the Rules of Court expressly allows the institution of a civil action in the crimes of both *estafa* and violation of BP 22, without need of election by the offended party. There is no forum shopping because both remedies are simultaneously available to the offended party. We explained that while every such act of issuing a bouncing check involves only one civil liability for the offended party who has sustained only a single injury, this single civil liability can be the subject of both civil actions in the *estafa* case and the BP 22 case. However, there may only be one recovery of the single civil liability. We affirmed this in *Rimando v. Aldaba,* where we were confronted with the similar issue of whether an accused's civil liability in the *estafa* case must be upheld despite acquittal and exoneration from civil liability in BP 22 cases. We held that both *estafa* and BP 22 cases can proceed to their final adjudication–both as to their criminal and civil aspects–subject only to the prohibition on double recovery. Since the Rules itself allows for both remedies to be simultaneously availed of by the offended party, the doctrine of *res judicata* finds no application here. Moreover, the principle of *res judicata* in the concept of conclusiveness of judgment presupposes that facts and issues were actually and directly resolved in a previous case. x x x The basis for Chiok's acquittal therein is the prosecution's failure to show that a notice of dishonor was first given to Chiok. The discussion that the prosecution's version is incredible was merely secondary, and was not necessary, for accused's acquittal. There were no findings of fact on the transaction which gives rise to the civil liability. In light of these, we reject Chiok's claim that *res judicata* in

the concept of conclusiveness of judgment bars Chua from recovering any civil claims.

APPEARANCES OF COUNSEL

Cruz Durian Alday & Cruz Matters for Wilfred Chiok.
The Solicitor General for public respondent.
Romulo Mabanta Buenaventura Sayoc & Delos Angeles Law Offices for Rufina Chua.

D E C I S I O N

JARDELEZA, *J.*:

These are consolidated petitions[1] seeking to nullify the Court of Appeals' (CA) July 19, 2007 Decision[2] and October 3, 2007 Resolution[3] in CA-G.R. CR No. 23309. The CA reversed and set aside the December 3, 1998 Decision[4] of the Regional Trial Court (RTC) of Pasig-Branch 165, and acquitted petitioner Wilfred Chiok (Chiok) of the crime of *estafa* in Criminal Case No. 109927, but ordered him to pay civil liability to Rufina Chua in the total amount of ₱9,500,000.00, plus interests:

WHEREFORE, the **DECISION DATED DECEMBER 3, 1998** is **REVERSED AND SET ASIDE** and accused **WILFRED N.**

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[1] Petition for Review on *Certiorari* filed by Wilfred Chiok, *rollo,* G.R. No. 179814, pp. 83-97; and Petition for *Certiorari* and *Mandamus*, and Petition for Review on *Certiorari* filed by Rufina Chua, *rollo,* G.R. No. 180021, pp. 36-110. We resolved to consolidate these petitions in our Resolution dated March 16, 2011; See *rollo*, G.R. No. 179814, pp. 392-393.

[2] *Rollo,* G.R. No. 179814, pp. 12-48; penned by Associate Justice Lucas P. Bersamin and concurred in by Associate Justices Noel G. Tijam and Marlene Gonzales-Sison, (Special Division of Five). See dissent by Associate Justice Estela M. Perlas-Bernabe, joined by Associate Justice Marina L. Buzon, *rollo,* G.R. No. 179814, pp. 49-54.

[3] *Id.* at 73-80; penned by Associate Justice Lucas P. Bersamin and concurred in by Associate Justices Noel G. Tijam, Marlene Gonzales-Sison, Estela M. Perlas-Bernabe, and Marina L. Buzon (Special Division of Five).

[4] *Rollo*, G.R. No. 180021, pp. 111-133; penned by Judge Marietta A. Legaspi.

CHIOK is **ACQUITTED** for failure of the Prosecution to prove his guilt beyond reasonable doubt, but he is **ORDERED** to pay complainant **RUFINA CHUA** the principal amount of [₱]9,500,000.00, plus legal interest of 6% *per annum* reckoned from the filing of this case, which rate shall increase to 12% *per annum* from the finality of judgment.

No pronouncement on costs of suit.

SO ORDERED.[5] (Emphasis in original)

STATEMENT OF FACTS

Chiok was charged with *estafa*, defined and penalized under Article 315, paragraph 1 (b) of the Revised Penal Code, in an Information that reads:

That sometime in June, 1995 in the Municipality of San Juan, Metro Manila, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, received in trust from Rufina Chua the amount of ₱9,563,900.00 for him to buy complainant shares of stocks, under the express obligation on the part of the accused to deliver the documents thereon or to return the whole amount if the purchase did not materialize, but the accused once in possession of the said amount, far from complying with his obligation as aforesaid, with intent to defraud the complainant, did then and there willfully, unlawfully and feloniously misapply, misappropriate and convert to his own personal use and benefit the said amount of ₱9,563,900.00, and despite repeated demands failed and refused and still fails and refuses to return the said amount or to account for the same, to the damage and prejudice of the complainant Rufina Chua in the aforementioned amount of ₱9,563,900.00.

CONTRARY TO LAW.[6]

Chiok pleaded not guilty to the crime charged. Thereafter, trial ensued, with both parties presenting their evidence in support of their respective claims and defenses.

According to the Prosecution, petitioner Rufina Chua (Chua) met Chiok in mid-1989, during which he offered to be her

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[5] *Rollo,* G.R. No. 179814, pp. 47-48.

[6] RTC records, Vol. I, p. 1.

investment adviser. Convinced by Chiok's representations and the fact that he is Chinese, Chua made an initial investment of ₱200,000.00, allegedly to buy Meralco and PLDT shares. She rolled over the original investment and profits, and this went on until 1994. For each of their transactions, Chua claimed she was not given any document evidencing every stock transaction and that she only relied on the assurances of Chiok. In mid-1995, she accepted his proposal to buy shares in bulk in the amount of ₱9,563,900.00. Chua alleged that she deposited ₱7,100,000.00 to Chiok's Far East Bank, Annapolis account on June 9, 1995 and delivered to him ₱2,463,900.00 in cash later that same date at the Han Court Restaurant in Annapolis, Greenhills. As proof, she presented a deposit slip dated June 9, 1995 of Chiok's Far East Bank Annapolis account. There was no receipt or memorandum for the cash delivery.[7]

Chua narrated that she became suspicious when Chiok later on avoided her calls and when he failed to show any document of the sale. He reassured her by giving her two interbank checks, Check No. 02030693 dated July 11, 1995 for ₱7,963,900.00 and Check No. 02030694 dated August 15, 1995 in the amount of ₱1,600,000.00 (interbank checks). The interbank checks were given with the request to deposit the first check only after 60-75 days to enable him to generate funds from the sale of a property in Hong Kong. Both interbank checks were ultimately dishonored upon presentment for payment due to garnishment and insufficiency of funds. Despite Chua's pleas, Chiok did not return her money. Hence, she referred the matter to her counsel who wrote a demand letter dated October 25, 1995. Chiok sent her a letter-reply dated November 16, 1995 stating that the money was Chua's investment in their unregistered partnership, and was duly invested with Yu Que Ngo. In the end, Chua decided to file her complaint-affidavit against him in the Pasig Prosecutor's Office.[8]

In his defense, Chiok denied that he enticed Chua to invest in the stock market, or offered her the prospect of buying shares

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[7] CA Decision dated July 19, 2007, *rollo,* G.R. No. 179814, pp. 13-14.

[8] *Id.* at 14-15.

of stocks in bulk. Chiok maintained that from the time he met her in 1991 and until 1995, he previously only had dollar transactions with Chua. It was in 1995 when both of them decided to form an unregistered partnership. He admitted that the ₱7,963,900.00 she gave him before she left for the United States was her investment in this unregistered partnership. Chua allegedly instructed him to invest according to his best judgment and asked him to issue a check in her name for her peace of mind. Chiok denied having received the ₱2,463,900.00 in cash from her.[9]

On cross-examination, however, Chiok admitted receiving "₱7.9" million in June 1995 and "₱1.6" million earlier.[10] He testified that exercising his best judgment, he invested ₱8,000,000.00 with Yu Que Ngo, a businesswoman engaged in the manufacture of machine bolts and screws under the name and style of Capri Manufacturing Company.[11] Chiok narrated that Chua only panicked when she learned that he was swindled by one Gonzalo Nuguid, who supplied him with dollars.[12] It was then that she immediately demanded the return of her investment. To reassure Chua, Chiok informed her that he had invested the money with Yu Que Ngo and offered to give Yu Que Ngo's checks to replace his previously issued interbank checks.[13] Chua agreed, but instead of returning his checks, she retained them along with the checks of Yu Que Ngo. Chua rejected Yu Que Ngo's offer to settle her obligation with land and machineries, insisting on recovering the "whole amount plus interest, litigation expenses plus attorney's fees."[14] After the

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[9] *Id.* at 15-16.

[10] Transcript of Stenographic Notes (TSN), October 13, 1997, p. 23. CA *rollo*, Vol. I, p. 1215.

[11] TSN, June 3, 1997, pp. 33-34.

[12] *Rollo*, G.R. No. 179814, p. 17.

[13] The checks of Yu Que Ngo that were given to Chua were Metrobank Check No. 0261666961 dated August 15, 1995 for ₱2,000,000.00 and Metrobank Check No. 0261666962 dated October 15, 1995 for ₱6,000,000.00, *id.* at 17.

[14] *Id.* at 16.

case was filed, Chiok and Yu Que Ngo met with Chua, accompanied by their lawyers, in an effort to amicably settle Chua's demand for the return of her funds. Chua demanded more than ₱30,000,000.00, but Chiok and Yu Que Ngo requested for a lower amount because the original claim was only ₱9,500,000.00. Chua did not grant their request.[15]

In a Decision[16] dated December 3, 1998, the RTC convicted Chiok of the crime of *estafa* (RTC conviction). Its dispositive portion reads:

> In View Of All The Foregoing, the Court hereby finds the accused Wilfred N. Chiok guilty beyond reasonable doubt of the crime of estafa under Art. 315, paragraph 1(b) of the Revised Penal Code.
>
> Applying the Indeterminate Sentence Law, the Court hereby sentences the accused to suffer imprisonment of twelve (12) years of prision mayor as minimum to twenty (20) years of reclusion temporal as maximum and to pay the costs.
>
> The accused is ordered to pay the private complainant the amount of ₱9,563,900.00 with interest at the legal rate to be computed from the date of demand – October 25, 1995 until fully paid.
>
> For want of evidence, the Court cannot award the alleged actual damages.
>
> SO ORDERED.[17]

The prosecution filed a Motion for Cancellation of Bail[18] pursuant to Section 5, Rule 114 of the 1985 Rules on Criminal Procedure on February 1, 1999, the same day the judgment was promulgated.[19]

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[15] *Id.* at 17-18.

[16] RTC records, Vol. II, pp. 325-345.

[17] *Id.* at 345.

[18] *Id.* at 348-356.

[19] Section 5. *Bail, when discretionary*.—Upon conviction by the Regional Trial Court of an offense not punishable by death, *reclusion perpetua* or life imprisonment, the court, on application, may admit the accused to bail.

On February 15, 1999, Chiok filed a Motion for Reconsideration[20] of the RTC conviction.

The RTC, in an omnibus order[21] dated May 28, 1999 (omnibus order), denied Chiok's motion for reconsideration, and also cancelled his bail pursuant to Section 5, Rule 114 of the 1985 Rules on Criminal Procedure. The RTC held that the circumstances of the accused indicated the probability of flight if released on bail and/or that there is undue risk that during the pendency of the appeal, he may commit another crime. Thus:

> WHEREFORE, the bail of the accused is cancelled. The accused is given five (5) days from receipt of this order within which to surrender before this Court otherwise, his arrest will be ordered.
>
> SO ORDERED.[22]

The court, in its discretion, may allow the accused to continue on provisional liberty under the same bail bond during the period of appeal subject to the consent of the bondsman.

If the court imposed a penalty of imprisonment exceeding six (6) years but not more than twenty (20) years, the accused shall be denied bail, or his bail previously granted shall be cancelled, upon a showing by the prosecution, with notice to the accused, of the following or other similar circumstances:

(a) That the accused is a recidivist, quasi-recidivist, or habitual delinquent, or has committed the crime aggravated by the circumstance of reiteration;

(b) That the accused is found to have previously escaped from legal confinement, evaded sentence, or has violated the conditions of his bail without valid justification;

(c) That the accused committed the offense while on probation, parole, or under conditional pardon;

(d) That the circumstances of the accused or his case indicate the probability of flight of released on bail; or

(e) That there is undue risk that during the pendency of the appeal, the accused may commit another crime.

The appellate court may review the resolution of the Regional Trial Court, on motion and with notice to the adverse party.

[20] RTC records, Vol. II, pp. 372-383.

[21] *Rollo*, G.R. No. 180021, pp. 134-152.

[22] *Id.* at 151-152.

On June 18, 1999, Chiok filed a Notice of Appeal[23] on the RTC conviction and omnibus order, docketed as CA-G.R. CR No. 23309 (the appeal case) and raffled to the CA Fifteenth Division. On June 19, 1999, Chiok also filed a Petition for Certiorari and Prohibition with a prayer for Temporary Restraining Order (TRO) and/or Injunction against the omnibus order,[24] which was docketed as CA-G.R. CR No. 53340 (bail case) and raffled to the CA Thirteenth Division.

Meanwhile, the RTC issued an order of arrest[25] on June 25, 1999 (order of arrest) pursuant to the omnibus order. The order of arrest was returned to the trial court by the Makati Police Station on July 25, 1999 on the ground that Chiok could not be located at his last given address.[26]

The Bail Case

On July 27, 1999, the CA issued a TRO on the implementation of the omnibus order until further orders.[27] On September 20, 1999, the CA issued a writ of preliminary injunction[28] enjoining the arrest of Chiok. The CA ruled that Chiok should not be deprived of liberty pending the resolution of his appeal because the offense for which he was convicted is a non-capital offense, and that the probability of flight during the pendency of his appeal is merely conjectural.[29] The Office of the Solicitor General (OSG) and Chua filed a motion for reconsideration but it was denied by the CA in a Resolution dated November 16, 1999.

On November 3, 1999, the OSG representing the People of the Philippines, and Chua, filed separate petitions for certiorari before us seeking review of the CA Resolutions dated September

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[23] CA *rollo,* Vol. I, pp. 18-19.

[24] *Id.* at 55-77.

[25] RTC records, Vol. II, pp. 538-539.

[26] *Rollo*, G.R. No. 180021, p. 46.

[27] *Id.* at 514.

[28] *Id.* at 509-512.

[29] *Id*. at 510-511.

20, 1999 and November 16, 1999.[30] We granted the OSG's and Chua's petitions and reversed the CA's injunction on the arrest of Chiok.[31] Our decisions (SC bail decisions) became final on December 6, 2006 and June 20, 2007, respectively.

The Appeal Case

On September 21, 1999, the CA Thirteenth Division dismissed the appeal of Chiok finding him to have jumped bail when the order of arrest was returned unserved.[32] The CA considered his appeal abandoned, dismissing it pursuant to Section 8, Rule 124 of the 1985 Rules on Criminal Procedure. However, on February 29, 2000, the CA reinstated Chiok's appeal when it learned of the issuance of the TRO and injunction in the bail case on September 20, 1999 or a day prior to the appeal's dismissal.[33]

Proceedings before the CA ensued. Chiok filed his Appellant's Brief[34] dated August 28, 2003 while the OSG filed its Appellee's Brief[35] dated December 23, 2003. Chiok submitted his Reply Brief[36] dated April 14, 2004 while the OSG and Chua replied through their Rejoinder Briefs[37] dated October 6, 2004.

On July 19, 2007, the CA in a Special Division of Five (Former Fourth Division) rendered a Decision reversing and setting aside the Decision dated December 3, 1998 of the trial court, and

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[30] The petitions were docketed as G.R. No. 140285 and G.R. No. 140842, correspondingly.

[31] *People of the Philippines v. CA and Wilfred N. Chiok,* G.R. No. 140285, September 27, 2006, 503 SCRA 417 and *Rufina Chua v. Court of Appeals and Wilfred N. Chiok,* G.R. No. 140842, April 12, 2007, 520 SCRA 729.

[32] CA *rollo*, Vol. I, p. 28.

[33] *Rollo*, G.R. No. 180021, pp. 513-515.

[34] CA *rollo*, Vol. III, pp. 113-177.

[35] *Id.* at 356-388.

[36] *Id.* at 547-566.

[37] *Id*. at 865-904.

acquitted Chiok for failure of the prosecution to prove his guilt beyond reasonable doubt (CA acquittal).

The CA found that the RTC conviction did not contain findings of fact on the prosecution's evidence but merely recited the evidence of the prosecution as if such evidence was already proof of the ultimate facts constituting *estafa*. Instead of relying on the strength of the prosecution's evidence, the trial court relied on the weakness of the defense. It found that Chua's testimony, which was the sole evidence of the prosecution, was inconsistent and improbable. Specifically, it was irregular that Chua was not able to produce any single receipt or documentary evidence of all the alleged stock dealings which spanned for a long period of six years with Chiok–the purpose of which was to prove that he misappropriated the amount contrary to her instructions of investing it to blue chip stocks. More importantly, the acceptance by Chua of the checks issued by Yu Que Ngo ratified his application of the funds based on the instructions to invest it. Simply put, the prosecution was not able to prove the element of misappropriation (*i.e.,* deviation from Chua's instructions). As to the civil aspect, the CA found Chiok liable to Chua for the amount of ₱9,500,000.00,[38] the amount he admitted on record.

The OSG did not file a motion for reconsideration on the ground of double jeopardy. Chua, on the other hand, filed a motion for reconsideration[39] on August 8, 2007. Chiok also filed his own motion for reconsideration,[40] on the civil liability imposed on him.

In a Resolution[41] dated October 3, 2007, the CA denied Chua's motion for reconsideration and its supplement on the ground that acquittal is immediately final and the re-examination of the record of the case would violate the guarantee against double

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[38] *Rollo*, G.R. No. 179814, p. 36.

[39] CA *rollo,* Vol. III, pp. 962-996.

[40] *Rollo*, G.R. No. 179814, pp. 60-71.

[41] *Id.* at 73-80.

jeopardy. It also denied the motions for reconsideration of both parties on the civil aspect of the case.

Hence, these consolidated petitions questioning the CA acquittal by way of a petition for certiorari and mandamus, and the civil aspect of the case by way of appeal by certiorari.

Issues

The consolidated petitions raise the following issues:

I. Whether or not Chua has a legal personality to file and prosecute this petition.

II. Whether or not the case is an exception to the rule on finality of acquittal and the doctrine of double jeopardy.

III. Whether or not Chiok is civilly liable to Chua.

Discussion

I. Chua lacks the legal personality to file this petition.

Chua argues that her petition should be allowed because the circumstances of this case warrant leniency on her lack of personality to assail the criminal aspect of the CA acquittal. She argues that "the OSG did not take any action to comment on the position of Chua [and] that this case belongs to the realm of exceptions to the doctrine of double jeopardy."[42]

We disagree with Chua.

Chua lacks the personality or legal standing to question the CA Decision because it is only the OSG, on behalf of the State, which can bring actions in criminal proceedings before this Court and the CA.

In *Villareal v. Aliga,*[43] we upheld the doctrine that it is only the OSG, as representative of the State, which may question

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[42] *Rollo,* G.R. No. 180021, p. 70.

[43] G.R. No. 166995, January 13, 2014, 713 SCRA 52, 64-66, citing *Bautista v. Cuneta-Pangilinan*, G.R. No. 189754, October 24, 2012, 684 SCRA 521, 534-537.

the acquittal of the accused *via* a petition for certiorari under Rule 65, *viz*:

x x x **The authority to represent the State in appeals of criminal cases before the Supreme Court and the CA is solely vested in the Office of the Solicitor General (OSG).** Section 35 (1), Chapter 12, Title III, Book IV of the 1987 Administrative Code explicitly provides that the OSG shall represent the Government of the Philippines, its agencies and instrumentalities and its officials and agents in any litigation, proceeding, investigation or matter requiring the services of lawyers. It shall have specific powers and functions to represent the Government and its officers in the Supreme Court and the CA, and all other courts or tribunals in all civil actions and special proceedings in which the Government or any officer thereof in his official capacity is a party. The OSG is the law office of the Government.

To be sure, in criminal cases, the acquittal of the accused or the dismissal of the case against him can only be appealed by the Solicitor General, acting on behalf of the State. The private complainant or the offended party may question such acquittal or dismissal only insofar as the civil liability of the accused is concerned. In a catena of cases, this view has been time and again espoused and maintained by the Court. In *Rodriguez v. Gadiane*, it was categorically stated that if the criminal case is dismissed by the trial court or if there is an acquittal, the appeal on the criminal aspect of the case must be instituted by the Solicitor General in behalf of the State. The capability of the private complainant to question such dismissal or acquittal is limited only to the civil aspect of the case. The same determination was also arrived at by the Court in *Metropolitan Bank and Trust Company v. Veridiano II*. In the recent case of *Bangayan, Jr. v. Bangayan*, the Court again upheld this guiding principle.

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Thus, the Court has definitively ruled that in a criminal case in which the offended party is the State, the interest of the private complainant or the private offended party is limited to the civil liability arising therefrom. **If a criminal case is dismissed by the trial court or if there is an acquittal, an appeal of the criminal aspect may be undertaken, whenever legally feasible, only by the State through the Solicitor General.** As a rule, only the Solicitor General may represent the People of the Philippines on appeal. The

private offended party or complainant may not undertake such appeal. (Emphasis supplied)

The rationale behind this rule is that in a criminal case, the party affected by the dismissal of the criminal action is the State and not the private complainant.[44] The interest of the private complainant or the private offended party is limited only to the civil liability.[45] In the prosecution of the offense, the complainant's role is limited to that of a witness for the prosecution such that when a criminal case is dismissed by the trial court or if there is an acquittal, an appeal therefrom on the criminal aspect may be undertaken only by the State through the Solicitor General.[46] The private offended party or complainant may not take such appeal, but may only do so as to the civil aspect of the case.[47]

Although there are instances when we adopt a liberal view and give due course to a petition filed by an offended party, we direct the OSG to file its comment.[48] When through its comment, the OSG takes a position similar to the private complainant's, we hold that the OSG ratifies and adopts the private complainant's petition as its own.[49] However, when the OSG in its comment neither prays that the petition be granted nor expressly ratifies and adopts the petition as its own, we hesitate in disregarding, and uphold instead, the rule on personality or legal standing.[50]

In this case, the OSG neither appealed the judgment of acquittal of the CA nor gave its conformity to Chua's special civil action for certiorari and mandamus. In its Comment[51] dated March

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[44] *People v. Piccio*, G.R. No. 193681, August 6, 2014, 732 SCRA 254, 261-262. Citations omitted.

[45] *People v. Santiago*, G.R. No. 80778, June 20, 1989, 174 SCRA 143.

[46] *Id.*

[47] *Id.*

[48] See *Montañez v. Cipriano*, G.R. No. 181089, October 22, 2012, 684 SCRA 315.

[49] *Id.* at 322.

[50] *Villareal v. Aliga, supra* at 66.

[51] *Rollo*, G.R. No. 179814, pp. 302-315.

27, 2008, the OSG is of the view that Chua's petition will place Chiok in double jeopardy:

> x x x Notably, while petitioner [Chua] imputes grave abuse of discretion on the Court of Appeals in acquitting private respondent, a perusal of the allegations will reveal errors of judgment in the appreciation of evidence, not error of jurisdiction. Verily, petitioner contends that the Court of Appeals abused its discretion when it pronounced that "we have also reviewed the evidence of the accused in order to satisfy ourselves about the essential question of misappropriation or conversion" and hold thereafter that "review now justifies us to pronounce that his version on the matter was probably credible." Petitioner argues that a simple review of the evidence of respondent accused readily leads to the conclusion that it is very far from being probably credible.
>
> Clearly, the errors ascribed to the Court of Appeals are errors that go deeply into the appreciation and assessment of the evidence presented by the prosecution and the defense during the trial. Thus, the present petition smacks in the heart of the Court of [Appeals'] appreciation of evidence x x x.[52]

In view of the contrary position of the OSG, we do not subscribe to Chua's view that the circumstances of this case warrant the relaxation on the rule. Even if we do relax this procedural rule, we find that the merits of the case still calls for the dismissal of Chua's petition.

II. The appeal from the judgment of acquittal will place Chiok in double jeopardy.

The 1987 Constitution, as well as its predecessors, guarantees the right of the accused against double jeopardy.[53] Section 7, Rule 117 of the 1985 and 2000 Rules on Criminal Procedure strictly adhere to the constitutional proscription against double jeopardy and provide for the requisites in order for double jeopardy to attach. For double jeopardy to attach, the following elements must concur: (1) a valid information sufficient in form and

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[52] *Id.* at 309-310.

[53] CONSTITUTION, Art. III, Sec. 21. See also CONSTITUTION, (1973), Art. IV, Sec. 22 and CONSTITUTION, (1935), Art. III, Sec. 1, par. 20.

substance to sustain a conviction of the crime charged; (2) a court of competent jurisdiction; (3) the accused has been arraigned and had pleaded; and (4) the accused was convicted or acquitted or the case was dismissed without his express consent.[54]

In order to give life to the rule on double jeopardy, our rules on criminal proceedings require that a judgment of acquittal, whether ordered by the trial or the appellate court, is final, unappealable, and immediately executory upon its promulgation.[55] This is referred to as the "finality-of-acquittal" rule. The rationale for the rule was explained in *People v. Velasco*:[56]

> The fundamental philosophy highlighting the finality of an acquittal by the trial court cuts deep into "the humanity of the laws and in a jealous watchfulness over the rights of the citizen, when brought in unequal contest with the State. x x x." Thus, Green expressed the concern that "(t)he underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that **the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty."**
>
> It is axiomatic that on the basis of humanity, fairness and justice, an acquitted defendant is entitled to the right of repose as a direct consequence of the finality of his acquittal. The philosophy underlying this rule establishing the absolute nature of acquittals is "part of the paramount importance criminal justice system attaches to the protection of the innocent against wrongful conviction." **The interest in the finality-of-acquittal rule, confined exclusively to verdicts of not guilty, is easy to understand: it is a need for "repose," a desire to know the exact extent of one's liability.** With this right of repose, the criminal justice system has built in a protection to

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[54] See *People v. City Court of Silay*, G.R. No. L-43790, December 9, 1976, 74 SCRA 247, 253. See also *Tiu v. Court of Appeals*, G.R. No. 162370, April 21, 2009, 586 SCRA 118, 126.

[55] *Villareal v. Aliga, supra* note 43, at 70.

[56] G.R. No. 127444, September 13, 2000, 340 SCRA 207, 240-241.

insure that the innocent, even those whose innocence rests upon a jury's leniency, will not be found guilty in a subsequent proceeding.

Related to his right of repose is the defendant's interest in his right to have his trial completed by a particular tribunal. This interest encompasses his right to have his guilt or innocence determined in a single proceeding by the initial jury empanelled to try him, for society's awareness of the heavy personal strain which the criminal trial represents for the individual defendant is manifested in the willingness to limit Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws. The ultimate goal is prevention of government oppression; the goal finds its voice in the finality of the initial proceeding. As observed in *Lockhart v. Nelson*, **"(t)he fundamental tenet animating the Double Jeopardy Clause is that the State should not be able to oppress individuals through the abuse of the criminal process." Because the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair**. (Citations omitted, emphasis supplied)

There were cases, however, where we recognized certain exceptions to the rule against double jeopardy and its resultant doctrine of finality-of-acquittal.

In *Galman v. Sandiganbayan*,[57] we remanded a judgment of acquittal to a trial court due to a finding of mistrial. In declaring the trial before the *Sandiganbayan* of the murder of former Senator Benigno Simeon "Ninoy" Aquino, Jr., which resulted in the acquittal of all the accused, as a sham, we found that "the prosecution and the sovereign people were denied due process of law with a partial court and biased [*Tanodbayan*] under the constant and pervasive monitoring and pressure exerted by the authoritarian [p]resident to assure the carrying out of his instructions."[58] We considered the acquittal as void, and held that no double jeopardy attached.

In *People v. Uy*,[59] we held that by way of exception, a judgment of acquittal in a criminal case may be assailed in a petition for

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[57] G.R. No. 72670, September 12, 1986, 144 SCRA 43.

[58] *Id.* at 88.

[59] G.R. No. 158157, September 30, 2005, 471 SCRA 668, 680-681.

certiorari under Rule 65 of the Rules of Court upon clear showing by the petitioner that the lower court, in acquitting the accused, committed not merely reversible errors of judgment but grave abuse of discretion amounting to lack or excess of jurisdiction or a denial of due process, thus rendering the assailed judgment void.

Chua assails the acquittal of Chiok on two grounds. *First*, the first jeopardy did not attach because the CA did not have jurisdiction over the appeal; Chiok having lost his right to appeal when the CA found him to have jumped bail. *Second,* assuming that the first jeopardy attached, the circumstances of this case is an exception to the rule on double jeopardy.

A. The CA had jurisdiction to entertain Chiok's appeal.

Chua claims that the SC bail decisions set aside as bereft of any factual or legal basis the CA resolutions in the bail case which enjoined the cancellation of bail of Chiok and his warrant of arrest by the trial court. The logical and legal consequence of the nullification of the CA resolutions is to automatically revive the CA's Resolution dated September 21, 1999 dismissing the appeal of Chiok. Accordingly, the CA had no jurisdiction to entertain the appeal of Chiok and the proceedings therein are null and void.

We find no merit in Chua's claims.

At the outset, the CA validly acquired jurisdiction over Chiok's appeal. Chiok filed his Notice of Appeal on June 18, 1999 at the time when the 1985 Rules on Criminal Procedure was still in effect. Section 6, Rule 120 of the 1985 Rules on Criminal Procedure explicitly provides that the right to appeal is not automatically forfeited when an accused fails to appear during the promulgation of judgment.[60] Upon perfection of Chiok's

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[60] Said section provides:

Section 6. *Promulgation of judgment*-The judgment is promulgated by reading the same in the presence of the accused and any judge of the court in which it was rendered. However, if the conviction is for a light

Notice of Appeal and the subsequent denial of the prosecution's Motion to Deny Due Course to the Notice of Appeal by the RTC in its Order[61] dated July 15, 1999, the CA completely acquired jurisdiction over Chiok's appeal.

After acquiring jurisdiction over the appeal, the CA took cognizance of the unserved order of arrest. Exercising jurisdiction over Chiok's appeal, the CA in its Resolution dated September 21, 1999 dismissed his appeal in accordance with Section 8, Rule 124 of the 1985 Rules on Criminal Procedure:

Sec. 8. *Dismissal of appeal for abandonment or failure to prosecute.*– The appellate court may, upon motion of the appellee or on its own motion and notice to the appellant, dismiss the appeal

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offense, the judgment may be pronounced in the presence of his counsel or representative. When the judge is absent or outside of the province or city, the judgment may be promulgated by the clerk of court…

The proper clerk of court shall give notice to the accused personally or through his bondsman or warden and counsel, requiring him to be present at the promulgation of the decision. **In case the accused fails to appear thereat the promulgation shall consist in the recording of the judgment in the criminal docket and a copy thereof shall be served upon the accused or counsel. If the judgment is for conviction and the accused's failure to appear was without justifiable cause, the court shall further order the arrest of the accused, who may appeal within fifteen (15) days from notice of the decision to him or his counsel**. (Emphasis supplied)

The nuance between the 1985 and the 2000 Rules on Criminal Procedure was explained in the (*Pascua v. CA,* G.R. No. 140243, December 14, 2000, 348 SCRA 197, 205-206*)* case, to wit:

Here lies the difference in the two versions of the section. **The old rule automatically gives the accused 15 days from notice (of the decision) to him or his counsel within which to appeal. In the new rule, the accused who failed to appear without justifiable cause shall lose the remedies available in the Rules against the judgment.** However, within 15 days from promulgation of judgment, the accused may surrender and file a motion for leave of court to avail of these remedies. He shall state in his motion the reasons for his absence at the scheduled promulgation and if he proves that his absence was for a justifiable cause, he shall be allowed to avail of said remedies within 15 days from notice. (Emphasis supplied)

[61] *Rollo,* G.R. No. 180021, pp. 664-669.

if the appellant fails to file his brief within the time prescribed by this Rule, except in case the appellant is represented by a counsel *de oficio*.

The court *may* also, upon motion of the appellee or **on its own motion, dismiss the appeal if the appellant** escapes from prison or confinement or **jumps bail** or flees to a foreign country during the pendency of the appeal. (Emphasis and italics supplied)

The aforecited section gives the CA the authority to dismiss an appeal for abandonment if the accused escapes from prison or confinement or jumps bail or flees to a foreign country during the pendency of the appeal. This authority to dismiss an appeal is, nevertheless, discretionary.[62] When an accused jumps bail during the pendency of his appeal, the appellate court may exercise its discretion whether to proceed with the appeal or dismiss it outright.[63] In several cases, we still proceeded to acquit an accused who remained at large during the pendency of the appeal.[64]

In this case, the CA exercised this discretion when it found that Chiok jumped bail because the order of arrest was not served. Subsequently, when Chiok moved for its reconsideration, the CA again exercised its discretion, this time to entertain the appeal. Notably, neither the prosecution nor Chua attributed any grave abuse of discretion on the part of the appellate court when it reinstated the appeal *via* a Resolution dated February 29, 2000. This resolution, which effectively replaces the original resolution dismissing the appeal, has already attained finality.

Thus, contrary to the claim of Chua, the SC bail decisions which set aside the CA resolutions enjoining Chiok's arrest did not automatically revive the CA resolution dismissing the appeal; the dismissal being a discretionary act on the part of the appellate court. Consequently, we reject the claim of Chua that the first

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[62] *People v. Castillo*, G.R. No. 118912, May 28, 2004, 430 SCRA 40, 47.

[63] *Id.*

[64] See *People v. Mamalias,* G.R. No. 128073, March 27, 2000, 328 SCRA 760, 769-771; See also *People v. Araneta*, G.R. No. 125894, December 11, 1998, 300 SCRA 80, 89-90.

jeopardy did not attach because the whole proceedings before the CA, and the CA acquittal, are null and void.

B. Exceptions to the rule on finality-of-acquittal and double jeopardy doctrine do not apply.

Chua next asserts that certain exceptions to the rule on double jeopardy are present in this case. Particularly, she submits that: (1) the appellate court's proceeding is a sham or mock proceeding; (2) the People through the OSG, was deprived of the opportunity to be heard and its "day in court"; and (3) the result is a null and void judgment of acquittal. Chua cites the case of *Galman v. Sandiganbayan*[65] to bolster her assertions.

Chua claims that the "trial in both the bouncing checks cases and this *estafa* case, is a sham insofar as they have resulted in acquittals."[66] Chua anchors her claim on the report submitted by Judge Elvira D.C. Panganiban that there were unauthorized tamperings in the evidence in the bouncing checks cases[67] (BP 22 case) she filed against Chiok, and that a TSN in the same BP 22 case, where Chiok allegedly made an implied admission of guilt, has been secretly removed from the record.

We do not see any exception to the rule on double jeopardy in this case.

The factual milieu in *Galman v. Sandiganbayan*[68] is starkly different from this case. In *Galman*, we concluded that there was a mock or sham trial because of the overwhelming evidence of collusion and undue pressures made by former President Marcos on the prosecution and the Justices who tried and decided the case, which prevented the prosecution from fully ventilating its position and offering all evidence. We recognized the intensity

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[65] *Supra* note 57.

[66] *Rollo,* G.R. No. 180021, p. 92.

[67] *Id., rollo*, G.R. No. 179814, pp. 243-255. Criminal Cases No. 44739 and 51988 filed with the Metropolitan Trial Court of San Juan.

[68] *Supra*.

and gravity of the pressure exerted by the highest official in the land that resulted to a miscarriage of justice.

In this case, Chua presents a report submitted by Judge Elvira D.C. Panganiban showing irregularities in the BP 22 case against Chiok, including the loss of a TSN containing an alleged offer of settlement by Chiok equivalent to his implied admission of guilt. We, however, do not see the same evils presented in *Galman* when the alleged anomalies pointed out by Chua were in a different case and when the main basis of the acquittal is not on the credibility of the physical evidence but of the testimony of Chua herself. Moreover, it is apparent from the CA acquittal that the appellate court considered Chiok's offer of settlement in arriving at the decision, having included it in its statement of facts. In essence, Chua is asking us to nullify the CA acquittal because in her opinion, if the appellate court considered these pieces of evidence, it would have convicted Chiok. These are purported errors of judgment or those involving misappreciation of evidence which cannot be raised and be reviewed in a petition for certiorari under Rule 65.

We are also not convinced that the State was deprived of due process in presenting its case. The OSG, in fact, actively participated in prosecuting the case before the CA. It was able to file an Appellee's Brief[69] dated December 23, 2003, as well as its Rejoinder Brief[70] dated October 6, 2004. As Chua even admits in her petition, the OSG was able to present its case before the appellate court as when "[t]he OSG's position in this case on the merits is clear in the submissions it has filed, as most eloquently expressed in the Rejoinder Brief…"[71] Certainly, no grave abuse of discretion can be ascribed where both parties had the opportunity to present their case and even required them to submit memoranda from which its decision is based, as in this case.[72]

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[69] CA *rollo,* Vol. III, pp. 356-389.

[70] *Id.* at 865-904.

[71] *Rollo*, G.R. No. 180021, p. 69.

[72] See *Metropolitan Bank and Trust Company v. Veridiano II*, G.R. No. 118251, June 29, 2001, 360 SCRA 359, 366-367.

Although we do not absolutely preclude the availment of the remedy of *certiorari* to correct an erroneous acquittal, the petitioner must clearly and convincingly demonstrate that the appellate court blatantly abused its authority to a point so grave and so severe as to deprive it of its very power to dispense justice.[73] Chua failed to do so.

III. Chiok is civilly liable to Chua in the amount of ₱9,563,900.00.

Chiok claims that the Joint Decision[74] dated November 27, 2000 in the BP 22 case docketed as Criminal Case No. 44739 of the Metropolitan Trial Court (MeTC) San Juan, Manila — Branch 58, which absolved Chiok from civil liability, is *res judicata* on this case. On the other hand, Chua claims that the CA erred when it ordered Chiok to pay only the amount of ₱9,500,000.00 when it was shown by evidence that the amount should be ₱9,563,900.00.

We rule that Chiok is liable for the amount of ₱9,563,900.00.

In *Castillo v. Salvador*[75] and several cases before it, we ruled that if the acquittal is based on reasonable doubt, the accused is not automatically exempt from civil liability which may be proved by preponderance of evidence only. In this regard, preponderance of evidence is the weight, credit, and value of the aggregate evidence on either side and is usually considered to be synonymous with the term "greater weight of the evidence" or "greater weight of the credible evidence." Preponderance of evidence is evidence which is more convincing to the court as worthy of belief than that which is offered in opposition thereto.[76]

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[73] *People v. De Grano*, G.R. No. 167710, June 5, 2009, 588 SCRA 550, 568.

[74] *Rollo*, G.R. No. 179814, pp. 243-255.

[75] G.R. No. 191240, July 30, 2014, 731 SCRA 329, 340.

[76] *Id.,* citing *Encinas v. National Bookstore, Inc*., G.R. No. 162704, November 19, 2004, 443 SCRA 293, 302.

While the CA acquitted Chiok on the ground that the prosecution's evidence on his alleged misappropriation of Chua's money did not meet the quantum of proof beyond reasonable doubt, we hold that the monetary transaction between Chua and Chiok was proven by preponderance of evidence.

Chua presented in evidence a bank deposit slip dated June 9, 1995 to Chiok's Far East Bank, Annapolis account in the amount of ₱7,100,000.00. She also testified that she delivered to him in cash the amount of ₱2,463,900.00. Chiok's admission that he issued the interbank checks in the total amount of ₱9,563,900.00 to Chua, albeit claiming that it was "for safekeeping purposes only" and to assure her that she will be paid back her investment, corroborates Chua's evidence. In any event, as found by the appellate court, Chiok admitted that he received from Chua the amount of "₱7.9" million in June 1995 and for "₱1.6" million at an earlier time. It is on this basis that the CA found Chiok civilly liable in the amount of ₱9,500,000.00 only.

However, we find that during the direct and cross-examination of Chiok on September 15, 1997 and October 13, 1997, the reference to "₱9.5" million is the amount in issue, which is the whole of ₱9,563,900.00:

TSN September 15, 1997 (direct examination of Wilfred Chiok)

> ATTY ESPIRITU[:] Mr. Witness. The amount here you are being charged in the information is ₱9,563,900.00 covered by the two (2) checks Exhibits "C" and "D" of the prosecution. x x x[77]

TSN October 13, 1997 (cross examination of Wilfred Chiok)

> PROSECUTOR RASA[:] Do you know how much Mrs. Chua is claiming from you [which is the] *subject matter* of this case of estafa?
>
> WITNESS[:] Yes, ma'am.
>
> PROSECUTOR RASA[:] How much?
>
> WITNESS[:] More or less 9.5.

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[77] CA *rollo*, Vol. I, p. 1167.

PROSECUTOR RASA[:] In peso or in dollar?

WITNESS[:] In Peso.

PROSECUTOR RASA[:] 9.5 Million what?

WITNESS[:] Million Peso, ma'am.

PROSECUTOR RASA[:] You admit that you received 9.5 Million from Mrs. Chua?

WITNESS[:] I admitted that, ma'am.[78] (Italics supplied)

Accordingly, the amount admitted should be ₱9,563,900.00.

There is also no merit in Chiok's claim that his absolution from civil liability in the BP 22 case involving the same transaction bars civil liability in this *estafa* case under the doctrine of *res judicata* in the concept of "conclusiveness of judgment."

The doctrine of *res judicata* under the concept of "conclusiveness of judgment" is found in paragraph (c) of Section 47, Rule 39 of the Revised Rules of Court. Under this doctrine, a final judgment or decree on the merits by a court of competent jurisdiction is conclusive of the rights of the parties or their privies in all later suits on points and matters determined in the former suit.[79] Stated differently, facts and issues actually and directly resolved in a former suit cannot again be raised in any future case between the same parties, even if the latter suit may involve a different cause of action.[80] This principle of *res judicata* bars the re-

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[78] *Id.* at 1213-1214.

[79] RULES OF COURT, RULE 39, Sec. 47 (c).

RULE 39. Sec. 47. *Effect of judgments or final orders*.– The effect of a judgment or final order rendered by a court of the Philippines, having jurisdiction to pronounce the judgment or final order, may be as follows:

x x x x x x x x x

(c) In any other litigation between the same parties or their successors in interest, that only is deemed to have been adjudged in a former judgment or final order which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto.

[80] See *Superior Commercial Enterprises, Inc. v. Kunnan Enterprises Ltd.*, G.R. No. 169974, April 20, 2010, 618 SCRA 531, 552.

litigation of particular facts or issues in another litigation between the same parties on a different claim or cause of action.[81]

In *Rodriguez v. Ponferrada,*[82] we explained that a civil action in a BP 22 case is not a bar to a civil action in *estafa* case. In rejecting the theory of petitioner therein that the civil action arising from the criminal case for violation of BP 22 precludes the institution of the corresponding civil action in the criminal case for *estafa* pending before the RTC, we ruled that Rule 111 of the Rules of Court expressly allows the institution of a civil action in the crimes of both *estafa* and violation of BP 22, without need of election by the offended party. There is no forum shopping because both remedies are simultaneously available to the offended party. We explained that while every such act of issuing a bouncing check involves only one civil liability for the offended party who has sustained only a single injury, this single civil liability can be the subject of both civil actions in the *estafa* case and the BP 22 case. However, there may only be one recovery of the single civil liability.

We affirmed this in *Rimando v. Aldaba,*[83] where we were confronted with the similar issue of whether an accused's civil liability in the *estafa* case must be upheld despite acquittal and exoneration from civil liability in BP 22 cases. We held that both *estafa* and BP 22 cases can proceed to their final adjudication–both as to their criminal and civil aspects–subject only to the prohibition on double recovery.

Since the Rules itself allows for both remedies to be simultaneously availed of by the offended party, the doctrine of *res judicata* finds no application here.

Moreover, the principle of *res judicata* in the concept of conclusiveness of judgment presupposes that facts and issues were actually and directly resolved in a previous case.[84] However,

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[81] *Id.*

[82] G.R. Nos. 155531-34, July 29, 2005, 465 SCRA 338, 349-350.

[83] G.R. No. 203583, October 13, 2014, 738 SCRA 232, 239.

[84] *Superior Commercial Enterprises, Inc. v. Kunnan Enterprises Ltd.*, *supra*.

the records show that in the BP 22 case, the facts and issues proving the transaction were not actually and directly resolved in the decision, *viz*:

> The court is not persuaded.
>
> First, what the law requires is a notice of dishonor of the check to be given to the accused after its dishonor. There is no showing that this requirement was complied by the prosecution. Second, the drawer must be given at least 5 banking days from such notice of dishonor within which to pay the holder thereof the amount due thereon or to make arrangement for payment in full by the drawee of such check. Indeed, there was no notice of dishonor established to have been furnished the accused and therefore there is more reason that the accused was not given the requisite 5-banking day to make good aforesaid checks. The 5-day notice serves to mitigate the harshness of the law in its application by giving the drawer an opportunity to make good the bum check. And, it cannot be said that accused was ever given that opportunity simply because the prosecution failed to prove that accused was notified of the dishonor of the checks in suit.
>
> x x x x x x x x x
>
> Even assuming without admitting but only for the sake of argument that accused was notified of the dishonor of the checks in suit by the demand letter adverted to above, still the prosecution cause must fail because there are more reasons not to believe than to believe the theory of the prosecution as compared with that of the defense as will be explained hereunder.
>
> x x x x x x x x x
>
> WHEREFORE, in the light of the foregoing considerations, the court hereby absolves the accused from criminal as well as civil liability and orders these cases DISMISSED for lack of evidence to support the charges levelled against him.
>
> Costs *de oficio*.
>
> No other pronouncements.
>
> SO ORDERED.[85]

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[85] *Rollo,* G.R. No. 179814, pp. 252-255.

The basis for Chiok's acquittal therein is the prosecution's failure to show that a notice of dishonor was first given to Chiok. The discussion that the prosecution's version is incredible was merely secondary, and was not necessary, for accused's acquittal. There were no findings of fact on the transaction which gives rise to the civil liability.

In light of these, we reject Chiok's claim that *res judicata* in the concept of conclusiveness of judgment bars Chua from recovering any civil claims.

Following this Court's ruling in *Nacar v. Gallery Frames*,[86] the foregoing amount of ₱9,563,900.00 shall earn interest at the rate of six percent (6%) per annum computed from October 25, 1995, the date of Chua's extrajudicial demand, until the date of finality of this judgment. The total amount shall thereafter earn interest at the rate of six percent (6%) per annum from such finality of judgment until its satisfaction.

WHEREFORE, the petition for review on certiorari in G.R. No. 179814 and the special civil action for certiorari and mandamus in G.R. No. 180021 are **DENIED.** The petition for review on certiorari in G.R. No. 180021 is **GRANTED**. The Assailed Decision dated July 19, 2007 and the Resolution dated October 3, 2007 of the Court of Appeals are **AFFIRMED** with the **MODIFICATION** that Wilfred Chiok is ordered to pay Rufina Chua the principal amount of ₱9,563,900.00, with interest at the rate of six percent (6%) per annum computed from October 25, 1995 until the date of finality of this judgment. The total amount shall thereafter earn interest at the rate of six percent (6%) per annum from the finality of judgment until its satisfaction.

No costs.

SO ORDERED.

Sereno,[*] *C.J., Velasco, Jr. (Chairperson), Villarama, Jr.,* and *Reyes, JJ.,* concur.

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[86] G.R. No. 189871, August 13, 2013, 703 SCRA 439.

[*] Designated as Additional Member per Raffle dated November 9, 2015.

THIRD DIVISION

[G.R. No. 190583. December 7, 2015]

MARIA PAZ FRONTRERAS *y* ILAGAN, *petitioner, vs.* **PEOPLE OF THE PHILIPPINES,** *respondent.*

SYLLABUS

1. **CRIMINAL LAW; REVISED PENAL CODE; THEFT; WHEN COMMITTED; DEFINED.—** Theft is committed by any person who, with intent to gain but without violence against, or intimidation of persons nor force upon things, shall take personal property of another without the latter's consent. Intent to gain or *animus lucrandi* is an internal act that is presumed from the unlawful taking by the offender of the thing subject of asportation. Theft becomes qualified if it is among others, committed with grave abuse of confidence.

2. **ID.; ID.; QUALIFIED THEFT; ELEMENTS.—** Conviction for qualified theft committed with grave abuse of confidence entails the presence of all the following elements: 1. Taking of personal property; 2. That the said property belongs to another; 3. That the said taking be done with intent to gain; 4. That it be done without the owner's consent; 5. That it be accomplished without the use of violence or intimidation against persons, nor of force upon things; 6. That it be done with grave abuse of confidence. On the other hand, the elements of *corpus delicti* in theft are: (1) that the property was lost by the owner; and (2) that it was lost by felonious taking.

3. **REMEDIAL LAW; EVIDENCE; CONFESSION; A CONFESSION, WHETHER JUDICIAL OR EXTRAJUDICIAL, IF VOLUNTARILY AND FREELY MADE, CONSTITUTES EVIDENCE OF A HIGH ORDER; RATIONALE.—** A confession, whether judicial or extrajudicial, if voluntarily and freely made, constitutes evidence of a high order since it is supported by the strong presumption that no sane person or one of normal mind will deliberately and knowingly confess himself to be the perpetrator of a crime, unless prompted by truth and conscience. The admissibility and validity of a confession, thus hinges on its voluntariness, a condition vividly present in this case. x x x The language of the confession letter was straightforward, coherent and clear. It bore no

suspicious circumstances tending to cast doubt upon its integrity and it was replete with details which could only be known to the petitioner. Moreover, it is obvious that losing one's job in an administrative case is less cumbersome than risking one's liberty by confessing to a crime one did not really commit. It is thus implausible for one to be cajoled into confessing to a wrongdoing at the mere prospect of losing his/her job. The petitioner's declarations to Talampas show that she fully understood the consequences of her confession. She also executed the letter even before Finolan came to the Old Balara branch, thus, negating her claim that the latter threatened her with an administrative sanction.

4. CRIMINAL LAW; REVISED PENAL CODE; QUALIFIED THEFT; IMPOSABLE PENALTY.— Under Article 310 of the Revised Penal Code (RPC), the penalty for qualified theft is two degrees higher than that specified in Article 309. x x x Considering that the value involved in the present case exceeds ₱22,000.00, the basic penalty is *prision mayor* in its minimum and medium periods. Anent the graduation of penalty for qualified theft and the imposition of incremental penalty for the amount in excess of ₱22,000.00, the ruling espoused in *Ringor v. People* is hereby adopted. Since the petitioner committed qualified theft, the penalty shall be two degrees higher or *reclusion temporal in its medium and maximum periods*, which shall be imposed in its maximum period which has a range of seventeen (17) years, four (4) months and one (1) day to twenty (20) years. The incremental penalty shall then be determined by deducting ₱22,000.00 from the amount involved or ₱414,050.00. This will yield the amount of ₱392,050.00 which would then be divided by ₱10,000.00, disregarding any amount less than ₱10,000.00. The end result is that 39 years should be added to the principal penalty. The total imposable penalty, however, should not exceed 20 years and as such, the maximum imposable penalty in this case is 20 years of *reclusion temporal*. x x x A reduction in the imposable penalty by one degreee is thus in order pursuant to Article 64(5) of the RPC which states that when there are two or more mitigating circumstances and no aggravating circumtances are present, the court shall impose the penalty next lower to that prescribed by law, in the period that it may deem applicable, according to the number and nature of such circumstances. As such, the penalty next lower in degree which is *prision mayor* in its medium period should be imposed.

Applying the Indeterminate Sentence Law, the minimum term shall be taken from the penalty next lower or anywhere within the full range of *prision correccional* or six (6) months and one (1) day to six (6) years, while the indeterminate maximum penalty shall be fixed anywhere within the range of *prision mayor* in its medium period or eight (8) years and on (1) day to ten (10) yers. The penalty imposed by the CA should thus be modified to conform to the foregoing findings.

5. ID.; MITIGATING CIRCUMSTANCES; BASED ON THE EXTRAJUDICIAL CONFESSION OF THE PETITIONER, MITIGATING CIRCUMSTANCES OF VOLUNTARY SURRENDER AND NOT INTENTION TO COMMIT SO GRAVE A WRONG CAN BE APPRECIATED IN CASE AT BAR; EXPLAINED.— Anent the appreciation of mitigating circumstances, the Court agrees with the RTC that the petitioner's extrajudicial confession through the handwritten letter coupled with her act of surrendering the redeemed pawn tickets and thereafter going to the police station can be taken as an analogous circumstance of voluntary surrender under Article 13, paragraph 10 in relation to paragraph 7 of the RPC. Based on the same extrajudicial confession, the petitioner is also entitled to the mitigating circumstance of no intention to commit so grave a wrong under paragraph 3 again in relation to paragraph 10 both of Article 13. Based on her letter, the petitioner misappropriated the redemption payments under her custody and control because she was constrained by extreme necessity for money. This is not to promote monetary crisis as an excuse to commit a crime or to embolden a person entrusted with funds or properties to feloniously access the same, but rather to underscore the utmost consideration in the Court's exercise of its discretional power to impose penalties, that is — *a guilty person deserves the penalty given the attendant circumstances and commensurate with the gravity of the offense committed*. From such standpoint, the Court finds it prudent that unless the foregoing analogous mitigating circumstances are appreciated in her favor, the petitioner will be penalized excessively.

APPEARANCES OF COUNSEL

Manuel R. Bustamante for petitioner.
The Solicitor General for respondent.

D E C I S I O N

REYES, *J.*:

Before the Court is a Petition for Review[1] under Rule 45 of the Rules of Court seeking to reverse and set aside the Decision[2] dated July 29, 2009 of the Court of Appeals (CA) in CA-G.R. CR No. 30909, which affirmed with modification the Decision[3] dated May 8, 2006 of the Regional Trial Court (RTC) of Quezon City, Branch 104, in Criminal Case No. Q-99-84626, convicting Maria Paz Frontreras[4] *y* Ilagan (petitioner) of the crime of Qualified Theft and sentencing her to suffer the penalty of *reclusion perpetua*.

The Facts

The petitioner was the Vault Custodian of the 685 Old Balara, Tandang Sora, Quezon City branch (Old Balara branch) of Cebuana Lhuillier Pawnshop (Cebuana). She was tasked to safe keep all the pawned items and jewelry inside the branch vault. Likewise employed in the same branch were Teresita Salazar (Salazar) and Jeannelyn Carpon (Carpon) who served as Branch Manager and District Manager, respectively. Salazar was responsible for the overall operation of the Old Balara branch and was also tasked to handle the appraisal of pawned items and the recording of such transactions. Carpon, on the other hand, supervised the overall operations of the branches within her district ensuring that they are operating within the objectives, procedures, and policies of Cebuana; she also monitored the district bank account and handled the appraisal of pawned items and the recording of cash.[5]

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[1] *Rollo*, pp. 9-31.

[2] Penned by Associate Justice Normandie B. Pizarro, with Associate Justices Martin S. Villarama, Jr. (now a member of this Court) and Jose C. Reyes, Jr. concurring; CA *rollo*, pp. 136-155.

[3] Issued by Judge Thelma A. Ponferrada; records (Vol. II), pp. 492-511.

[4] Fronteras in other documents of the case.

[5] CA *rollo*, pp. 137-138.

On October 27, 1998, a surprise audit was conducted at the Old Balara branch by Cebuana's internal auditors, Mila Escartin (Escartin) and Cynthia Talampas (Talampas). The audit revealed that 156 pieces of jewelry, with an aggregate value of ₱1,250,800.00 were missing. A cash shortage of ₱848.60 was likewise discovered. When the petitioner was asked to explain the discrepancy, she told Escartin that she would reduce her explanation into writing. The next day, an audit report was sent to Marcelino Finolan (Finolan), Area Manager of Cebuana.[6]

Upon receipt of the audit report on October 28, 1998, Finolan immediately proceeded to the Old Balara branch to conduct an investigation. He called Escartin and the petitioner for a meeting during which the petitioner handed over several pawn tickets[7] while Escartin gave him a handwritten letter made by the petitioner,[8] which reads:

Oct. 28, 1998

Sa Kinauukulan:

Sir, nagconduct po ng audit kahapon Oct. 27, 1998 dito sa Old Balara I at nadiskubre po na maraming nawawalang item. Sir ang lahat pong ito ay mga sanla namin. Ang involve po dito ay ang appraiser – Tess Salazar, Dist. Manager – Jeannelyn Uy Carpon, at ako po Vault Custodian – Ma. Paz Frontreras. Yong iba pong item ay mga tubos na at nakatago lang po ang papel. Nagsimula po ito noong buwan ng Hulyo. Dala na rin pong matinding pangangailangan sa pera. Ito lamang po ang tangi kong mailalahad at iyan din po ang katotohanan.

Sumasainyo,

[signed]
Ma. Paz Fronteras[9]

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[6] *Id.* at 138.

[7] TSN, December 13, 1999, pp. 10-13.

[8] Folder of Exhibits, Exhibit "B".

[9] *Id*.

On May 10, 1999, an Information[10] for Qualified Theft was filed before the RTC against the petitioner, Salazar, and Carpon. The accusatory portion of the Information reads:

> That on or about the period comprised from June 6, 1998 up to October 17, 1998, in Quezon City, Philippines, the above-named accused, conspiring, confederating and mutually helping one another, being then employed as the Branch Manager, District Manager and Vault Custodian, respectively of [CEBUANA] represented by [FINOLAN] located at Unit 1119 B & C 685 Tandang Sora, Old Balara, Quezon City and such have free access to the jewelries pawned to [CEBUANA], with grave abuse of confidence reposed on them by their employer, with intent to gain and without the knowledge and consent of the owner thereof, did then and there wilfully, unlawfully and feloniously take, steal and carry away the amount of ₱1,263,737.60, Philippine Currency, representing the value of the jewelries and redemption payments, belonging to said [CEBUANA], to the damage and prejudice of the said offended party in the amount aforementioned.
>
> CONTRARY TO LAW.[11]

Salazar and Carpon entered a "Not Guilty" plea upon arraignment on July 13, 1999.[12] The petitioner likewise pleaded "Not Guilty" during her arraignment on August 9, 1999.[13]

Trial thereafter ensued. According to prosecution witness Finolan, aside from receiving the petitioner's handwritten letter on October 28, 1998, the petitioner also gave him original pawn tickets, the back portion of which showed the signatures of their respective pledgors. These signatures mean that the pledgors have already redeemed the jewelry covered by each ticket by paying the amount for which they stand as a security. No payments were, however, recorded nor turned over to the pawnshop. The petitioner also intimated to him that Carpon took some of such

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[10] Records (Vol. I), pp. 1-2.

[11] *Id*.

[12] *Id*. at 172.

[13] *Id*. at 178.

cash payments but failed to return the same.[14] These declarations were corroborated by the testimonies of the other prosecution witnesses, Escartin[15] and Talampas.[16]

All of the accused took the witness stand and proffered in defense that the internal audit for June, July, August and September of 1998 showed no report of anomaly or shortage; that had there been any anomaly or shortage, it could have been discovered thru the periodic audit being conducted by Cebuana; they were not holding cash and there was no complaint from clients regarding missing pawned items.[17]

Carpon denied liability for the missing jewelry and redemption payments and averred that she had no official capacity to hold cash for Cebuana and that the pawned items were handled by the vault custodian. When Finolan asked her about the missing items, she told him there was none. She was brought to the police station and then submitted for inquest but was thereafter released based on insufficiency of evidence.[18]

Salazar was absent on October 27 and 28, 1998 because she was sick. She was surprised when she was informed that there are missing pawned items at the Old Balara branch because Finolan conducts an audit twice a month.[19]

The petitioner claimed that Finolan and the auditor prodded her to admit liability for the missing pawned items otherwise an administrative case will be filed against her. The prospect of losing her job frightened her. The police car outside the Old Balara branch also intimidated her. She was brought to the police station and was eventually subjected to inquest proceedings but

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[14] TSN, October 5, 1999, pp. 6-14, 16-17, TSN, December 13, 1999, pp. 4-6, 12-13, 16-17.

[15] TSN, June 19, 2000, pp. 4-5, 13-14.

[16] TSN, November 7, 2001, pp. 6-9, 12-13, 15-19, 23-24.

[17] Records (Vol. II), p. 502.

[18] *Id*. at 502-505.

[19] *Id*. at 505-506.

was released for lack of evidence. She denied that there were missing jewelries from the Old Balara branch. She stressed that what was actually missing was cash, over which she had no custodial duty.[20]

On rebuttal, Finolan clarified that the purpose of the spot/surprise audit was to check for fake or over-appraised pawned items and not to check for inventory anomalies.[21]

The Ruling of the RTC

In a Decision[22] dated May 8, 2006, the RTC found sufficient circumstantial evidence establishing that the petitioner perpetrated the offense. The petitioner was entrusted with the position of vault custodian tasked with the responsibility for all pawned wares and to make sure that they were all intact and safely kept in the vault. During the audit, there were open items (unredeemed pawned items) which she could not locate.

She had in her possession pawn tickets pertaining to items which were already redeemed. She surrendered the pawn tickets to Finolan, but without the corresponding redemption payment. Her position of vault custodian created a high degree of confidence between her and the pawnshop which she gravely abused.[23] Based on the appraisal value of the pieces of jewelry covered by the pawn tickets surrendered by the petitioner during audit but without the corresponding redemption payment, Cebuana suffered injury in the aggregate sum of ₱414,050.00.[24]

The petitioner's co-accused Salazar and Carpon were acquitted on the ground of reasonable doubt.[25] Accordingly, the dispositive portion of the RTC decision reads as follows:

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[20] *Id*. at 507-508.

[21] *Id*. at 508.

[22] *Id*. at 492-511.

[23] *Id*. at 509.

[24] *Id*. at 509-511.

[25] *Id*. at 511.

WHEREFORE, the Court finds [the petitioner] guilty beyond reasonable doubt as principal of the crime of QUALIFIED THEFT defined and penalized in Article 310 of the Revised Penal Code, sentencing her therefor to an indeterminate penalty of fourteen (14) years and eight (8) months of reclusion temporal as minimum to twenty (20) years of reclusion temporal as maximum, and ordering her to pay to [Cebuana] the amount of ₱414,050.00.

On ground of reasonable doubt, judgment is hereby rendered acquitting accused [Salazar] and [Carpon] of the offense charged against them.

SO ORDERED.[26]

The petitioner moved for reconsideration arguing for her acquittal for failure of the prosecution to establish her guilt beyond reasonable doubt. She also questioned the correctness of the penalty imposed by the RTC.[27]

In an Order[28] dated November 6, 2006, the RTC denied reconsideration on its finding of guilt but it reduced the penalty it had earlier imposed to four (4) years, two (2) months and one (1) day of *prision correccional* as minimum to ten (10) years and one (1) day of *prision mayor* as maximum, explaining thus:

The Court is however inclined to reduce the penalty by considering the surrender of the pawn tickets as a mitigating circumstance analogous to voluntary surrender under Article 13, paragraph 7, and the necessity mentioned in the handwritten explanation as analogous to incomplete justification under Article 11, paragraph 4, x x x in relation to Article 13, paragraph 1, of the Revised Penal Code.[29]

Consequently, the previous RTC ruling was modified as follows:

WHEREFORE, the Court maintains the Decision dated May 8, 2006 finding [the petitioner] guilty beyond reasonable doubt as

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[26] *Id*.

[27] *Id*. at 512-515.

[28] *Id*. at 525-540.

[29] *Id*. at 539.

principal of the crime of QUALIFIED THEFT defined and penalized in Article 310 of the Revised Penal Code, and, considering the two analogous mitigating circumstances, modifies the penalty by sentencing her therefor to an indeterminate penalty of four (4) years, two (2) months and one (1) day of prision correccional as minimum to ten (10) years and one (1) day of prision mayor as maximum, and ordering her to pay to [CEBUANA] the amount of ₱414,050.00

SO ORDERED.[30]

Undeterred, the petitioner filed a Motion for Amendment of Modified Penalty[31] arguing that the RTC erred in the application of the Indeterminate Sentence Law. The RTC denied the motion in an Order[32] dated March 8, 2007.

The Ruling of the CA

The petitioner appealed to the CA contending that the inferences made by the RTC were based on unfounded facts, since: (a) based on the audit reports for June, July, August and September of 1998, there were no anomalies occurring in Cebuana; (b) no evidence was presented tending to prove that the petitioner had the exclusive right to enter the pawnshop's vault; (c) no complaint from clients regarding the missing pawned items was ever filed.[33]

The CA rejected the petitioner's arguments and upheld the RTC's findings and conclusions. The CA observed that the audits were actually not audit reports *per se* but rather reports made in order to determine the profitability of the pawnshop. Even if they are considered as regular audits, their nature will not preclude the existence of fraud because they were conducted only for the purpose of ascertaining fake items or if there was over-appraisal.[34]

Anent the petitioner's insinuation that another person could have accessed the vault, the CA held:

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[30] *Id*. at 540.

[31] *Id*. at 541-543.

[32] *Id*. at 547-549.

[33] CA *rollo*, pp. 76-77.

[34] *Id*. at 145-146.

[O]nly the Vault Custodian and the Area Manager, Finolan in this case, knows the combination of the vault. Finolan, however, has no keys to the main door of the branch and likewise has no keys to the inner door/gate of the branch. Furthermore, nobody is allowed to enter the vault without the presence of the Vault Custodian. Thus, there is simply no way for Finolan or any other person for that matter, to have been able to remove items from the vault. Considering the circumstances and the safe-guards employed, it is absurd to impute the crime to any person other than [the petitioner].

[The petitioner], on the other hand, as Vault Custodian, has daily and unsupervised access to the vault. Again, she has the duty to ensure the safe-keeping of all the pawned items and jewelry inside the branch vault. If there was any loss, she should have immediately reported it to her superiors. The fact that she failed to do so leads to a reasonable inference that she is the author of the loss.[35] (Citations omitted and underscoring in the original)

The CA further held that the absence of any complaint from Cebuana's clients does not necessarily mean that there was no loss. In the pawnshop business, it is not uncommon for people to fail to redeem the valuables they pawned. The CA, thus, concluded that the prosecution was able to establish: (1) the fact of loss; (2) that the loss was due to an unlawful taking; and (3) that the unlawful taking was committed with grave abuse of confidence.[36]

The CA, however, disagreed with the RTC that the return by the petitioner of the pawn tickets can be deemed as the mitigating circumstance of voluntary surrender. The CA explained that the petitioner did not surrender herself to a person in authority and thus modified the penalty imposed on her to *reclusion perpetua*.[37]

Accordingly, the CA Decision[38] dated July 29, 2009 was disposed in this manner:

WHEREFORE, the instant appeal is **DISMISSED** for lack of merit and the assailed decision is **AFFIRMED with MODIFICATION**

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[35] *Id*. at 146-147.

[36] *Id*. at 147-148.

[37] *Id*. at 152-154.

[38] *Id*. at 136-155.

in that the [petitioner] is sentenced to suffer the penalty of *reclusion perpetua*.

SO ORDERED.[39] (Emphasis in the original)

The petitioner moved for reconsideration[40] but her motion was denied in the CA Resolution[41] dated December 18, 2009. Hence, the present petition[42] arguing that the CA:

I.

COMMITTED SERIOUS ERROR IN NOT FINDING THAT THE TRIAL COURT GRAVELY ERRED IN RENDERING JUDGMENT UPON CONJECTURES AND SURMISES *VIS-À-VIS* THE ABSENCE OF CIRCUMSTANTIAL EVIDENCE.

II.

COMMITTED AN ERROR OF LAW BY CONCLUDING THAT THE PETITIONER HAS TO SUFFER THE PENALTY OF RECLUSION PERPETUA.[43]

The Ruling of the Court

The Court denies the petition.

Theft is committed by any person who, with intent to gain but without violence against, or intimidation of persons nor force upon things, shall take personal property of another without the latter's consent.[44] Intent to gain or *animus lucrandi* is an internal act that is presumed from the unlawful taking by the offender of the thing subject of asportation.[45] Theft becomes qualified if it is among others, committed with grave abuse of confidence.[46]

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[39] *Id*. at 154-155.

[40] *Id*. at 156-169.

[41] *Id*. at 223-227.

[42] *Rollo*, pp. 9-31.

[43] *Id*. at 14.

[44] Revised Penal Code, Article 308, paragraph 1.

[45] *People v. Anabe*, 644 Phil. 261, 282 (2010).

[46] *Id*.; Revised Penal Code, Article 310.

Conviction for qualified theft committed with grave abuse of confidence entails the presence of all the following elements:

1. Taking of personal property;
2. That the said property belongs to another;
3. That the said taking be done with intent to gain;
4. That it be done without the owner's consent;
5. That it be accomplished without the use of violence or intimidation against persons, nor of force upon things;
6. That it be done with grave abuse of confidence.[47]

On the other hand, the elements of *corpus delicti* in theft are: (1) that the property was lost by the owner; and (2) that it was lost by felonious taking.[48]

The evidence on record shows that the foregoing elements are present in this case. The prosecution has established beyond reasonable doubt that the petitioner unlawfully deprived Cebuana of cash/money when she took out pawned items and released them to redeeming pledgors in exchange for redemption payments which she, however, did not turnover to the pawnshop, and instead pocketed them for her own gain. She gravely abused the confidence concurrent with her sensitive position as a vault custodian when she exploited her exclusive and unlimited access to the vault to facilitate the unlawful taking. Her position entailed a high degree of confidence reposed by Cebuana as she had been granted daily unsupervised access to the vault.[49] Also, the petitioner knew the combinations of the branch's vault[50] and nobody was allowed to enter the vault without her presence.[51]

The petitioner gravely abused such relation of trust and confidence when she accessed and released the pawned items under her custody, received the payments for their redemption

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[47] *People v. Mirto,* 675 Phil. 895, 906 (2011).

[48] *Gan v. People*, 550 Phil. 133, 161-162 (2007).

[49] CA *rollo*, p. 147.

[50] TSN, February 7, 2000, pp. 3-4.

[51] *Id*. at 10.

but failed to record such redemption and remit the payments to the cash collections of Cebuana. Without the authority and consent of her employer, she repeatedly took and appropriated for herself the redemption payments paid for the pawned items with the aggregate appraised value of ₱414,050.00,[52] *viz*:

Pawn Ticket No.	Appraisal Value	Pawn Ticket No.	Appraisal Value
041487	₱ 13,000.00	043930	5,600.00
041818	2,000.00	043716	2,000.00
045453	1,500.00	044477	2,100.00
043874	2,400.00	044980	3,700.00
043875	700.00	044852	1,700.00
043876	500.00	043029	13,500.00
046047	600.00	043028	20,000.00
046019	500.00	043026	8,000.00
045960	2,700.00	045008	2,300.00
044271	5,200.00	044561	2,400.00
043002	18,000.00	046159	2,300.00
045777	6,500.00	045722	1,500.00
042934	17,700.00	042160	14,000.00
044586	8,200.00	041983	20,000.00
043970	5,000.00	042137	19,500.00
043796	3,800.00	042144	6,000.00
043647	6,500.00	042138	15,500.00
044061	6,500.00	045957	1,300.00
044235	5,000.00	046030	3,000.00
044130	1,100.00	041568	13,700.00
043844	1,200.00	043281	7,800.00
044867	4,000.00	042712	22,000.00
044903	3,000.00	042576	13,000.00
044714	2,500.00	043394	10,000.00
044938	2,300.00	043395	16,000.00
042988	2,500.00	042147	7,500.00
045029	2,300.00	041972	15,000.00
043858	5,500.00	044060	12,000.00
043766	3,500.00	043027	7,000.00
043641	1,750.00	042987	2,500.00
045068	2,000.00	043035	5,200.00

[52] Folder of Exhibits, Exhibits "D"-"D-61".

Intent to gain can be deduced from the petitioner's possession of the foregoing pawn tickets which were surrendered, together with the redemption payment by their respective pledgors. She submitted them during the spot audit along with a confession letter stating that portions of the ₱1,250,800.00 missing value of jewelry were actually already redeemed, thus:

Yung iba pong item ay mga tubos na at nakatago lang po ang papel. Nagsimula po ito noong buwan ng Hulyo. Dala na rin po ng matinding pangangailangan sa pera. Ito lamang po ang tangi kong mailalahad at iyan din po ang katotohanan.[53]

The tenor of the foregoing declaration and the circumstances of the petitioner at the time she wrote and signed it, all militate against her bare allegation that she was threatened with an administrative case unless she admits her transgression.

The petitioner wrote and signed the confession letter spontaneously. When Escartin asked her if there are any problems in the Old Balara branch, the petitioner answered that she will write down her explanation and will submit it to Escartin.[54] The petitioner also told Talampas that if she will escape, she will just be afraid that someone will go after her and that she will just face the consequences.[55] Talampas then saw the petitioner make and sign the confession letter.[56] When Finolan went to the Old Balara branch for further investigation, Escartin handed her the confession letter from the petitioner.[57]

The language of the confession letter was straightforward, coherent and clear. It bore no suspicious circumstances tending to cast doubt upon its integrity and it was replete with details which could only be known to the petitioner. Moreover, it is obvious that losing one's job in an administrative case is less cumbersome than risking one's liberty by confessing to a crime

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[53] *Id*. at Exhibit "B".

[54] TSN, June 19, 2000, pp. 13-14.

[55] TSN, November 7, 2001, p. 17.

[56] *Id*. at 18-19.

[57] TSN, October 5, 1999, pp. 9-10.

one did not really commit. It is thus implausible for one to be cajoled into confessing to a wrongdoing at the mere prospect of losing his/her job. The petitioner's declarations to Talampas show that she fully understood the consequences of her confession. She also executed the letter even before Finolan came to the Old Balara branch, thus, negating her claim that the latter threatened her with an administrative sanction.

A confession, whether judicial or extrajudicial, if voluntarily and freely made, constitutes evidence of a high order since it is supported by the strong presumption that no sane person or one of normal mind will deliberately and knowingly confess himself to be the perpetrator of a crime, unless prompted by truth and conscience. The admissibility and validity of a confession, thus hinges on its voluntariness,[58] a condition vividly present in this case.

The petitioner's extrajudicial written confession coupled with the following circumstantial evidence all point to her as the perpetrator of the unlawful taking:

1. On October 27, 1998, Escartin and Talampas conducted a spot audit at the Old Balara branch of Cebuana.[59]
2. Escartin counter-checked the computer list of all pawned items not yet redeemed *vis-à-vis* the actual stocks in the vault and discovered that there were missing items.[60]
3. Escartin asked the petitioner if there are any problems in the branch. The latter answered that she will just write down everything that happened and hand over her explanation to Escartin.[61]
4. After receiving the audit report on October 28, 1998, Finolan proceeded to the Old Balara branch and conducted an investigation.[62]
5. When Talampas reported for work on October 28, 1998, the petitioner told her that she thought about what

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[58] *People v. Satorre*, 456 Phil. 98, 107 (2003).

[59] TSN, June 19, 2000, pp. 5-6.

[60] *Id*. at 11.

[61] *Id*. at 13-14.

[62] TSN, October 5, 1999, pp. 8-9.

happened and that she is afraid that someone will be going after her if she will run away and so she has to face the consequences.[63]

6. Talampas thereafter saw the petitioner write and sign a confession letter.[64]
7. The letter was given to Finolan when he went to the Old Balara branch to investigate.[65]
8. In the letter, the petitioner admitted that some of the missing pawned items were already redeemed. She also stated that she had "extreme need for money."[66]
9. The petitioner then handed over to Finolan original pawn tickets.[67]
10. Finolan observed that the pawn tickets were already redeemed or paid by their respective pledgors as evidenced by their signatures of validation.[68]
11. There are no records of redemption transactions under the said pawn tickets.[69]
12. The petitioner did not convey any redemption payment to Finolan or to the pawnshop.[70]

Penalty

Under Article 310[71] of the Revised Penal Code (RPC), the penalty for qualified theft is two degrees higher than that specified in Article 309 which states:

Art. 309. *Penalties*.—Any person guilty of theft shall be punished by:

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[63] TSN, November 7, 2001, p. 17.

[64] *Id*. at 18-19.

[65] TSN, October 5, 1999, p. 10.

[66] CA *rollo*, p. 224.

[67] TSN, October 5, 1999, p. 17; TSN, November 7, 2001, p. 24.

[68] TSN, December 13, 1999, pp. 12-13.

[69] *Id*. at 14.

[70] *Id*. at 15.

[71] Art. 310. Qualified theft. – The crime of theft shall be punished by the penalties next higher by two degrees than those respectively specified

1. **The penalty of *prision mayor* in its minimum and medium periods, if the value of the thing stolen is more than 12,000 pesos but does not exceed 22,000 pesos, but if the value of the thing stolen exceeds the latter amount the penalty shall be the maximum period of the one prescribed in this paragraph, and one year for each additional ten thousand pesos, but the total of the penalty which may be imposed shall not exceed twenty years**. In such cases, and in connection with the accessory penalties which may be imposed and for the purpose of the other provisions of this Code, the penalty shall be termed *prision mayor* or *reclusion temporal*, as the case may be.

x x x x (Emphasis ours and italics in the original)

Considering that the value involved in the present case exceeds ₱22,000.00, the basic penalty is *prision mayor* in its minimum and medium periods.

Anent the graduation of penalty for qualified theft and the imposition of incremental penalty for the amount in excess of ₱22,000.00, the ruling espoused in *Ringor v. People*[72] is hereby adopted.

Since the petitioner committed qualified theft, the penalty shall be two degrees higher or *reclusion temporal in its medium and maximum periods*,[73] which shall be imposed in its maximum period which has a range of seventeen (17) years, four (4) months and one (1) day to twenty (20) years.[74]

The incremental penalty shall then be determined by deducting ₱22,000.00 from the amount involved or ₱414,050.00. This will yield the amount of ₱392,050.00 which would then be divided

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in the next preceding article, if committed by a domestic servant, or with grave abuse of confidence, or if the property stolen is motor vehicle, mail matter or large cattle or consists of coconuts taken from the premises of the plantation or fish taken from a fishpond or fishery, or if property is taken on the occasion of fire, earthquake, typhoon, volcanic eruption, or any other calamity, vehicular accident or civil disturbance.

[72] G.R. No. 198904, December 11, 2013, 712 SCRA 622.

[73] *Id*. at 634.

[74] REVISED PENAL CODE, Article 76.

by ₱10,000.00, disregarding any amount less than ₱10,000.00.[75] The end result is that 39 years should be added to the principal penalty. The total imposable penalty, however, should not exceed 20 years and as such, the maximum imposable penalty in this case is 20 years of *reclusion temporal*.[76]

Anent the appreciation of mitigating circumstances, the Court agrees with the RTC that the petitioner's extrajudicial confession through the handwritten letter coupled with her act of surrendering the redeemed pawn tickets and thereafter going to the police station can be taken as an analogous circumstance of voluntary surrender under Article 13, paragraph 10[77] in relation to paragraph 7[78] of the RPC.

Based on the same extrajudicial confession, the petitioner is also entitled to the mitigating circumstance of no intention to commit so grave a wrong under paragraph 3[79] again in relation to paragraph 10 both of Article 13. Based on her letter, the petitioner misappropriated the redemption payments under her custody and control because she was constrained by extreme necessity for money.

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[75] See *People v. Ocden*, 665 Phil. 268, 294 (2011).

[76] *Ringor v. People, supra* note 72, at 634.

[77] Art 13. *Mitigating circumstances*. – The following are mitigating circumstances:

x x x x x x x x x

10. And, finally, any other circumstances of a similar nature and analogous to those above-mentioned.

[78] Art 13. *Mitigating circumstances*.– The following are mitigating circumstances:

x x x x x x x x x

7. That the offender had voluntarily surrendered himself to a person in authority or his agents, or that he had voluntarily confessed his guilt before the court prior to the presentation of the evidence for the prosecution.

[79] Art. 13. *Mitigating circumstances*.– The following are mitigating circumstances;

x x x x x x x x x

3. That the offender had no intention to commit so grave a wrong as that committed.

This is not to promote monetary crisis as an excuse to commit a crime or to embolden a person entrusted with funds or properties to feloniously access the same, but rather to underscore the utmost consideration in the Court's exercise of its discretional power to impose penalties, that is — *a guilty person deserves the penalty given the attendant circumstances and commensurate with the gravity of the offense committed*.[80] From such standpoint, the Court finds it prudent that unless the foregoing analogous mitigating circumstances are appreciated in her favor, the petitioner will be penalized excessively.

A reduction in the imposable penalty by one degree is thus in order pursuant to Article 64(5) of the RPC which states that when there are two or more mitigating circumstances and no aggravating circumstances are present, the court shall impose the penalty next lower to that prescribed by law, in the period that it may deem applicable, according to the number and nature of such circumstances. As such, the penalty next lower in degree which is *prision mayor* in its medium period should be imposed.

Applying the Indeterminate Sentence Law, the minimum term shall be taken from the penalty next lower or anywhere within the full range of *prision correccional* or six (6) months and one (1) day to six (6) years, while the indeterminate maximum penalty shall be fixed anywhere within the range of *prision mayor* in its medium period or eight (8) years and one (1) day to ten (10) years. The penalty imposed by the CA should thus be modified to conform to the foregoing findings.

WHEREFORE, premises considered, the Decision dated July 29, 2009 of the Court of Appeals in CA-G.R. CR No. 30909 is **AFFIRMED with MODIFICATION** as to the imposed penalty such that the petitioner, Ma. Paz Frontreras *y* Ilagan, is sentenced to suffer the indeterminate penalty of four (4) years, two (2) months and one (1) day of *prision correccional* as *minimum* to ten (10) years of *prision mayor* as *maximum*.

SO ORDERED.

Velasco, Jr. (Chairperson), Peralta, del Castillo, and *Jardeleza, JJ.,* concur.

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[80] *Perez v. People, et al.*, 568 Phil. 491, 524 (2008).

SECOND DIVISION

[G.R. Nos. 197096-97. December 7, 2015]

ANTONIO Z. KING, herein represented by his Attorney-in-Fact, EDGARDO SANTOS, *petitioner, vs.* **FRANCISCO A. ROBLES, ANTONIO T. DATU, RENE A. MASILUNGAN, RESTITUTO S. SOLOMON, RODRIGO MENDOZA, ROMEO MENDOZA, REYNALDO DATU, JOSEPH TIU, TERESITA TIU, ROGELIO GEBILAGUIN and PRESCILLA GEBILAGUIN,** *respondents.*

SYLLABUS

1. POLITICAL LAW; CONSTITUTIONAL LAW; OFFICE OF THE OMBUDSMAN; IT IS BEYOND THE AMBIT OF THE COURT TO REVIEW THE OMBUDSMAN'S EXERCISE OF DISCRETION IN PROSECUTING OR DISMISSING A COMPLAINT FILED BEFORE IT EXCEPT WHEN THE EXERCISE THEREOF IS TAINTED WITH GRAVE ABUSE OF DISCRETION.— [I]t must be emphasized that the Ombudsman is a constitutional officer duty-bound to investigate on its own or on complaint by "any person, any act or omission of a public officer or employee when such act or omission appears to be illegal, unjust, improper or inefficient." By constitutional fiat and under RA 6770, the Ombudsman is given a wide latitude of investigatory and prosecutory powers on offenses committed by public officers free from legislative, executive or judicial intervention. Because of the endowment of broad investigative authority, the Ombudsman is empowered to determine, based on the sufficiency of the complaint, whether there exist reasonable grounds to believe that a crime has been committed and that the accused is probably guilty thereof and file the corresponding information with the appropriate courts. In contrast, if the Ombudsman finds the complaint insufficient in form or substance, it may also dismiss the complaint. Such prerogative is beyond the ambit of this Court to review the Ombudsman's exercise of discretion in prosecuting or dismissing a complaint filed before it except when the exercise thereof is tainted with grave abuse of discretion.

2. ID.; ID.; ID.; THE OMBUDSMAN'S DISMISSAL OF THE CHARGES AGAINST THE RESPONDENTS FOR LACK OF PROBABLE CAUSE NOT TAINTED WITH GRAVE ABUSE OF DISCRETION.— "Grave abuse of discretion is the capricious and whimsical exercise of judgment on the part of the public officer concerned, equivalent to an excess or lack of jurisdiction. The abuse of discretion must be so patent and gross as to amount to an evasion of a positive duty or a virtual refusal to perform a duty enjoined by law, or to act at all in contemplation of law, as where the power is exercised in an arbitrary or despotic manner by reason of passion or hostility." A perusal of the Petition shows that petitioner failed to demonstrate the Ombudsman's abuse, much less grave abuse of discretion in dismissing the charges against respondents for lack of probable cause. On the contrary, a review of the records readily reveals that the Ombudsman's assailed Joint Resolution is based on substantial evidence. From the well-explained Joint Resolution, in our view, petitioner's Affidavit/Complaint is bereft of sufficient ground to engender a well-founded belief that the crimes imputed on respondents have been committed and that they are probably guilty thereof and should be held for trial. In fine, the Ombudsman did not abuse his discretion warranting the Court's intervention, in dismissing the charges against respondents.

3. REMEDIAL LAW; APPEALS; MATTERS PERTAINING TO PROOFS AND EVIDENCE ARE BEYOND THE POWER OF THE COURT TO REVIEW UNDER A RULE 45 PETITION EXCEPT IN THE PRESENCE OF SOME MERITORIOUS CIRCUMSTANCES.— Petitioner complained of procedural flaws in the enforcement of the writ of execution arguing in the main that the value of the levied and hauled properties were much more than the monetary award of the NLRC. This we believe is not an adequate ground to reverse the action of the Ombudsman. Petitioner's bone of contention in the present Petition boils down to the appreciation and determination of factual matters. The question of whether there was indeed an over levy of properties is one that is essentially a factual concern as it goes into the determination of the fair market value of the properties levied upon vis-à-vis the value of the properties hauled and taken out of the company's premises. Obviously, petitioner invites an evaluation of the evidentiary matters which is not proper in a petition for review on *certiorari*.

Besides, this Court is not a trier of facts. Matters pertaining to proofs and evidence are beyond the power of this Court to review under a Rule 45 Petition except in the presence of some meritorious circumstances, none of which is availing in this case.

APPEARANCES OF COUNSEL

Castro Castro & Associates for petitioner.
Potenciano A. Flores, Jr. for Rodrigo and Romeo Mendoza.
Lazaro S. Galindez, Jr. for Antonio Datu and Restituto Solomon.

D E C I S I O N

DEL CASTILLO, *J.*:

This Petition for Review on *Certiorari*[1] seeks to reverse and set aside the August 29, 2008 Joint Resolution[2] and November 17, 2010 Joint Order[3] of the Office of the Ombudsman in OMB-C-C-02-0339-F and C-C-02-0340-F. The Ombudsman dismissed for lack of probable cause the cases for Robbery, Violation of Section 3(e) of Republic Act No. 3019 (RA 3019) and Falsification of Public Documents filed by Antonio Z. King (King) against Labor Arbiter Francisco A. Robles (Arbiter Robles), Antonio T. Datu, Rene A. Masilungan, Restituto S. Solomon (Deputy Sheriffs), Rodrigo Mendoza (Rodrigo), Romeo Mendoza (Romeo), Reynaldo Datu, Joseph Tiu (Joseph), Teresita Tiu (Teresita), Rogelio Gebilaguin (Rogelio), Prescilla Gebilaguin and the other private respondents.

The Antecedent Facts

In a Decision[4] dated February 28, 1997 rendered by the Third Division of the National Labor Relations Commission (NLRC),

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[1] *Rollo*, pp. 3-22.

[2] *Id*. at 239-285.

[3] *Id*. at 308-316.

[4] *Id*. at 36-46.

Azkcon Group of Companies and/or Jay Ar Lazo were adjudged guilty of having illegally dismissed Rogelio from service and were ordered to reinstate Rogelio to his former position, to pay him full backwages from the time his salary was withheld up to his actual reinstatement. This Decision became final and executory. On November 19, 2001, Arbiter Robles issued a writ of execution[5] commanding the execution arm of the NLRC "to proceed to the premises of Azkcon Group of Companies and/or Jay Ar Lazo located at J.P. Ramos St., Bo. Talipapa, Caloocan City or wherever it may be found and collect the sum of x x x ₱471,200.99 representing [Rogelio's] backwages and 13th month pay. In case you fail to collect said amount in cash, you are to cause the satisfaction of the same from the movable or immovable properties of the respondent not exempt from execution."[6]

In compliance with the directive in the writ of execution, respondent Deputy Sheriffs served a Notice of Levy/Sale on Execution on Personal Properties[7] upon the representative of therein respondents on March 5, 2002. Personal properties found inside the compound of Azkcon at No. 220 Lias Road, Lambakan Street, Marilao, Bulacan were levied upon. Meanwhile, on March 13, 2002, Philippine Metal and Alloy Fabrication Corporation (PMAFC, one of the companies represented by King) filed an Affidavit of Third Party Claim[8] before Arbiter Robles, asserting ownership over the levied properties. Subsequently, PMAFC filed a Motion to Quash Notice of Levy/Sale on Execution of Personal Property and to Inhibit Sheriffs.[9] PMAFC contended that the Deputy Sheriffs levied on properties belonging to PMAFC worth ₱12 million and that the Deputy Sheriffs intended to sell the said properties for a measly sum of ₱471,200.99. PMAFC thus prayed that the Notice of Levy/Sale on Execution be set

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[5] *Id*. at 48-52.

[6] *Id*. at 51-52.

[7] *Id*. at 53.

[8] *Id*. at 54-55.

[9] *Id*. at 77-79.

aside for being void *ab initio* and the Deputy Sheriffs be disqualified. In an Order[10] dated April 18, 2002, Arbiter Robles directed Rogelio to post a Sheriff's Indemnity Bond in an amount double the judgment award.

On April 26, 2002, Arbiter Robles approved Rogelio's Sheriff's Indemnity Bond, directed the Deputy Sheriffs to obtain physical possession of the levied properties, sell them at public auction, and apply the proceeds thereof for the satisfaction of the judgment award.[11] Rogelio, through his attorney-in-fact, Rodrigo Mendoza, emerged as the highest bidder in the auction sale conducted on May 2, 2002. After the Certificate of Sale was issued, Rodrigo and his workers started to pull out and haul the sold properties.

Contending that the value of the properties taken and hauled by Rogelio through his attorney-in-fact were worth more than the monetary award of the NLRC, petitioner King, claiming to be the President of Azkcon Metal Industries, Inc., Azkcon Refrigeration Industries, Inc., Azkcon Construction Development Corporation, Azk Trading and PMAFC, filed criminal complaints for Robbery, Violation of RA 3019 and Falsification of Public Documents against respondents before the Office of the Ombudsman docketed as OMB-C-C-02-0339-F and C-C-02-1340-F. He alleged that respondents conspired in the unlawful taking of the machineries and equipment which caused him and the aforesaid companies undue injury. King claimed that the properties were owned by PMAFC inasmuch as the Azkcon Group of Companies is not a registered corporation; that in the Notice rescheduling the auction sale, the Deputy Sheriffs misleadingly indicated the address as 220 Lambakin St., Marilao, Bulacan, when the correct address of Azkcon is 220 Lias Road, Bo. Lambakin, Marilao, Bulacan; that the Deputy Sheriffs did not actually hold a public auction consistent with respondents' intention to rob Azkcon; and that Joseph and Teresita conspired with the other respondents when they allowed the safekeeping of the hauled machineries and equipment in their compound.

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[10] *Id*. at 75-76.

[11] *Id*. at 138-139.

The National Bureau of Investigation whose assistance was sought by petitioner likewise filed similar charges against the aforenamed accused before the Office of the Provincial Prosecutor of Bulacan and docketed as I.S. No. 02-05-1059 and I.S. No. 02-06-1406.

Ruling of the Ombudsman

After the consolidation of the cases and hearing the parties' respective position, the Ombudsman in its Joint Resolution dated August 29, 2008 dismissed all the charges against the respondents for lack of probable cause.

According to the Ombudsman, petitioner's evidence failed to establish the four elements of the crime of robbery. The Ombudsman held that the intent to gain is totally absent since Rogelio is the owner of the subject properties on account of his being the highest bidder and a Certificate of Sale issued to him. Thus, Rogelio cannot be charged for taking the personal property of another.

The Ombudsman likewise ruled that the sale of the levied properties through auction was not made with manifest partiality, evident bad faith and/or gross inexcusable negligence. The Deputy Sheriffs' actions were done pursuant to the NLRC Manual on Execution of Judgment.

With respect to the charge of Falsification of Public Documents, the Ombudsman found no record to show that respondents falsified any pertinent document in this case.

Petitioner's Motion for Reconsideration was denied by the Office of the Ombudsman in its assailed Joint Order dated November 17, 2010.

Hence, this instant Petition for Review on *Certiorari*. King insists that probable cause exists to charge respondents with Robbery, Falsification of Public Documents and Violation of Sec. 3(e) of RA 3019.

On July 20, 2011, we resolved to require respondents to file comment.[12] Respondents Romeo and Rodrigo filed their

[12] *Id*. at 317.

Comment[13] maintaining that King failed to prove that there was probable cause to charge them with the foregoing crimes. They also posit that King did not establish conspiracy among them. Moreover, they maintain that Arbiter Robles and the Deputy Sheriffs were only performing their duties as mandated by law. Also, the withdrawal of the properties was done by authority of the law and by virtue of the Certificate of Sale. King thereafter filed his Reply.[14] To date, the other respondents failed to comment. Hence, they are deemed to have waived their right to file comment.

Issue

Whether the Ombudsman erred in its finding of lack of probable cause to hold respondents for trial.

The Court's Ruling

The Petition is bereft of merit.

At the outset, it must be emphasized that the Ombudsman is a constitutional officer duty-bound to investigate on its own or on complaint by "any person, any act or omission of a public officer or employee when such act or omission appears to be illegal, unjust, improper or inefficient."[15] By constitutional fiat and under RA 6770,[16] the Ombudsman is given a wide latitude of investigatory and prosecutory powers on offenses committed by public officers free from legislative, executive or judicial intervention.[17] Because of the endowment of broad investigative authority, the Ombudsman is empowered to determine, based on the sufficiency of the complaint, whether there exist reasonable grounds to believe that a crime has been committed and that the accused is probably guilty thereof and file the corresponding information with the appropriate courts. In contrast, if the

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[13] *Id*. at 330-397.

[14] *Id*. at 460-465.

[15] *Presidential Ad Hoc Committee on Behest Loans v. Tabasondra*, 579 Phil. 312, 324 (2008).

[16] THE OMBUDSMAN ACT OF 1989.

[17] *Id*. at 325.

Ombudsman finds the complaint insufficient in form or substance, it may also dismiss the complaint. Such prerogative is beyond the ambit of this Court to review the Ombudsman's exercise of discretion in prosecuting or dismissing a complaint filed before it[18] except when the exercise thereof is tainted with grave abuse of discretion.[19]

"Grave abuse of discretion is the capricious and whimsical exercise of judgment on the part of the public officer concerned, equivalent to an excess or lack of jurisdiction. The abuse of discretion must be so patent and gross as to amount to an evasion of a positive duty or a virtual refusal to perform a duty enjoined by law, or to act at all in contemplation of law, as where the power is exercised in an arbitrary or despotic manner by reason of passion or hostility."[20] A perusal of the Petition shows that petitioner failed to demonstrate the Ombudsman's abuse, much less grave abuse of discretion in dismissing the charges against respondents for lack of probable cause. On the contrary, a review of the records readily reveals that the Ombudsman's assailed Joint Resolution is based on substantial evidence. From the well-explained Joint Resolution, in our view, petitioner's Affidavit/Complaint is bereft of sufficient ground to engender a well-founded belief that the crimes imputed on respondents have been committed and that they are probably guilty thereof and should be held for trial. In fine, the Ombudsman did not abuse his discretion warranting the Court's intervention, in dismissing the charges against respondents.

Petitioner complained of procedural flaws in the enforcement of the writ of execution arguing in the main that the value of the levied and hauled properties were much more than the monetary award of the NLRC. This we believe is not an adequate ground to reverse the action of the Ombudsman.

Petitioner's bone of contention in the present Petition boils down to the appreciation and determination of factual matters.

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[18] *Id*. at 324.

[19] *Id*. at 325.

[20] *Id*.

The question of whether there was indeed an over levy of properties is one that is essentially a factual concern as it goes into the determination of the fair market value of the properties levied upon vis-à-vis the value of the properties hauled and taken out of the company's premises. Obviously, petitioner invites an evaluation of the evidentiary matters which is not proper in a petition for review on *certiorari*. Besides, this Court is not a trier of facts. Matters pertaining to proofs and evidence are beyond the power of this Court to review under a Rule 45 Petition except in the presence of some meritorious circumstances, none of which is availing in this case.

WHEREFORE, the Petition is **DENIED**. The Joint Resolution dated August 29, 2008 of the Office of the Ombudsman and its Joint Order dated November 17, 2010 are **AFFIRMED**.

SO ORDERED.

Carpio (Chairperson), Perez,[*] *Mendoza,* and *Leonen, JJ.,* concur.

THIRD DIVISION

[G.R. No. 197763. December 7, 2015]

SMART COMMUNICATIONS, INC., MR. NAPOLEON L. NAZARENO, and MR. RICKY P. ISLA, *petitioners, vs*. **JOSE LENI Z. SOLIDUM,** *respondent*.

[G.R. No. 197836. December 7, 2015]

JOSE LENI Z. SOLIDUM, *petitioner, vs.* **SMART COMMUNICATIONS, INC., MR. NAPOLEON L. NAZARENO, and MR. RICKY P. ISLA,** *respondents*.

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[*] Per Special Order No. 2301 dated December 1, 2015.

SYLLABUS

1. LABOR AND SOCIAL LEGISLATION; LABOR CODE; OMNIBUS RULES IMPLEMENTING THE LABOR CODE; PREVENTIVE SUSPENSION; WHILE THE OMNIBUS RULES LIMIT THE PERIOD OF PREVENTIVE SUSPENSION TO THIRTY (30) DAYS, SUCH TIME FRAME PERTAINS ONLY TO ONE OFFENSE BY THE EMPLOYEE.— The relevant provisions regarding preventive suspensions are found in Sections 8 and 9 of Rule XXIII, Book V of the Omnibus Rules Implementing the Labor Code (Omnibus Rules), as amended by Department Order No. 9, Series of 1997. x x x By a preventive suspension an employer protects itself from further harm or losses because of the erring employee. This concept was explained by the Court in *Gatbonton v. National Labor Relations Commission*: **Preventive suspension is a disciplinary measure for the protection of the company's property pending investigation of any alleged malfeasance or misfeasance committed by the employee**. x x x While the Omnibus Rules limits the period of preventive suspension to thirty (30) days, such time frame pertains only to one offense by the employee. For an offense, it cannot go beyond 30 days. However, if the employee is charged with another offense, then the employer is entitled to impose a preventive suspension not to exceed 30 days specifically for the new infraction. Indeed, a fresh preventive suspension can be imposed for a separate or distinct offense. Thus, an employer is well within its rights to preventively suspend an employee for other wrongdoings that may be later discovered while the first investigation is ongoing.

2. ID.; ID.; NATIONAL LABOR RELATIONS COMMISSION (NLRC); CAN SUSPEND THE RULES IF IT FINDS THAT THE INTERESTS OF JUSTICE WILL BE BETTER SERVED IF THE STRICT COMPLIANCE WITH THE RULES SHOULD BE RELAXED.— As aptly found by the NLRC, substantial compliance with the rules on appeal bonds has been repeatedly held by this Court to be sufficient for the perfection of an appeal: x x x Furthermore, considering that it is the NLRC that has interpreted its own rules on this matter, the Court is inclined to accept such interpretation. The Court has held, "By reason of the special knowledge and expertise of administrative agencies over matters falling under their

jurisdiction, they are in a better position to pass judgment on those matters." Moreover, the NLRC properly relaxed the rules on appeal bonds. The NLRC has the power and authority to promulgate rules of procedure under Article 218(a) of the Labor Code. As such, it can suspend the rules if it finds that the interests of justice will be better served if the strict compliance with the rules should be relaxed. In short, a substantial compliance may be allowed by the NLRC especially in this case where the party which submitted the bond is a multibillion company which can easily pay whatever monetary award may be adjudged against it. Even if there is no proof of security deposit or collateral, the surety bond issued by an accredited company is adequate to answer for the liability if any to be incurred by Smart.

3. ID.; ID.; TERMINATION OF EMPLOYEE BY THE EMPLOYER; LOSS OF TRUST AND CONFIDENCE, AS A GROUND; AS A MANAGERIAL EMPLOYEE, DISMISSAL FROM EMPLOYMENT DUE TO LOSS OF TRUST AND CONFIDENCE IS VALID; CASE AT BAR.— Solidum does not deny having "the authority to devise, implement and control strategic and operational policies of the Department he was then heading." This is clearly the authority to lay down and execute management policies. Consequently, the CA affirmed these findings. Thus, the NLRC and the CA correctly found that Solidum was a managerial employee. As such, he may be validly dismissed for loss of trust and confidence. In *Amadeo Fishing Corporation v. Nierra*, the Court ruled that "an acquittal in criminal prosecution does not have the effect of extinguishing liability for dismissal on the ground of breach of trust and confidence." While in *Vergara v. National Labor Relations Commission*, the Court was even more succinct and ruled that the filing of the complaint by the public prosecutor is a sufficient ground for a dismissal of an employee for loss of trust and confidence. x x x In the instant case, both the NLRC and the CA found Solidum guilty of the alleged acts that constituted grounds for his dismissal for loss of trust and confidence. x x x Such findings of the NLRC and affirmed by the CA are binding on this Court.

APPEARANCES OF COUNSEL

Leoncio S. Solidum for Jose Leni Z. Solidum.
Villanueva Gabionza & Dy for Smart Communications, *et al.*

D E C I S I O N

VELASCO, JR., *J.*:

The Case

These are consolidated petitions filed under Rule 45 of the Rules of Court assailing the Decision dated April 4, 2011[1] and Resolution dated July 14, 2011[2] of the Court of Appeals (CA) in CA-G.R. SP No. 109765 entitled *Jose Leni Z. Solidum v. National Labor Relations Commission (First Division), Smart Communications, Inc., Napoleon L. Nazareno and Ricky P. Isla*. The CA Decision affirmed with modification the Resolution dated January 26, 2009 and Decision dated May 29, 2009 of the National Labor Relations Commission (NLRC) in NLRC Case No. 00-11-09564-05.

The Facts

The facts as found by the CA are as follows:

In an Employment Contract dated April 26, 2004,[3] Smart Communications, Inc. (Smart) hired Jose Leni Solidum (Solidum) as Department Head of Smart Prepaid/Buddy Activations under the Product Marketing Group. Existing company procedures provide that a department head shall approve project proposals coming from his marketing assistants and product managers/ officers. Once approved, a finance officer will assign a reference number to the project with a stated budget allocation. If the

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[1] *Rollo* (G.R. No. 197763), pp. 44-59. Penned by Associate Justice Mario V. Lopez and concurred in by Associate Justices Magdangal M. De Leon and Edwin D. Sorongon.

[2] *Id*. at 61-67.

[3] *Rollo* (G.R. No. 197836), pp. 656-658.

Company decides to engage the services of a duly accredited creative agency, the department head will coordinate with it to discuss the details of the project. The implementation details and total amount of the project will then be included in a Cost Estimate (CE) submitted to the Company, routed for approval, and returned to the selected agency for implementation. After the project is carried out, the agency will bill the Company by sending the CE with attached invoices and other supporting documents.

On September 21, 2005, Solidum received a Notice to Explain of even date[4] from the Company charging him with acts of dishonesty and breach of trust and confidence. In summary, he was charged with violating "various company policies by misrepresenting and using his position and influence in his grant plot to defraud Smart by conceptualizing fictitious marketing events, appointing fictitious advertising agencies to supposedly carry out marketing events and submitting fictitious documents to make it appear that the marketing events transpired."[5] He was charged with the following infractions: (1) falsification and/or knowingly submitting falsified contents of reports/ documents relative to his duties and responsibilities; (2) obtaining through fraudulent means materials, goods or services from the Company; (3) failing or refusing to disclose to the Company any existing or future dealings, transactions, relationships, etc. posing or would pose possible conflict of interest; (4) other forms of deceit, fraud, swindling, and misrepresentation committed by an employee against the company or its representative; and (5) fraud or willful breach of trust in relation to transactions covered by Invoice No. 2921 and CE No. 2005-533 as well as CE Nos. 2005-413, 2005-459, 2005-461, 2005-526, 2005-460, 2005-552 and 2005-527 that were approved/noted by him. Solidum received a copy of the Notice on the same date. Pending administrative investigation, Solidum was placed under preventive suspension without pay for a period of thirty (30) days.

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[4] *Id*. at 597-599.

[5] *Id*. at 422.

In a letter dated September 26, 2005,[6] Solidum denied the charges and claimed that he never defrauded nor deceived the Company in his transactions.

Continued audit investigation, however, revealed that Solidum approved/noted several CEs covering activities for which payments were made but did not actually carried out. Unaccredited third parties were also engaged in the implementation of the projects. Thus, the Company issued another Notice to Explain dated October 21, 2005[7] to Solidum, this time covering the following additional CEs: 2005-416, 2005-480, 2005-481, 2005-479, 2005-512, 2005-513, and 2005-533. Solidum was again preventively suspended for another ten (10) days. Further, the Company scheduled the administrative investigation of the case on October 26, 2005.

Solidum then sent a letter dated October 24, 2005[8] to the Company requesting copies of the pertinent documents so he can prepare an intelligible explanation. In another letter dated October 26, 2005,[9] Solidum stated that the investigation is highly suspicious and his extended suspension imposed undue burden. He also reserved his right to present evidence. In his last letter dated October 28, 2005,[10] Solidum declared that he shall no longer receive or entertain notices or memorandum, except the final decision resolving the administrative charges against him.

Thereafter, the Company issued a letter dated November 2, 2005, alleging that Solidum refused to accept the documents that he had requested. Using this allegation, the Company imposed an additional preventive suspension of ten (10) days on Solidum.

Based on the available evidence, the Company decided to dismiss Solidum for breach of trust in a Notice of Decision

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[6] *Id*. at 601-607.

[7] *Id*. at 630-633.

[8] *Id*. at 639-640.

[9] *Id*. at 636-638.

[10] *Id*. at 666.

dated November 9, 2005.[11] Corollarily, a Notice of Termination was served on him on November 11, 2005.

Aggrieved, Solidum filed a complaint dated November 19, 2005 for illegal suspension and dismissal with money claims before the Arbitration Branch of the NLRC claiming that his extended suspension and subsequent termination were without just cause and due process.

In a Decision dated July 3, 2006,[12] the labor arbiter declared that the extended period of suspension without pay was illegal and that Solidum was unjustly dismissed from work without observance of procedural due process. He was ordered reinstated and was awarded backwages and monetary claims. The labor arbiter ratiocinated that the ground of breach of trust and confidence is restricted to managerial employees; however, no substantial evidence was presented to prove that Solidum has the prerogatives akin to a manager other than his titular designation as department head.

The Company appealed the adverse decision of the labor arbiter to the NLRC but was denied for having been filed out of time and/or for non-perfection, thus:

> Records show that respondents received a copy of the Decision on "July 10, 2006" (See Registry Return Receipt, p. 561, Record) However, respondents filed their appeal only on "July 25, 2006" x x x already beyond the reglementary ten (10) calendar day period for filing an appeal to the Commission. x x x
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> Moreover, perusal of the appeal shows that the appeal bond attached to it is not accompanied by a security deposit or collateral. The CERTIFICATE OF NO COLLATERAL x x x that was submitted by the bonding company stating that the bond was issued on (sic) behalf of respondent SMART "without collateral because they are our valued client" and that "[t]he company declares its commitment to honor the validity of the foregoing bond notwithstanding the absence of collateral" does not serve any purpose other than an admission

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[11] *Id*. at 1038-1044.

[12] *Id*. at 344-403.

that the security deposit or collateral requirement under Section 6, Rule VI of the Revised Rules of [P]rocedure of the NLRC for perfecting an appeal was not complied with. Needless to state, the absence of a security deposit or collateral securing the bond renders the appeal legally infirm.[13]

In its motion for reconsideration, the Company insisted that the appeal was filed within the reglementary period considering that it received the labor arbiter's decision only on July 13, 2006 and not July 10, 2006. It presented among others the Certification from Makati Central Post Office, the pertinent page of the letter carrier's Registry Book, and the respective affidavit of the letter carrier and the Company's receiving clerk. It added that in case of conflict between the registry receipt and the postmaster's certification, the latter should prevail. Likewise, the Company maintained that the surety bond was secured by its goodwill and the alleged lack of collateral or security will not render the bond invalid in view of the surety's unequivocal commitment to pay the monetary award.

Finding merit in the motion, the NLRC issued a Resolution dated January 26, 2009[14] reversing its earlier ruling and giving due course to the appeal. It upheld the certification of the postmaster over the registry receipt and found that there was substantial compliance with the bond requirement, viz:

> Given the factual milieu, the Commission rules that respondents' appeal was indeed filed within the ten (10) day period x x x. Since the Decision [of the Labor Arbiter] dated July 3, 2006 was received by respondents on July 13, 2006, respondents have (sic) effectively until July 25, 2006 (considering that July 23 was a Sunday, and July 24 was a declared nonworking day) x x x.
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> x x x x x x x x x
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> As to the absence of security deposit or collateral, the Commission x x x finds that respondents were able to comply substantially with the pre- requisite for the perfection of appeal.

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[13] *Id*. at 405-406.

[14] *Id*. at 410-437.

x x x While the appeal bond was posted without security or collateral, the Certification dated July 20, 2006, issued by the bonding company attests to the latter's "commitment to honor the validity of the foregoing bond notwithstanding the absence of collateral." Otherwise stated, the very purpose of a security or collateral should be deemed served considering the guarantee of the bonding company to pay the entire amount of the bond in the event respondents suffer an adverse disposition of their appeal. It matters not that the bond was issued on behalf of respondents without collateral for after all, the bond is accompanied by a declaration under oath bearing the bonding company's commitment to honor the validity of the surety bond and attesting that the surety bond is genuine and shall be in effect until the final disposition of the case.

The NLRC likewise reversed the labor arbiter's decision. It ruled that the seriousness of Solidum's infractions justified the additional period of suspension. It added that the labor arbiter erred in declaring Solidum's dismissal illegal and without just cause on the basis that he is not a managerial employee. On the contrary, overwhelming evidence showed that Solidum holds a position of trust and has violated various company policies. Finally, the NLRC found that Solidum was accorded procedural due process. The dispositive portion of the Resolution thus reads:

WHEREFORE, the foregoing considered, the Commission hereby resolves as follows:

1. complainant's Motion to Inhibit dated June 13, 2008 is DENIED for lack of merit.
2. respondents' Motion for Reconsideration dated July 27, 2007 is GRANTED and their instant appeal dated July 25, 2006 is given DUE COURSE.
3. the Commission's Resolution dated July 4, 2007 is SET ASIDE and VACATED.
4. the appealed Decision a quo dated July 3, 2006 is SET ASIDE and new one is ENTERED dismissing the complaint below for lack of merit.

SO ORDERED.

Thus, Solidum appealed to the CA. The CA then rendered the assailed Decision dated April 4, 2011 affirming with modification the Decision of the NLRC. The dispositive portion of the CA Decision reads:

> FOR THESE REASONS, the Court AFFIRMS the NLRC Resolution dated January 26, 2009 with the MODIFICATION that petitioner Jose Leni Solidum be paid his salaries and benefits which accrued during the period of his extended preventive suspension.
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> SO ORDERED.

From such Decision both parties moved for reconsideration. The CA denied such Motions in a Resolution dated July 14, 2011. From such ruling of the appellate court, both parties appealed. Hence, the instant petitions.

The Issues

In G.R. No. 197763, Smart raises the following issues:

(A)

> The Court of Appeals gravely erred in declaring illegal the second preventive suspension imposed by petitioner Smart upon the respondent.

(B)

> The Court of Appeals gravely erred in declaring that petitioner Smart may not place the respondent under another preventive suspension after discovery of additional offenses notwithstanding that the offenses committed by the respondent warrant another preventive suspension.[15]

In G.R. No. 197836, Solidum raises the following issues, to wit:

A.

> Whether or not the public respondent Court of Appeal's Decision dated April 4, 2011 and Resolution dated July 14, 2011, ruling that the appeal of private respondent Smart filed with public respondent NLRC was well taken within the reglementary period, is in accordance with law, rules and prevailing jurisprudence.

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[15] *Rollo* (G.R. No. 197763), pp. 26-27.

B.

Whether or not the public respondent Court of Appeal's Decision dated April 4, 2011 and Resolution dated July 14, 2011, considering private respondent Smart's appeal with the NLRC as perfected by upholding the validity of the appeal bond posted by said private respondent Smart even if there was no security deposit or collateral, is in accordance with Section 4 and 6, Rule VI of the 2005 NLRC Revised Rules of Procedure, NLRC Memorandum Circular 1-01, series of 2004, and prevailing jurisprudence.

C.

Whether or not the public respondent Court of Appeals gravely erred in failing to consider the evidence petitioner showing that even up to the present, or more than five (5) years after the expiration of the 10-day reglementary period to file a perfected appeal with the NLRC on July 20, 2006, private respondent Smart still fails to provide petitioner with a certified true copy of the surety bond and copy of the security deposit required for the perfection of the appeal under Section 6, Rule VI of the 2005 NLRC Revised Rules of Procedure.

D.

Whether or not the public respondent Court of Appeals committed grave abuse of discretion in upholding the validity of the appeal bond filed by private respondent Smart despite the fact that both the appeal bond and collateral securing the said bond had long expired.

E.

Whether or not the public respondent Court of Appeals gravely erred in ruling that the technical rules are not controlling in any proceeding before the NLRC.

F.

Whether or not the public respondent Court of Appeals gravely erred in affirming the Resolution of public respondent NLRC dated January 26, 2009 which set aside the decision of the labor arbiter dated July 3, 2006 declaring that petitioner's preventive suspension for more than 30 days without pay is illegal and tantamount to constructive dismissal.

G.

Whether or not the public respondent Court of Appeals gravely erred in finding that petitioner was afforded procedural due process by private respondent under the Two-Notice Rule.

H.

Whether or not the public respondent Court of Appeals gravely erred in finding that those irregularities committed by petitioner were proven by documentary evidence and testimonies of his product managers and marketing assistants despite the fact that none of those product managers and marketing assistants appeared and testified during the hearings and, most importantly, during the hearing for cross-examination on their submitted affidavits and documentary evidence as scheduled by the labor arbiter upon specific request and manifestation by the petitioner invoking his constitutional right to cross-examine.

I.

Whether or not the public respondent Court of Appeals gravely erred in finding that herein petitioner is a fiduciary employee and is therefore covered by the trust and confidence rule to a wider latitude.

J.

Whether or not the public respondent Court of Appeals gravely erred in finding that petitioner is a managerial employee.

K.

Whether or not the public respondent Court of Appeals gravely erred in finding that there was just and valid cause to terminate the petitioner from the service.[16]

The Court's Ruling

The petitions must be denied.

Solidum's 2nd preventive suspension is valid

In G.R. No. 197763, Smart contended:

On the same vein, the respondent was validly placed under second preventive suspension for the reason that pending investigation of

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[16] *Rollo* (G.R. No. 197836), pp. 131-134.

separate and distinct set of offenses committed by the respondent as contained in the second Notice to Explain dated 21 October 2005 (Annex F hereof), his continued presence in the company premises during the investigation poses serious and imminent threat to the life or property of the employer and co-workers.[17]

On the other hand, Solidum claims that his preventive suspension of 20 days is an extension of his initial 30-day suspension and, hence, illegal and constitutes constructive dismissal.

Smart's position is impressed with merit.

The relevant provisions regarding preventive suspensions are found in Sections 8 and 9 of Rule XXIII, Book V of the Omnibus Rules Implementing the Labor Code (Omnibus Rules), as amended by Department Order No. 9, Series of 1997, which read as follows:

Section 8. *Preventive suspension*. The employer may place the worker concerned under preventive suspension only if his continued employment poses a serious and imminent threat to the life or property of the employer or of his co-workers.

Section 9. *Period of suspension*. **No preventive suspension shall last longer than thirty (30) days.** The employer shall thereafter reinstate the worker in his former or in a substantially equivalent position or the employer may extend the period of suspension provided that during the period of extension, he pays the wages and other benefits due to the worker. In such case, the worker shall not be bound to reimburse the amount paid to him during the extension if the employer decides, after completion of the hearing, to dismiss the worker. (emphasis supplied)

By a preventive suspension an employer protects itself from further harm or losses because of the erring employee. This concept was explained by the Court in *Gatbonton v. National Labor Relations Commission*:[18]

Preventive suspension is a disciplinary measure for the protection of the company's property pending investigation of

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[17] *Rollo* (G.R. No. 197763), p. 29.

[18] G.R. No. 146779, January 23, 2006, 479 SCRA 416, 421-422.

any alleged malfeasance or misfeasance committed by the employee. The employer may place the worker concerned under preventive suspension if his continued employment poses a serious and imminent threat to the life or property of the employer or of his co-workers. However, when it is determined that there is no sufficient basis to justify an employee's preventive suspension, the latter is entitled to the payment of salaries during the time of preventive suspension. (emphasis supplied)

Such principle was applied by the Court in *Bluer Than Blue Joint Ventures/Mary Ann Dela Vega v. Esteban*,[19] where it was ruled:

> Preventive suspension is a measure allowed by law and afforded to the employer if an employee's continued employment poses a serious and imminent threat to the employer's life or property or of his co-workers. It may be legally imposed against an employee whose alleged violation is the subject of an investigation.
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> In this case, the petitioner was acting well within its rights when it imposed a 10-day preventive suspension on Esteban. **While it may be that the acts complained of were committed by Esteban almost a year before the investigation was conducted, still, it should be pointed out that Esteban was performing functions that involve handling of the petitioner's property and funds, and the petitioner had every right to protect its assets and operations pending Esteban's investigation.** (emphasis supplied)

While the Omnibus Rules limits the period of preventive suspension to thirty (30) days, such time frame pertains only to one offense by the employee. For an offense, it cannot go beyond 30 days. However, if the employee is charged with another offense, then the employer is entitled to impose a preventive suspension not to exceed 30 days specifically for the new infraction. Indeed, a fresh preventive suspension can be imposed for a separate or distinct offense. Thus, an employer is well within its rights to preventively suspend an employee for other wrongdoings that may be later discovered while the first investigation is ongoing.

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[19] G.R. No. 192582, April 7, 2014, 720 SCRA 765, 777.

As in this case, Smart was able to uncover other wrongdoings committed by Solidum during the investigation for the initial charges against him. These newly discovered transgressions would, thus, require an additional period to investigate. The first batch of offenses was captured in the September 21, 2005 Notice to Explain issued by Smart. The notice covers fraud or willful breach of trust in relation to transactions covered by Invoice No. 2921 and CE No. 2005-533 as well as CE Nos. 2005-413, 2005-459, 2005-461, 2005-526, 2005-460, 2005-552 and 2005-527 that were noted by him. For these offenses, Solidum was issued a preventive suspension without pay for 30 days.

On October 21, 2005, Smart, however, issued another notice to explain to Solidum this time involving additional CEs: 2005-416, 2005-480, 2005-481, 2005-479, 2005-512, and 2005-513. Solidum was again preventively suspended for twenty (20) days. The preventive suspension of 20 days is not an extension of the suspension issued in relation to the September 21, 2005 Notice to Explain but is a totally separate preventive suspension for the October 21, 2005 Notice to Explain. As earlier pointed out, the transactions covered by the 30-day preventive suspension are different from that covered by the 20-day preventive suspension. Such being the case the court *a quo* was incorrect when it treated said suspension as an "extension" and, consequently, it is a miscue to award Solidum the payment of back salaries and benefits corresponding to the 20-day preventive suspension of Solidum.

As to the issues raised by Solidum in G.R. No. 197836, the same are bereft of merit.

Smart's appeal from the Decision of the labor arbiter was filed within the reglementary period

Solidum contends that Smart's motion for reconsideration of the labor arbiter's Decision was filed out of time. The issue here is: When did Smart receive a copy of the Decision? The confusion originated from the date stamped by the receiving clerk of Smart on the receiving copy of the Decision as July 10, 2006. Smart claims that the stamped date was erroneous as it actually received a copy of the Decision only on July 13,

2006. Such claim is supported by the certification from the postmaster of the Makati Central Post Office, the letter carrier's Registry Book, and the affidavits of the letter carrier and Smart's receiving clerk. With such overwhelming evidence, there can be no other conclusion except that Smart received a copy of the Decision on July 13, 2006 and filed their motion for reconsideration within the prescribed 10-day period on July 25, 2006, as July 24, 2006 fell on a Sunday. Thus, Smart's Motion was timely filed.

Smart substantially complied with the requirements of an appeal bond

Next, Solidum questions the validity of the appeal bond filed by Smart, pointing out the lack of a proof of security deposit or collateral necessary to perfect its appeal to the NLRC. To recall, Section 6, Rule VI of the 2005 NLRC Revised Rules of Procedure states:

> Section 6. *Bond.* – In case the decision of the Labor Arbiter or the Regional Director involves a monetary award, an appeal by the employer may be perfected only upon the posting of a bond, which shall either be in the form of cash deposit or surety bond equivalent in amount to the monetary award, exclusive of damages and attorney's fees.
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> In case of surety bond, the same shall be issued by a reputable bonding company duly accredited by the Commission or the Supreme Court, and shall be accompanied by original or certified true copies of the following:
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> x x x x x x x x x
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> c) **proof of security deposit or collateral securing the bond**: provided, that a check shall not be considered as an acceptable security. (emphasis supplied)

Thus, Solidum claims that the lack of proof of security deposit or collateral securing the bond renders the bond irregular and the appeal legally infirm.

We disagree.

As aptly found by the NLRC, substantial compliance with the rules on appeal bonds has been repeatedly held by this Court to be sufficient for the perfection of an appeal:

The perfection of an appeal within the reglementary period and in the manner prescribed by law is jurisdictional, and noncompliance with such legal requirement is fatal and effectively renders the judgment final and executory. As provided in Article 223 of the Labor Code, as amended, in case of a judgment involving a monetary award, an appeal by the employer may be perfected only upon the posting of a cash or surety bond issued by a reputable bonding company duly accredited by the Commission in the amount equivalent to the monetary award in the judgment appealed from.

However, not only in one case has this Court relaxed this requirement in order to bring about the immediate and appropriate resolution of cases on the merits. In *Quiambao v. National Labor Relations Commission*, this Court allowed the relaxation of the requirement when there is substantial compliance with the rule. Likewise, in *Ong v. Court of Appeals*, the Court held that the bond requirement on appeals may be relaxed when there is substantial compliance with the Rules of Procedure of the NLRC or when the appellant shows willingness to post a partial bond. The Court held that "while the bond requirement on appeals involving monetary awards has been relaxed in certain cases, this can only be done where there was substantial compliance of the Rules or where the appellants, at the very least, exhibited willingness to pay by posting a partial bond."[20]

Furthermore, considering that it is the NLRC that has interpreted its own rules on this matter, the Court is inclined to accept such interpretation. The Court has held, "By reason of the special knowledge and expertise of administrative agencies over matters falling under their jurisdiction, they are in a better position to pass judgment on those matters."[21] Moreover, the NLRC properly relaxed the rules on appeal bonds.

The NLRC has the power and authority to promulgate rules of procedure under Article 218(a) of the Labor Code. As such, it can suspend the rules if it finds that the interests of justice

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[20] *Pasos v. Philippine National Construction Corporation*, G.R. No. 192394, July 3, 2013, 700 SCRA 608, 622-623.

[21] *Encinas v. Agustin*, G.R. No. 187317, April 11, 2013, 696 SCRA 240, 266-267.

will be better served if the strict compliance with the rules should be relaxed. In short, a substantial compliance may be allowed by the NLRC especially in this case where the party which submitted the bond is a multibillion company which can easily pay whatever monetary award may be adjudged against it. Even if there is no proof of security deposit or collateral, the surety bond issued by an accredited company is adequate to answer for the liability if any to be incurred by Smart.

Solidum is not entitled to reinstatement

Next, Solidum claims that due to the extension of his period of preventive suspension, he must be considered as having been constructively dismissed and entitled to reinstatement and backwages. To support his claim, Solidum cites *Maricalum Mining Corporation v. Decorion*.[22] Such case, however, is not factually on all fours with the instant case. In *Maricalum*, the Court ruled that Decorion was illegally constructively dismissed, which is why he was entitled to reinstatement. Here, Solidum was validly dismissed for loss of trust and confidence. Thus, his reliance on *Maricalum* is misplaced and will not justify his reinstatement.

As to Solidum's claim of denial of due process, such issues are factual in nature. This Court, not being a trier of facts, will not pass upon such issues, as ruled in *Nahas v. Olarte*:[23]

> The Court is not a trier of facts; factual findings of the labor tribunals when affirmed by the CA are generally accorded not only respect, but even finality, and are binding on this Court.

Notably, Solidum's allegation that he was denied his right to counsel was passed upon the NLRC in this wise:

> Similarly, the Commission is not convinced with Labor Arbiter Pati's finding that the complainant was deprived on his right to counsel when he was not allowed to be assisted by his counsel at the alleged investigation held on September 21, 2005. **Other than**

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[22] G.R. No. 158637, April 12, 2006, 487 SCRA 182.

[23] G.R. No. 169247, June 2, 2014, 724 SCRA 224, 234.

his bare claim, there is no evidence on record buttressing complainant's claim.[24] x x x (emphasis supplied)

Similarly, Solidum contends that he did not receive other documents necessary for him to be apprised of the charges against him. Such are also issues of fact. The NLRC ruled on this matter in this wise:

The Commission is likewise not convinced with the finding of Labor Arbiter Pati that complainant was deprived of due process when he was not furnished copies of the documents he referred to in his letter dated October 24, 2005 thereby prompting him not to attend the hearings on October 26 and 28, 2005. **There is evidence to show that respondents furnished copies of the documents requested by complainant but which the latter refused to received when they were sent to his residence**.[25] x x x (emphasis supplied)

It is not necessary that witnesses be cross-examined by counsel of the adverse party in proceedings before the labor arbiter

Solidum further alleges that he was denied the right to cross-examine the witnesses who submitted affidavits in favor of Smart; thus, the affidavits must be considered hearsay and inadmissible. In support of such contention, Solidum cites *Naguit v. National Labor Relations Commission*.[26]

Such contention is misplaced.

The controlling jurisprudence on the matter is the ruling in the more recent *Philippine Long Distance Telephone Company v. Honrado*,[27] where the Court ruled:

It is hornbook in employee dismissal cases that "[t]he essence of due process is an opportunity to be heard, or as applied to administrative proceedings, an opportunity to explain one's side

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[24] *Rollo* (G.R. No. 197836), p. 435.

[25] *Id*. at 434.

[26] G.R. No. 120474, August 12, 2003, 408 SCRA 617.

[27] G.R. No. 189366, December 8, 2010, 637 SCRA 778, 783-784.

x x x. A formal or trial type hearing is not at all times and in all instances essential to due process, the requirements of which are satisfied where the parties are afforded fair and reasonable opportunity to explain their side of the controversy." **Neither is it necessary that the witnesses be cross-examined by counsel for the adverse party**. (emphasis supplied)

The Court explained the reason why cross-examination is not required in the proceedings before the labor arbiter in *Reyno v. Manila Electric Company*,[28] citing *Rabago v. National Labor Relations Commission*[29] where the Court ruled:

x x x The argument that the affidavit is hearsay because the affiants were not presented for cross-examination is not persuasive because the rules of evidence are not strictly observed in proceedings before administrative bodies like the NLRC where decisions may be reached on the basis of position papers only. x x x

Clearly, the alleged denial of Solidum's request to cross-examine the witnesses of Smart does not render their affidavits hearsay. Thus, these pieces of evidence were properly considered by the labor tribunal.

Solidum was a managerial employee of Smart

Next, Solidum argues that he is not a fiduciary or managerial employee and, therefore, cannot be legally dismissed on the ground of loss of trust and confidence. Article 212(m) of the Labor Code defines a Managerial Employee as:

(m) 'Managerial employee' is one who is vested with powers or prerogatives to lay down and execute management policies and/or to hire, transfer, suspend, lay-off, recall, discharged, assign or discipline employees. x x x

The NLRC found that Solidum was a managerial employee in this wise:

The facts on hand indubitably show that complainant occupied the position of Department Head and held the same with trust and

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[28] G.R. No. 148105, July 22, 2004, 434 SCRA 660, 667.

[29] G.R. No. 82868, August 5, 1991, 200 SCRA 158, 164-165.

confidence as required him under his employment contract. As Department Head of the Smart Buddy Activations and Usage Group, complainant led and directed his subordinates composed of product managers, product officers, and senior marketing assistants to achieving the company's marketing goals. **Moreover, complainant appears to have the authority to devise, implement and control strategic and operational policies of the Department he was then heading**. Likewise, it cannot be denied that complainant's Department has a budget of millions of pesos over which he exercises the power to allocate to different marketing projects conceptualized by him and/or his subordinates. The records would also show that for complainant's services, he received a monthly salary in the hefty amount of ₱233,910.00, monthly allowance of ₱19,000.00, and bonuses and incentives of more than ₱7 Million.

Under the foregoing facts, complainant's duties and responsibilities, coupled with the amount of salaries he is receiving and other benefits he is entitled to, certainly show that his position of Department Head is managerial in nature.[30] (emphasis supplied)

Solidum denies that he is a managerial employee by stating that just because he directed subordinates, he should be considered a managerial employee. He also argues that just because he had a large salary does not mean that he was a managerial employee. Finally, Solidum denies having the power to lay down and execute management policies.

Notably, however, Solidum does not deny having "the authority to devise, implement and control strategic and operational policies of the Department he was then heading." This is clearly the authority to lay down and execute management policies. Consequently, the CA affirmed these findings. Thus, the NLRC and the CA correctly found that Solidum was a managerial employee. As such, he may be validly dismissed for loss of trust and confidence.

The rulings of trial court in criminal cases generally do not bind the labor tribunals

Further, Solidum alleges that he did not commit any dishonesty-related offense that would justify Smart's loss of confidence in

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[30] *Rollo* (G.R. No. 197836), p. 421.

him. He supports such allegation with the rulings of two (2) trial courts of Makati City that ruled that Solidum did not commit any fraud in the subject transactions.

Solidum's reliance on the rulings of the trial courts is misplaced. His acquittal before such courts cannot bind the labor tribunal.

In *Amadeo Fishing Corporation v. Nierra*,[31] the Court ruled that "an acquittal in criminal prosecution does not have the effect of extinguishing liability for dismissal on the ground of breach of trust and confidence." While in *Vergara v. National Labor Relations Commission*,[32] the Court was even more succinct and ruled that the filing of the complaint by the public prosecutor is a sufficient ground for a dismissal of an employee for loss of trust and confidence, to wit:

> The Court finds adequate basis for private respondent's loss of trust and confidence in petitioner. x x x **Besides, the evidence supporting the criminal charge, found after preliminary investigation as sufficient to show *prima facie* guilt, constitutes just cause for his termination based on loss of trust and confidence**. To constitute just cause, petitioner's malfeasance did not require criminal conviction. Verily, petitioner was dismissed not because he was convicted of theft, but because his dishonest acts were substantially proven. (emphasis supplied)

In the instant case, both the NLRC and the CA found Solidum guilty of the alleged acts that constituted grounds for his dismissal for loss of trust and confidence, which were summarized by the CA as follows:

> First, Solidum noted two versions of CE No. 2005-533 with description "Buy SIM Download All You Can" but containing different particulars. Specifically, the second CE included charges from various radio stations which are not found in the first CE. However, the Company discovered that the only projects with approved radio components were the "Mindanao Kolek Mo To Promo" which ended on July 15, 2005; the "Visayas Kolek Mo To Promo" which ended

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[31] G.R. No. 163099, October 4, 2005, 472 SCRA 13, 32.

[32] G.R. No. 117196, December 5, 1997, 282 SCRA 486, 497.

on August 15, 2005, and the "Smart Download and Win" with promo period from August 22 to October 22, 2005. The "Buy SIM Download All You Can" has no approved radio component. Moreover, Solidum submitted certificates of performance from various radio stations which are outside of the promo periods.

Second, in the implementation of several projects, Solidum endorsed unaccredited third parties, which is already a violation of established company policies. One of these corporations is M&M Events, Inc., which turned out as a non-existing corporation. The Smart Senior Product Officer Ma. Luisa Suguitan even testified that she has not worked with an agency such as M&M Events, Inc. Worse, the said entity cannot be found in its declared business address and the VAT registration number appearing on its sales invoice is registered under a different company. Moreover, Solidum approved CE No. 2005-459 and CE No. 2005-460, pertaining to different projects, but with attached invoices from M&M Events, Inc. bearing the same date and amount. Finally, Solidum deviated from the existing company procedures. He presented CEs to his subordinate product manager for signature with his approval already affixed. Later, it was discovered that the duly signed CEs were altered without the knowledge of the product manager. He even dictated to the agency the title to be used and the details that should be included in the CEs. The CEs were then forwarded directly to him instead of the Smart marketing point person. Solidum also charged certain projects against the budget of another approved program.

Such findings of the NLRC and affirmed by the CA are binding on this Court. Thus, Solidum's petition must also fail on this point.

WHEREFORE, the petition of Jose Leni Z. Solidum in G.R. No. 197836 is hereby **DENIED**. The petition of petitioners Smart Communications, Inc, et al. in G.R. No. 197763 is **PARTIALLY GRANTED**. The Court of Appeals Decision dated April 4, 2011 is hereby **AFFIRMED** with **MODIFICATION** that the award of salaries and benefits that accrued during the period of extended preventive suspension is **DELETED**.

No costs.

SO ORDERED.

Peralta, Villarama, Jr., Reyes, and *Jardeleza, JJ.,* concur.

THIRD DIVISION

[G.R. No. 199314. December 7, 2015]
(Formerly UDK No. 14553)

TAMBLOT SECURITY & GENERAL SERVICES, INC., *petitioner, vs.* **FLORENCIO ITEM, LEONARDO PALMA, RICARDO UCANG, FLORENCIO AMORA, REYNALDO DANO, APOLLO JOTOJOT, TEODORO BARONG, JUAN T. CUSI, TEODORO DE LOS REYES, EFREN ESCOL, JOVANNE COSE, DARIO S. GEALON, JULIO ESPADA and DARIO PAJE,** *respondents.*

SYLLABUS

LABOR AND SOCIAL LEGISLATION; LABOR RELATIONS; TERMINATION OF EMPLOYMENT BY EMPLOYER; ABANDONMENT OF WORK, AS A GROUND; REQUISITES; NOT PRESENT IN CASE AT BAR.— The failure to firmly establish that respondents were actually notified or informed that they were being ordered to report back for duty is fatal to petitioner's cause. Without proof that respondents were aware of their new assignments or were being ordered to report back for duty, it cannot be said that the employee failed to report for work. There is, therefore, no showing of any overt act of the respondents that would point to an intention to abandon their work. On the contrary, since respondents almost immediately filed a complaint for illegal dismissal after they were relieved from duty, there is a clear indication that they had the desire to continue with their employment. In fine, petitioner utterly failed to establish the requisites for abandonment of work to exist, *i.e.*, (1) that the employee must have failed to report for work or must have been absent without valid or justifiable reason; and (2) that there must have been a clear intention to sever the employer-employee relationship manifested by some overt acts. Since there is nothing extraordinary with the facts and circumstances of this case, then there is no justifiable reason for the Court to overturn the longstanding view that the immediate filing of a complaint for illegal dismissal negates a charge for abandonment of work.

APPEARANCES OF COUNSEL

Handel T. Lagunay for petitioner.
Caesar A.M. Tabotabo for respondents.

D E C I S I O N

PERALTA, *J.*:

This resolves the Petition for Review on *Certiorari* under Rule 45 of the Rules of Court, praying that the Decision[1] of the Court of Appeals (*CA*) promulgated on May 28, 2010, and its Resolution[2] dated July 8, 2011, denying petitioner's Motion for Reconsideration be reversed and set aside.

Respondents were employed by petitioner as security guards and deployed at Marcela Mall. Respondent Florencio Item (*hereinafter referred to as Florencio*) had a misunderstanding with the security officer of Marcela Mall, thus, he was recalled and relieved from duty by petitioner. Florencio then consulted a lawyer who told him that he was also underpaid. He shared this information with his co-respondents, which prompted the rest of them to file a letter-complaint with the Department of Labor and Employment (*DOLE*) for labor standards benefits. During their meeting for said case, petitioner's representatives tried to convince them to withdraw their complaint but they refused. As a result of their refusal, all the other respondents were also relieved from their duties at Marcela Mall. Respondents then withdrew their complaint with the DOLE and instead filed complaints for illegal dismissal before the NLRC.

Petitioner countered that it did not dismiss respondents; rather, it was respondents who refused to return to work. Letters notifying

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[1] Penned by Associate Justice Agnes Reyes-Carpio, with Associate Justices Edgardo L. Delos Santos and Eduardo B. Peralta, Jr., concurring; *rollo*, pp. 25-36.

[2] Penned by Associate Justice Eduardo B. Peralta, Jr., with Associate Justices Edgardo L. Delos Santos and Ramon Paul L. Hernando, concurring; *id*. at 19-23.

respondents of their new assignments and directing them to report to the office were allegedly sent to respondents, but they never reported for work. Hence, petitioner faulted respondents for abandonment of work.

The Labor Arbiter dismissed respondents' complaint. The Arbiter's Decision was appealed to the National Labor Relations Commission (*NLRC*), and in a Decision dated March 30, 2006, the NLRC ruled that the complaint for illegal dismissal was prematurely filed since at the time of filing of the complaint, respondents could still be considered to be on reserve status, as the period of six (6) months from the date they were relieved from duty has not yet lapsed. The NLRC, however, pointed out that because only respondents Florencio and Leonardo Palma signed the Verification and Certification of the Notice of Appeal, they were the only ones who could be deemed to have appealed the Labor Arbiter's Decision to the NLRC. Thus, petitioner was ordered to pay only Florencio and Leonardo Palma their separation pay, refund of cash bonds and attorney's fees. In a Resolution dated July 26, 2006, respondents' motion for reconsideration of said Decision was denied, while petitioner's motion for reconsideration thereof was partially granted by absolving Marcela Mall from any liability.

Elevating the case to the CA via a petition for *certiorari*, herein respondents (*petitioners below*) argue that the NLRC erred in not giving due course to the appeal of the other respondents and in not categorically ruling that herein respondents were constructively dismissed, entitling all respondents to all their money claims and other benefits.

The CA then promulgated the assailed Decision dated May 28, 2010, the dispositive portion of which reads as follows:

> **IN LIGHT OF THE FOREGOING**, the instant petition is hereby **GRANTED**. The Resolutions of [the] NLRC dated April 30, 2008 and July 28, 2008, in NLRC VAC-02-000105-2008 are hereby **SET ASIDE** and a new one is hereby **ENTERED**, as follows:
>
> 1. Declaring the twelve (12) other petitioners [herein respondents] to have validly taken their appeal with the NLRC;

2. Declaring petitioners to have been constructively dismissed by Tamblot Security & General Services, Inc.;

3. Ordering Tamblot Security & General Services, Inc. to pay petitioners their full backwages from the time their compensation were withheld up to the time of their actual reinstatement, refund cash bond at the rate of ₱50.00 per month of service and Attorney's fees equivalent to 10% of the monetary award. In the event that reinstatement is impossible, Tamblot Security & General Services, Inc. is liable to pay separation pay computed at one month salary for every year of service, a fraction of at least six (6) months considered as one whole year.

Further, this case is **REMANDED** to the labor arbiter for the computation of backwages, refund of cash bond and attorney's fees.

SO ORDERED.[3]

Hence, the present petition wherein petitioner security agency contends that there was no constructive dismissal as it was respondents who are guilty of abandonment of work; hence, they are not entitled to any monetary award.

The Court finds the petition devoid of merit.

In *Protective Maximum Security Agency, Inc. v. Fuentes*,[4] the Court reiterated the rule that:

> x x x for abandonment of work to exist, it is essential (1) that the employee must have failed to report for work or must have been absent without valid or justifiable reason; and (2) that there must have been a clear intention to sever the employer-employee relationship manifested by some overt acts. . . . Absence must be accompanied by overt acts unerringly pointing to the fact that the employee simply does not want to work anymore. And the burden of proof to show that there was unjustified refusal to go back to work rests on the employer.

. . . It is not enough to simply allege that the private respondent had "mysteriously disappeared" and that "[a]s usual and routine,

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[3] *Rollo*, pp. 35-36. (Emphasis in the original)

[4] G.R. No. 169303, February 11, 2015.

private respondent should have reported to his Team Leader or Officer-in-Charge."[5]

Here, the NLRC, affirmed by the CA, made the factual finding that petitioner failed to present evidence sufficiently proving its defense of abandonment of work, so as to make the termination of respondents' employment a valid one. Petitioner should be reminded of the oft-repeated rule that in petitions for review on *certiorari*, the jurisdiction of this Court is generally limited to reviewing errors of law or jurisdiction. This Court cannot be tasked to analyze or weigh evidence all over again as the evaluation of facts is best left to the lower courts.[6] This was further elaborated in *Stanley Fine Furniture v. Gallano*,[7] thus:

> Specifically, in reviewing a CA labor ruling under Rule 45 of the Rules of Court, the Court's review is limited to:
>
> (1) Ascertaining the correctness of the CA's decision in finding the presence or absence of a grave abuse of discretion. This is done by examining, on the basis of the parties' presentations, whether the CA correctly determined that at the NLRC level, all the adduced pieces of evidence were considered; no evidence which should not have been considered was considered; and the evidence presented supports the NLRC findings; and
>
> (2) Deciding any other jurisdictional error that attended the CA's interpretation or application of the law. (Citation omitted)

Thus, the proper issue in this case is whether the Court of Appeals correctly determined the presence of grave abuse of discretion on the part of the National Labor Relations Commission.[8]

A perusal of the records convinced us that the CA correctly concluded that the NLRC did not commit any grave abuse of

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[5] *Protective Maximum Security Agency, Inc. v. Fuentes, supra*. Underscoring in the original; citation omitted.

[6] *Gan v. Galderma Philippines, Inc.*, G.R. No. 177167, January 17, 2013, 688 SCRA 666, 693; *Padalhin v. Laviña*, G.R. No. 183026, November 14, 2012, 685 SCRA 549.

[7] G.R. No. 190486, November 26, 2014.

[8] *Stanley Fine Furniture v. Gallano, supra*.

discretion because the NLRC's findings are firmly grounded on the evidence on record. Indeed, petitioner failed to discharge its burden to prove that it was respondents who refused to report for duty. Nothing on record shows that respondents actually received the notices to report for duty which petitioner supposedly sent them. The Court notes with approval the finding of the NLRC in its Decision promulgated on March 30, 2006, to wit:

> x x x records disclosed that the advice regarding transfer of assignment involving complainant Item was made on March 9, 2004 and March 12, 2004 although no proof of receipt by the party concerned was adduced by the respondents [herein petitioner]. While complainants Espada, Paje and Jotojot were notified of the vacancy at Bohol Beach Club in a letter dated June 23, 2004. On the other hand, complainants Dano, Crusit, De los Reyes and Cose were offered the assignment at Tambuli Beach Resorts in a letter dated June 28, 2004. Both notices however does (sic) not show that the parties concerned have acknowledged receipt of the same. Such being the case respondent's [herein petitioner's] defense of abandonment is wanting considering that there are essential requisites that have to be met for abandonment to apply, x x x.[9]

The failure to firmly establish that respondents were actually notified or informed that they were being ordered to report back for duty is fatal to petitioner's cause. Without proof that respondents were aware of their new assignments or were being ordered to report back for duty, it cannot be said that the employee failed to report for work. There is, therefore, no showing of any overt act of the respondents that would point to an intention to abandon their work. On the contrary, since respondents almost immediately filed a complaint for illegal dismissal after they were relieved from duty, there is a clear indication that they had the desire to continue with their employment. As held in *Fernandez v. Newfield Staff Solutions, Inc.*,[10] to wit:

> x x x Employees who take steps to protest their dismissal cannot logically be said to have abandoned their work. A charge of

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[9] *Rollo*, p. 121.

[10] G.R. No. 201979, July 10, 2013, 701 SCRA 109.

abandonment is totally inconsistent with the immediate filing of a complaint for illegal dismissal. The filing thereof is proof enough of one's desire to return to work, thus negating any suggestion of abandonment.[11]

In fine, petitioner utterly failed to establish the requisites for abandonment of work to exist, *i.e.*, (1) that the employee must have failed to report for work or must have been absent without valid or justifiable reason; and (2) that there must have been a clear intention to sever the employer-employee relationship manifested by some overt acts.[12]

Since there is nothing extraordinary with the facts and circumstances of this case, then there is no justifiable reason for the Court to overturn the longstanding view that the immediate filing of a complaint for illegal dismissal negates a charge for abandonment of work.

WHEREFORE, the petition is **DENIED** for utter lack of merit. The Decision of the Court of Appeals in CA-G.R. CEB-SP No. 02281 is **AFFIRMED** with **MODIFICATION**, by ordering petitioner to **PAY INTEREST** of six percent (6%) *per annum* from finality of this Decision until its full satisfaction.

The Labor Arbiter is hereby **ORDERED** to make another recomputation of the total monetary benefits awarded and due to respondents in accordance with this Decision.

SO ORDERED.

Velasco, Jr. (Chairperson), Villarama, Jr., Reyes, and *Jardeleza, JJ.,* concur.

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[11] *Fernandez v. Newfield Staff Solutions, Inc., supra*, at 120-121.

[12] *Protective Maximum Security Agency, Inc. v. Fuentes*, *supra* note 4.

FIRST DIVISION

[G.R. No. 200901. December 7, 2015]

SM INVESTMENTS CORPORATION, *petitioner, vs.* **ESTELA MARFORI POSADAS, MARIA ELENA POSADAS and AIDA MACARAIG POSADAS,** *respondents*.

SYLLABUS

1. **CIVIL LAW; CIVIL CODE; CONTRACTS; ELEMENTS; ESTABLISHED IN THE JOINT VENTURE AGREEMENT IN CASE AT BAR.—** It is basic in this jurisdiction that a contract is perfected by mere consent of the parties. Thus, Article 1315 of the Civil Code provides: In relation to the foregoing, Articles 1318 to 1320 of the Civil Code states the necessary requisites of a contract. x x x At this point, following the above-quoted provisions of the Civil Code, particularly Articles 1318 and 1319 thereof, we agree with the finding of the Trial Court that a joint venture agreement between the parties has been perfected, in that (i) there is consent, or a meeting of the minds, (ii) there is an object certain, which is the joint venture, and (iii) there is a cause and/or consideration, which are the goodwill money and specific sharing scheme.

2. **ID.; ID.; ID.; STAGES OF CONTRACT; PRESENT IN CASE AT BAR.—** In *Swedish Match, AB v. Court of Appeals*, we explained the stages of a contract, thus: In general, contracts undergo three distinct stages, to wit: negotiation; perfection or birth; and consummation. Negotiation begins from the time the prospective contracting parties manifest their interest in the contract and ends at the moment of agreement of the parties. Perfection or birth of the contract takes place when the parties agree upon the essential elements of the contract. Consummation occurs when the parties fulfill or perform the terms agreed upon in the contract, culminating in the extinguishment thereof. In this case, the first and second stage of the contract had been fulfilled. Negotiations took place when the parties made their exchange of correspondences until the letter of 24 August 1995. The perfection of the contract came thereafter, when SMIC, through the letter of 24 August 1995, accepted the counter-offer of respondents in their letter of 18 August 1995.

The same statement of respondents in said letter of 18 August 1995 already deals with the consummation stage of the contract, wherein the parties fulfill or perform the terms agreed upon in the contract. Verily, the details of the development of the Subject Property, particularly the plans and specifications of the same shall come only after the parties have already agreed to enter into a joint venture agreement to develop the same. In other words, the said plans and specifications are but the result of the perfected contract; these were done in execution of the perfected contract.

3. ID.; ID.; ID.; OBLIGATIONS ARISING FROM CONTRACTS HAVE THE FORCE OF LAW BETWEEN THE CONTRACTING PARTIES AND SHOULD BE COMPLIED WITH IN GOOD FAITH; SUSTAINED IN CASE AT BAR.— It is a hornbook doctrine that findings of fact of trial courts are entitled to great weight on appeal and should not be disturbed except for strong and valid reasons because the trial court is in a better position to examine the demeanor of the witnesses while testifying. It is not a function of this Court to analyze and weigh evidence by the parties all over again. Indeed, the letter of SMIC of 27 February 1996 on the increased goodwill money was a post perfection matter, and clearly, was for the purpose of having the issue of breach of the perfected contract settled without further ado. In view of the foregoing, we affirm the finding of the Trial Court that there is a perfected joint venture agreement between the parties for the development of the Subject Property. Therefore, the said perfected joint venture agreement still stands. In this jurisdiction, obligations arising from contracts have the force of law between the contracting parties and should be complied with in good faith.

APPEARANCES OF COUNSEL

Ponce Enrile Reyes & Manalastas for petitioner.

Luis M. Posadas for Aida Macaraig Posadas.

Romulo Mabanta Buenaventura Sayoc & De los Angeles for Estela Marfori Posadas & Maria Elena Posadas.

D E C I S I O N

PEREZ, *J.*:

Before this Court is a Petition for Review[1] filed by petitioner SM Investments Corporation (SMIC) assailing the Decision[2] dated 13 September 2011 of the Court of Appeals in CA-G.R. CV No. 91788, which decision, in turn, reversed and set aside the Decision[3] dated 18 December 2007 of the Regional Trial Court of Makati City (Trial Court) in Civil Case No. 97-832.

The material facts of this case, as borne by the records, are as follows:

Respondents Estela Marfori Posadas, Maria Elena Posadas and Aida Macaraig Posadas are the owners of several parcels of land with a total area of 27.6 hectares, more or less, and covered by Transfer Certificates of Title Nos. S-37656, 158291 and 158292 of the Register of Deeds of Makati City (Subject Property).

On 08 August 1995, SMIC, through its President, Henry Sy, Jr. (Mr. Sy), sent respondents a written offer for a joint venture for the development of the Subject Property, which in part reads:

Madames:

The undersigned offers a JOINT VENTURE with your realty of more or less 27.6 hectares at the Posadas Subdivision, Sucat, Muntinlupa City, under the following terms:

1. Development of the entire area into a first class commercial/ residential subdivision. Development of area presently leased to Worldwide with an area of 2.6 hectares will be after expiration of lease on year 2002.

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[1] *Rollo*, pp. 8-42.

[2] *Id*. at 44-66; Penned by Associate Justice Rosalinda Asuncion-Vicente with Associate Justices Jane Aurora C. Lantion and Edwin D. Sorongon concurring.

[3] CA *rollo*, pp. 38-54.

2. To set values for the property, the set price of ₱4,000.00 per square meter of areas fronting South Super Highway and ₱1,500.00 per square meter for the rest of the area. After full development, the set price is ₱20,000.00 per square meter of said front areas and ₱10,000.00 for the rest of the areas; with no sale of lots after development for less than the set values herein stated above, except sale to our affiliate company.

3. The sharing of the Joint Venture Partners shall be 60/40 on your favour. The undersigned reserves his right of first choice for a contiguous consolidated area indicated in plan attached herewith, for commercial/residential development. You are granted a choice of your 60% share of developed areas thereafter. Areas used for open spaces and streets required by law shall have no set values.

4. Upon execution of Joint Venture Agreement, the undersigned will pay you the amount of **SEVENTY MILLION PESOS (₱70,000,000.00)**, Philippine currency, as goodwill money over and above your 60% share in the Joint Venture and the agents for this joint venture shall be given five percent (5%) of the goodwill payment as their full commission.

5. In case you decide to avail of a third party to sell your lots from your 60% share, I will be given the priority to exclusively sell the same, subject to terms and conditions that may be agreed upon.

The foregoing offer supersedes and revokes my previous offers and/or proposals. I hope you will favourably consider the foregoing offer.[4]

On 18 August 1995, respondents sent SMIC a written counter-proposal, which, in part, reads as follows:

Dear Mr. Sy Jr.:

Thank you for your interest in our property subject of your Joint Venture proposal dated August 8, 1995.

The terms mentioned in your proposal, except the goodwill money which we submit should be not less than EIGHTY MILLION (₱80,000,000.00) PESOS, are acceptable in principle, subject however

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[4] Records, Vol. I, pp. 32-34.

to our agreement on the specified terms and conditions such as details of development, your plans and specifications therein, period of completion, use of the area allocated to you in the Joint Venture and other details.

If our counter-proposal of goodwill money of EIGHTY MILLION (₱80,000,000.00) PESOS is acceptable to you, upon your presentation of the details as stated above, upon our agreement on the same, we will be ready to sign a Joint Venture Agreement with your goodself.[5]

On 24 August 1995, SMIC, through Mr. Sy, Jr., sent respondents another letter containing its acceptance of the counter-offer of respondents, which reads as follows:

Dear Mesdames:

This is to signify acceptance of your counter proposal of goodwill money in the amount of EIGHTY MILLION PESOS (₱80,000,000.00), Philippine currency, as contained in your letter of August 18, 1995, for the development of your property in Sucat, Parañaque, subject to the condition that the said amount of goodwill money will be paid and tendered to you upon your signing of the Joint Venture Agreement.[6]

On 02 December 1995, SMIC, in compliance with what it considered as a perfected contract for the joint venture, sent respondents four (4) drawings of the proposed mall and its location within the Subject Property.

However, on 06 December 1995, after receiving the aforementioned drawings, respondents sent SMIC a letter informing it that they had received several other offers for the Subject Property, and demanding that SMIC better the said offers, before they submit their comments on the drawings. The said letter reads:

Dear Mr. Sy Jr.:

By reason of your failure since August 24, 1995 to present to us the "specified terms and conditions on the details of development" of the 27.6 hectares subject of your offer, up to the present, specifically "its plans and specifications, period of completion, use of allocated

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[5] *Id*. at 35.

[6] *Id*. at 36.

area and other details" we have not been able to finalize or even negotiate in the proposed Joint Venture Agreement.

In the interim period of your silence (from August 24, 1995 to December 1, 1995) which indicated lack interest on your part to pursue your offer, various parties submitted offers on the 27.6 hectares, amongst which are:

a.) Offer of ₱120 Million goodwill on the 27.5 hectares plus 60% of the proceeds from [the] sale of the developed lots of the 27.5 hectares, with the option to submit offers on the vertical development of the entire 27.6 hectares;

b.) Offer to purchase 7.2 hectares of the 27.6 hectares at the price of ₱10,000.00 per square meter on CASH BASIS, with the undertaking to construct a giant commercial complex on the same; and

c.) Offer to purchase 5.48 hectares of the 27.6 hectares at the price of ₱5,000.00 per square meter with ₱10 Million downpayment with undertaking to construct a giant structure to cater on the "warehouse concept of marketing";

all of which are now under negotiation.

Last Saturday, December 2, 1995, your representative delivered four (4) drawings of your proposed Mall (on the 2.3 hectares with the balance devoted to parking) on your choice area (more or less 8 to 9 hectares) which did not include any plans and specifications of development of the 27.6 hectares.

Considering the various offers presented to us while waiting for your 'plans and specifications of development of the 27.6 hectares' which you have not presented up to now, unless you submit a better offer, there is no need to comment on your drawings.[7] (Underlining supplied)

On 27 February 1996, SMIC sent respondents a letter, which reads as follows:

Madames (sic):

The undersigned reiterates our previous offer for a Joint Venture with you on your 27.6 hectares property at Posadas Subdivision, Sucat, Muntinlupa City, under the following revised terms:

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[7] *Id*. at 37-38.

As earlier conveyed to you, we will develop the subject property into a first class mixed commercial/residential subdivision and we propose a 60/40 sharing in your favor. The undersigned reserves his right of first choice for a contiguous consolidated area which we will developed (sic) into mixed use development.

Upon execution of the Joint Venture agreement, the undersigned will pay you One Hundred Forty Million Pesos (₱140,000.00) as goodwill money over and above your sixty (60%) percent share in the Joint Venture.

In case you decide to avail of a third party to sell your lots from your sixty (60%) percent share, I will be given the priority to exclusively sell same subject to the terms and condition that may be agreed upon.

If the foregoing terms and conditions is (sic) acceptable to you please signify your conformity on the space provided herein below.[8]

Thereafter, on 21 August 1996, SMIC, through counsel, sent respondents a letter reminding them to respect the joint venture agreement for the development of the Subject Property.

It appearing that respondents were not willing to honor the joint venture agreement, SMIC, on 21 April 1997, filed Civil Case No. 97-832, a case for Specific Performance and Damages with Prayer for Temporary Restraining Order and Writ of Preliminary Injunction against respondents.

After conducting a full-blown hearing on the merits, the Trial Court, on 18 December 2007, promulgated its Decision, the dispositive portion of which reads:

WHEREFORE, premises considered, judgment is hereby rendered: (a) declaring the existence, validity and enforceability of the contract between [SMIC and respondents] under the terms and conditions embodied in the letters dated 08, 18 & 24 August 1995 for the development of the subject property and ordering the said [respondents] to faithfully comply with the terms and conditions thereof, particularly to work out with [SMIC], in good faith, the details, plans and specifications of developments of the subject property, and upon agreement thereon, to execute the formal Joint

[8] *Id*. at 39.

Venture Agreement; (b) ordering said [respondents] to pay [SMIC] the sum of ₱500,000.00 for attorney's fees and litigation expenses.[9]

Aggrieved by the above-mentioned decision, respondents appealed the same to the Court of Appeals.[10]

On 13 September 2011, the Court of Appeals promulgated its Decision reversing and setting aside the Decision of the Trial Court, the dispositive portion of which reads:

WHEREFORE, premises considered, the instant appeal is hereby GRANTED. The assailed Decision dated December 18, 2007 is hereby **REVERSED** and **SET ASIDE**. The complaint in Civil Case No. 97-382 for Specific Performance and Damages with Prayer for Temporary Restraining Order and Writ of Preliminary Injunction is **DISMISSED** for lack of merit.[11]

Thus, SMIC filed this Petition where it attributed grave and serious errors in judgment on the part of the Court of Appeals when it made the following findings:

a. There was no perfected contract between SMIC and respondents;

b. The lack of agreement on details and plans of development prevented the perfection of the contract;

c. The parties are still in the negotiation stage;

d. The Letter of 24 August 1995 embodied only a qualified acceptance on the part of SMIC; and

e. The Letter of 27 February 1996 constituted a new offer on the part of SMIC.[12]

In separate Comments,[13] respondents refuted the aforestated assignment of errors, and contended that the exchange of

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[9] CA *rollo*, p. 54.

[10] *Id*. at 61-62.

[11] *Rollo*, p. 65.

[12] *Id*. at 22-24.

[13] *Id*. at 108-A-127 and 149-165.

correspondences between SMIC and respondents, in fact, shows that no joint venture agreement for the development of the Subject Property was perfected.

The records will show that, indeed, several correspondences were had between the parties and these constitute the crux of the controversy in this case. It is, thus, incumbent upon Us to determine whether a contract for a joint venture between the parties has, in fact, been perfected.

Inasmuch as the principal issues of this case, raised in the foregoing assignment of errors, are interrelated, we shall proceed to jointly resolve the same.

We find the Petition to be impressed with merit.

It is basic in this jurisdiction that a contract is perfected by mere consent of the parties. Thus, Article 1315 of the Civil Code provides:

> Art. 1315. Contracts are perfected by mere consent and from that moment the parties are bound not only to the fulfilment of what has been expressly stipulated but also to all the consequences which, according to their nature, may be in keeping with good faith, usage and law.

In relation to the foregoing, Articles 1318 to 1320 of the Civil Code states the necessary requisites of a contract, to wit:

> Art. 1318. There is no contract unless the following requisites concur:
>
> (1) Consent of the contracting parties;
>
> (2) Object certain which is the subject matter of the contract;
>
> (3) Cause of the obligation which is established.
>
> SECTION 1. CONSENT
>
> Art. 1319. Consent is manifested by the meeting of the offer and the acceptance upon the thing and the cause which are to constitute the contract. The offer must be certain and the acceptance absolute. A qualified acceptance constitutes a counter-offer,
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> Acceptance made by letter or telegram does not bind the offerer except from the time it came to his knowledge. The contract, in

such a case, is presumed to have been entered in the place where the offer was made.

Art. 1320. An acceptance may be express or implied.

Based on the above-mentioned provisions of law, we concur with the findings of the Trial Court that the facts in this particular case show that a contract for a joint venture between the parties has, in fact, been perfected.

First, the Letter of 08 August 1995 embodies a complete offer on the part of SMIC in that it contained an object certain, which is the joint venture for the development of the Subject Property, and a specific cause and/or consideration therefor, which are the goodwill money in the amount of ₱70 Million, plus a 60/40 sharing, in favor of respondents of the said development.

Second, the Letter dated 18 August 1995 in return embodies a complete counter-offer on the part of respondents in that they conveyed their acceptance of the joint venture subject only to the counter-proposal to increase the goodwill money from ₱70 Million to ₱80 Million.

Third, the Letter dated 24 August 1995 contains an unqualified acceptance on the part of SMIC of the above-mentioned counter-proposal of respondents, again on the aspect of the goodwill money alone.

At this point, following the above-quoted provisions of the Civil Code, particularly Articles 1318 and 1319 thereof, we agree with the finding of the Trial Court that a joint venture agreement between the parties has been perfected, in that (i) there is consent, or a meeting of the minds, (ii) there is an object certain, which is the joint venture, and (iii) there is a cause and/or consideration, which are the goodwill money and specific sharing scheme.

The controversy arose when respondents sent SMIC the Letter of 6 December 1995, wherein the former stated that they had received more lucrative offers for the Subject Property, noted a three (3)-month period of silence on the part of SMIC and

concluded that the said silence was tantamount to a lack of interest on the part of SMIC. Significantly, this particular letter of respondents immediately followed the submission by SMIC of certain drawings related to the development. Lastly, and more importantly, respondents stated therein that unless SMIC submits a better offer, there would simply be no need for respondents to comment on the said drawings SMIC sent.

The 6 December 1995 Letter of respondents did not have any effect on the perfected joint venture between the parties. At best, the same letter may be considered as a mere proposal, on the part of respondents, to amend the consideration of the joint venture. This is confirmed by the premise laid by respondents therein, particularly that they received better offers from third parties for the purchase and/or development of the Subject Property, or portions thereof. We are all but convinced that respondents were well aware and were acting with the knowledge that the joint venture agreement had indeed been perfected. This is precisely the reason respondents were very careful with their language when they insisted that unless SMIC would propose amending the Joint Venture to include better terms, respondents would withhold their comments on the drawings. It would be important to note that respondents, in the said letter, did not, in any way or manner, disavow the existence of the Joint Venture.

Further, respondents, in arguing that a perfected joint venture agreement does not exist, rely on the statement they made in the letter of 18 August 1995, which states "*subject however to our agreement on the specified terms and conditions such as details of development, your plans and specifications therein, period of completion, use of the area allocated to you in the Joint Venture and other details.*" However, the same, as correctly pointed out by the Trial Court, is not a condition precedent for the perfection of the joint venture agreement.

In *Swedish Match, AB v. Court of Appeals*,[14] we explained the stages of a contract, thus:

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[14] 483 Phil. 735 (2004).

In general, contracts undergo three distinct stages, to wit: negotiation; perfection or birth; and consummation. Negotiation begins from the time the prospective contracting parties manifest their interest in the contract and ends at the moment of agreement of the parties. Perfection or birth of the contract takes place when the parties agree upon the essential elements of the contract. Consummation occurs when the parties fulfill or perform the terms agreed upon in the contract, culminating in the extinguishment thereof.[15]

In this case, the first and second stage of the contract had been fulfilled. Negotiations took place when the parties made their exchange of correspondences until the letter of 24 August 1995. The perfection of the contract came thereafter, when SMIC, through the letter of 24 August 1995, accepted the counter-offer of respondents in their letter of 18 August 1995.

The same statement of respondents in said letter of 18 August 1995 already deals with the consummation stage of the contract, wherein the parties fulfill or perform the terms agreed upon in the contract. Verily, the details of the development of the Subject Property, particularly the plans and specifications of the same shall come only after the parties have already agreed to enter into a joint venture agreement to develop the same. In other words, the said plans and specifications are but the result of the perfected contract; these were done in execution of the perfected contract.

We agree with the Trial Court that the development of a first class commercial/residential subdivision in a 27.6 hectare property is a complex project, which involves a careful and meticulous preparation of the plans and specifications thereof. And, SMIC for its part have already exerted efforts and incurred cost for the preparation of the above-mentioned drawings, in the implementation of the joint venture agreement.

The fact that the above-mentioned drawings came three and a half (3 ½) months after the joint venture agreement was perfected

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[15] *Id*. at 750-751 citing *Bugatti v. Court of Appeals*, 397 Phil. 376, 388-389 (2000).

is not a valid cause for respondents to unilaterally back out from the same. We note that nowhere in the records does it appear that SMIC was given a specific period within which to submit drawings and/or plans. Neither do the records show that respondents corresponded with SMIC to follow up on the same. On the contrary, the records will show that respondents tried to solicit more favourable terms from SMIC, after they received the drawings.

Anent the increase in the goodwill money to the amount of ₱140 million, subject of the 27 February 1996 letter of SMIC, suffice it to say that We concur with the finding of the Trial Court that the same was merely to appease respondents, who were lured by subsequent offers from other parties, and to dissuade respondents from violating or unjustifiably withdrawing from their subsisting contract with SMIC. This finding was supported by the testimony of respondent Ma. Elena Posadas, who admitted that the "better offer" they were asking SMIC to submit referred only to the goodwill money.[16] It is a hornbook doctrine that findings of fact of trial courts are entitled to great weight on appeal and should not be disturbed except for strong and valid reasons because the trial court is in a better position to examine the demeanor of the witnesses while testifying. It is not a function of this Court to analyze and weigh evidence by the parties all over again.[17]

Indeed, the letter of SMIC of 27 February 1996 on the increased goodwill money was a post perfection matter, and clearly, was for the purpose of having the issue of breach of the perfected contract settled without further ado.

In view of the foregoing, we affirm the finding of the Trial Court that there is a perfected joint venture agreement between the parties for the development of the Subject Property. Therefore, the said perfected joint venture agreement still stands. In this

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[16] CA *rollo*, p. 53; Trial Court Decision.

[17] *Local Superior of the Servants of Charity, Inc. v. Jody King Construction & Development Corporation*, 509 Phil. 426, 431 (2005) citing *Uriarte v. People*, 403 Phil. 513, 523 (2001).

jurisdiction, obligations arising from contracts have the force of law between the contracting parties and should be complied with in good faith.[18]

WHEREFORE, premises considered, the instant petition is hereby **GRANTED.** The assailed Decision dated 13 September 2011 is hereby **REVERSED and SET ASIDE**. The Decision dated 18 December 2007 of the Regional Trial Court of Makati City in Civil Case No. 97-832 is hereby **REINSTATED**.

SO ORDERED.

Serreno, C.J., (Chairperson), Leonardo-de Castro, Bersamin, and *Perlas-Bernabe, JJ.,* concur.

SECOND DIVISION

[G.R. No. 203115. December 7, 2015]

ISLAND OVERSEAS TRANSPORT CORPORATION/ PINE CREST SHIPPING CORPORATION/CAPT. EMMANUEL L. REGIO, *petitioners, vs.* **ARMANDO M. BEJA,** *respondent.*

SYLLABUS

1. LABOR AND SOCIAL LEGISLATION; LABOR CODE; NATIONAL LABOR RELATIONS COMMISSION (NLRC); APPEALS; RULES OF PROCEDURES AND EVIDENCE SHOULD NOT BE APPLIED IN A VERY RIGID AND TECHNICAL SENSE IN A LABOR CASE IN ORDER THAT TECHNICALITIES WOULD NOT STAND

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[18] *Morla v. Belmonte, et al.,* 678 Phil. 102, 117 (2011) citing *Roxas v. De Zuzuarregui, Jr*., 516 Phil. 605, 622-623 (2006).

IN THE WAY OF EQUITABLY AND COMPLETELY RESOLVING THE RIGHTS AND OBLIGATIONS OF THE PARTIES; APPLICATION IN CASE AT BAR.— While, indeed, petitioners did not dispute, before the Labor Arbiter, the fact that Beja met an accident while performing his duties, they, however, disputed the same in their appeal with the NLRC by submitting the certifications of the Master of the vessel and Chief Engineer that no accident happened under their command. We have held that "rules of procedure and evidence should not be applied in a very rigid and technical sense in a labor cases in order that technicalities would not stand in the way of equitably and completely resolving the rights and obligations of the parties." The Court is, thus, not precluded to examine and admit this evidence, even if presented only on appeal before the NLRC, if only to dispense substantial justice. We, however, note that Beja has not presented any proof of his allegation that he met an accident on board the vessel. There was no single evidence to show that Beja was injured due to an accident while doing his duties in the vessel. No accident report existed nor any medical report issued indicating that he met an accident while on board. Beja's claim was simply based on pure allegations. Yet, evidence was submitted by petitioners disputing Beja's allegation. The certifications by the Master of the vessel and Chief Engineer affirmed that Beja never met an accident on board nor was he injured while in the performance of his duties under their command. Beja did not dispute these certifications nor presented any contrary evidence. "It is an inflexible rule that a party alleging a critical fact must support his allegation with substantial evidence, for any decision based on unsubstantiated allegation cannot stand without offending due process."

2. **ID.; ID.; POEA-STANDARD EMPLOYMENT CONTRACT (POEA-SEC); A PARTIAL AND PERMANENT DISABILITY COULD, BY LEGAL CONTEMPLATION, BECOME TOTAL AND PERMANENT; REQUISITES.—** The aforequoted provisions should be read in harmony with each other, thus: (a) the 120 days provided under Section 20 B(3) of the POEA-SEC is the period given to the employer to determine fitness to work and when the seafarer is deemed to be in a state of total and temporary disability; (b) the 120 days of total and temporary disability may be extended up to a maximum of 240 days should the seafarer require further medical treatment;

and (c) a total and temporary disability becomes permanent when so declared by the company-designated physician within 120 or 240 days, as the case may be, or upon the expiration of the said periods without a declaration of either fitness to work or disability assessment and the seafarer is still unable to resume his regular seafaring duties. Thus, although Section 32 of the POEA-SEC states that only those injuries or disabilities classified as Grade 1 are considered total and permanent, a partial and permanent disability could, by legal contemplation, become total and permanent.

APPEARANCES OF COUNSEL

Retoriano & Olalia-Retoriano for petitioners.
R.Go, Jr. Law Office for respondent.

D E C I S I O N

DEL CASTILLO, *J.*:

This Petition for Review on *Certiorari*[1] assails the March 28, 2012 Decision[2] and August 13, 2012 Resolution[3] of the Court of Appeals (CA) in CA-G.R. SP No. 113550 affirming the October 26, 2009 Decision[4] and February 15, 2010 Resolution[5] of the National Labor Relations Commission (NLRC), which ordered petitioners Island Overseas Transport Corporation/ Pine Crest Shipping Corporation/Capt. Emmanuel L. Regio

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[1] *Rollo,* pp. 4-45.

[2] CA *rollo,* pp. 427-441; penned by Associate Justice Priscilla J. Baltazar-Padilla and concurred in by Associate Justices Jose C. Reyes, Jr. and Agnes Reyes-Carpio.

[3] *Id*. at 507-508.

[4] NLRC Records pp. 301-313; penned by Commissioner Angelita A. Gacutan and concurred in by Presiding Commissioner Raul T. Aquino and Commissioner Teresita D. Castillon-Lora.

[5] *Id*. at 333-334; penned by Commissioner Napoleon M. Menese and concurred in by Presiding Commissioner Raul T. Aquino and Commissioner Teresita D. Castillon-Lora.

(petitioners) to pay respondent Armando M. Beja (Beja) US$110,000.00 as permanent total disability benefits and 10% thereof as attorney's fees.

Antecedent Facts

On March 6, 2007, Beja entered into a Contract of Employment[6] with petitioner Island Overseas Transport Corp. for and on behalf of its foreign principal, petitioner Pine Crest Shipping Corporation, for a period of nine months as Second Assistant Engineer for the vessel M/V Atsuta. Beja underwent the pre-employment medical examination, where he was declared fit for work. He boarded the vessel on March 14, 2007.

In November 2007, Beja experienced pain and swelling of his right knee, which he immediately reported to the Master of the vessel. On November 10, 2007, he was brought to a hospital in Italy and was diagnosed to have *Arthrosynovitis*. He underwent arthrocentesis of the right knee, was referred to an orthopedic surgeon and was advised to take a rest.[7] However, while in Spain, the pain in his right knee recurred and persisted. He was brought to a physician on November 19, 2007 and was advised to be medically repatriated.

Upon arrival in Manila on November 22, 2007, petitioners referred him to Nicomedes G. Cruz (NGC) Medical Clinic for evaluation. The Magnetic Resonance Imaging of his right knee showed *Chronic Tenosynovitis* with *Vertical Tear, Postero-Lateral Meniscus* and *Probable Tear Anterior Cruciate and Lateral Collateral Ligaments*.[8] Beja underwent physical therapy and was advised to undergo operation.[9] On April 23, 2008, Anterior Cruciate Ligament Reconstruction and Partial Menisectomy of the Medial Meniscus was done on his right

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[6] *Id*. at 67.

[7] See Seaman's Medical Report dated November 10, 2007, *id*. at 41.

[8] See MRI Diagnostic Center Inc. MRI Report dated December 21, 2007, *id*. at 43.

[9] See NGC Medical Report dated February 29, 2008, *id*. at 71.

knee at Medical Center Manila.[10] After the operation, petitioners sent him for rehabilitation at St. Luke's Medical Center under the supervision of Dr. Reynaldo R. Rey-Matias (Dr. Matias).

Meantime, while undergoing therapy, or on May 15, 2008, Beja filed a complaint[11] against petitioners for permanent total disability benefits, medical expenses, sickness allowance, moral and exemplary damages and attorney's fees. Beja alleged that his knee injury resulted from an accident he sustained on board the vessel when a drainage pipe fell on his knee. He claimed that from the time of his repatriation on November 22, 2007, his knee has not recovered which rendered him incapable of returning to his customary work as seafarer. This, according to him, clearly entitles him to permanent total disability benefits pursuant to AMOSUP-JSU Collective Bargaining Agreement (CBA) which provides:

Article 28.1:

A seafarer who suffers permanent disability as a result of an accident whilst in the employment of the Company regardless of fault, including, accidents occurring while travelling to or from the ship, and whose ability to work as a seafarer is reduced as a result thereof, but excluding permanent disability due to willful acts, shall in addition to sick pay, be entitled to compensation, according to the provisions of this Agreement.[12]

He claimed for compensation in the amount of US$137,500.00 in accordance with the degree of disability and rate of compensation indicated in the said CBA, to wit:

Disability

In the event a seafarer suffers permanent disability in accordance with the provisions of Article 28 of this Agreement, the scale of compensation provided for under Article 28.3 shall, unless more favourable benefits are negotiated, be:

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[10] See Medical Center Manila Record of Operation dated April 23, 2008, *id*. at 44.

[11] *Id*. at 1-3.

[12] CA *rollo,* p. 14.

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Effective from 1st January to 31st December, 2007

Degree of Disability	Rate of Compensation (US$)		
%	Ratings, AB & Below	Junior Officers & Ratings Above AB	Senior Officers (4)
100	82,500	110,000	137,500
75	61,900	82,500	103,150
60	49,500	66,000	82,500
50	41,250	55,000	68,750
40	33,000	44,000	55,000
30	24,750	33,000	41,250
20	16,500	22,000	27,500
10	8,250	11,000	13,750

Note: "Senior Officers" for the purpose of this clause means Master, Chief Officer, Chief Engineer and 1st Engineer.[13]

On May 26, 2008, the company-designated physician, Dr. Nicomedes G. Cruz (Dr. Cruz), issued an assessment of Beja's disability:

1. Prognosis – guarded.
2. Combined disability grading under the POEA schedule of disabilities:
   a. Grade 10 – stretching leg of the ligaments of a knee resulting in instability of the joint.
   b. Grade 13 – slight atrophy of calf muscles without apparent shortening or joint lesion or disturbance of weight-bearing line.[14]

After more than three months of therapy, Dr. Matias issued on August 28, 2008 a medical report[15] stating that Beja is still under pain as verified by the Visual Analog System which measures his pain at 6 out of 10 (10 being the highest measure of pain) and is having difficulty in his knee movements. Thereafter, on

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[13] NLRC Records, p. 49.

[14] *Id*. at 73.

[15] *Id*. at 46.

August 30, 2008, Beja consulted an orthopedic surgeon, Dr. Nicanor F. Escutin (Dr. Escutin), who examined and certified him to be unfit for sea duty in whatever capacity due to pain and difficulty of the use of his right knee despite the operation and therapy performed on him.[16]

Proceedings before the Labor Arbiter

During the preliminary conference, petitioners offered to pay Beja the amount of US$13,345.00, corresponding to the combined disability grading given by Dr. Cruz, which is disability Grade 10 (US$50,000 x 20.15%) and Grade 13 (US$50,000 x 6.72%) under the Schedule of Disability Allowances in the POEA Standard Employment Contract (POEA- SEC). Beja, however, rejected petitioners' offer and reiterated his claim for total disability benefits as strengthened by the certification of Dr. Escutin that he suffers from a permanent total disability, which he claimed, confirmed the findings of Dr. Matias.

Petitioners, however, insisted that the combined disability assessment given by Dr. Cruz, who for months continuously treated and monitored Beja's condition, prevails over that rendered by Dr. Escutin, who examined Beja only once and whose diagnosis was merely based on the medical reports and findings of the company-designated physicians. Petitioners further disclaimed Beja's entitlement to disability claim under the CBA as it expressly requires the parties to consult a third doctor whose opinion shall be binding on them. Since Beja failed to observe this procedure which is also mandated under the POEA-SEC, the finding of Dr. Cruz deserves utmost respect. Petitioners also asseverated that Beja already received his sickness allowance by presenting several vouchers.[17]

In a Decision[18] dated February 27, 2009, the Labor Arbiter awarded Beja maximum disability benefits under the CBA. The

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[16] See Dr. Escutin's Disability Report Re: Beja, Armando M. dated August 30, 2008, *id*. at 47-48.

[17] *Id*. at 74-80.

[18] *Id*. at 135-141; penned by Labor Arbiter Madjayran H. Ajan.

Labor Arbiter did not give credence to the assessment given by Dr. Cruz as it was issued after the lapse of 120 days which, by operation of law, transformed Beja's disability to total and permanent. Moreover, despite continued physical therapy, Beja's condition did not improve even beyond the 240-day maximum medical treatment period. The Labor Arbiter found doubtful Dr. Cruz's assessment considering that he was not the one who performed the operation on Beja's knee. The Labor Arbiter denied Beja's claim for sickness allowance since payment thereof was fully substantiated by evidence presented by petitioners. The dispositive portion of the Decision reads:

> WHEREFORE, premises considered, judgment is hereby rendered against the above-named respondents ISLAND OVERSEAS TRANSPORT CORP. and/or PINE CREST SHIPPING CORP. and/or CAPT. EMMANUEL L. REGIO, who are hereby ordered to pay, jointly and severally, complainant's Permanent Total Disability benefits in the amount of US DOLLARS ONE HUNDRED THIRTY SEVEN THOUSAND FIVE HUNDRED (US$ 137,500.00), in Philippine currency at the prevailing rate of exchange at the time of payment, plus ten percent (10%) thereof as attorney's fees.
>
> SO ORDERED.[19]

Proceedings before the National Labor Relations Commission

On appeal, petitioners attributed error in the Labor Arbiter in granting Beja the maximum disability benefits under the CBA. Petitioners argued that since Dr. Cruz made an assessment on May 26, 2008 or before the lapse of the maximum 240-day treatment period from the date of Beja's repatriation on November 22, 2007, there was no factual basis in ruling that Beja is entitled to full disability benefits. They cited *Vergara v. Hammonia Maritime Services, Inc.*,[20] where it was pronounced that only after the lapse of 240 days of continuous medical treatment without any assessment given by the company doctor that a medically repatriated seafarer could be adjudged as permanently and totally disabled. They also claimed that the CBA is inapplicable

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[19] *Id*. at 141.

[20] 588 Phil. 895 (2008).

in Beja's case because Beja failed to comply with the procedure regarding the third doctor referral and more importantly, no proof was adduced to show that his medical condition resulted from an accident. Petitioners presented a certification[21] of the Master of vessel M/V Atsuta, Captain Henry M. Tejado, and a written declaration[22] of the vessel's Chief Engineer, Ramon B. Ortega, both confirming that Beja neither met an accident on board nor was injured during his stay in the vessel under their command. Finally, petitioners contended that assuming that the CBA applies, the award of US$137,500.00 is erroneous as Beja is not a Senior Officer. In fine, petitioners insisted that the disability assessment given by Dr. Cruz based on the POEA-SEC is binding and controlling.

Beja, however, disputed petitioners' belated and self-serving denial that an accident took place and insisted that his failure to resume his work as Second Engineer for more than 240 days resulted in his entitlement to the maximum disability benefit under the CBA, as correctly ruled by the Labor Arbiter.

In a Decision[23] dated October 26, 2009, the NLRC sustained the Labor Arbiter's finding that Beja is permanently and totally disabled. It found Dr. Cruz's disability assessment premature and inaccurate considering that it was issued only a month after Beja's surgery when the latter was still under medical evaluation and treatment. On the other hand, it found Dr. Escutin's evaluation of Beja's condition more credible as it conforms to Dr. Matias' medical report which was rendered after four months of therapy following the operation. The NLRC likewise ruled that Beja is entitled to compensation under the CBA for an accident-sustained disability. It noted that his medical records reveal indications of tear and injury on his right knee that could have resulted from an accident on board. It, however, reduced the award from US$137,500.00 to US$110,000.00 as Beja was only a Second Engineer and not a Senior Officer, thus:

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[21] NLRC Records, p. 299.

[22] *Id*. at 300.

[23] *Id*. at 301-313.

WHEREFORE, premises considered, the Decision appealed from is hereby declared Modified to the extent only that complainant's permanent total disability award should be US Dollars 110,000.00 (US$110,000.00). All other dispositions are hereby Affirmed.

SO ORDERED.[24]

Petitioners' motion for reconsideration[25] was denied in the NLRC Resolution[26] dated February 15, 2010.

Proceedings before the Court of Appeals

Petitioners filed a Petition for *Certiorari* with Prayer for the Urgent Issuance of a Writ of Preliminary Injunction and/or Temporary Restraining Order[27] to enjoin the enforcement/ execution of the NLRC judgment. In a Resolution[28] dated June 23, 2010, the CA denied Petitioners' application for the issuance of a Temporary Restraining Order and/or Writ of Preliminary Injunction.

On March 28, 2012, the CA rendered a Decision[29] denying the Petition for *Certiorari* and affirming the NLRC ruling. The CA similarly found that Beja's injury resulting from an accident while on board the vessel. It likewise found merit in Dr. Escutin's disability report declaring Beja unfit to work since his injury has prevented him from performing his customary work as Second Engineer for more than 240 days and thus entitles him to permanent total disability benefits in accordance with the CBA.

Petitioners sought reconsideration[30] of the CA Decision. In a CA Resolution[31] dated August 13, 2012, petitioners' motion was denied.

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[24] *Id*. at 313.

[25] *Id*. at 316-330.

[26] *Id*. at 333-334.

[27] CA *rollo,* pp. 3-35.

[28] *Id*. at 325-326.

[29] *Id*. at 427-441.

[30] *Id*. at 448-468.

[31] *Id*. at 507-508.

Issues

Hence, petitioners filed the present Petition for Review on *Certiorari* raising the following grounds:

I. In awarding permanent total disability benefits in favor of the Respondent in utter disregard of extant case laws outlining the instances when and how a temporary total disability can be converted into a permanent total one.

II. In relying on the opinion of Respondent's chosen doctor to justify an award of disability compensation contrary to the clear edicts of the POEA Contract, the CBA and of the Supreme Court in jurisprudential precedents on the proper establishment and/or determination of a seafarer's entitlement to disability benefits.

III. In awarding benefits based on the compensation provided in the parties' CBA when the said agreement unequivocally confines compensation to injuries arising from accident, which is absolutely wanting in this case.

IV. In sustaining the award of attorney's fees albeit [without] legal and factual substantiation.[32]

Petitioners assert that Beja cannot be automatically declared as permanently and totally disabled by the mere lapse of 120 days without any assessment or certification of fit to work being issued. Citing *Vergara,* they argue that the 120-day period may be extended up to the maximum of 240 days if the seafarer requires further medical attention. Since Dr. Cruz's assessment was issued within the 240-day medical treatment period, albeit beyond 120 days, this could serve as the basis for determining Beja's disability and the degree thereof. In short, Beja should have been declared as partially disabled with Grades 10 and 13 disability under the POEA-SEC, as assessed by Dr. Cruz.

Moreover, they posit that Beja's complaint was prematurely filed and lacked cause of action for total and permanent disability benefits. According to petitioners, the lack of a second opinion from Beja's chosen physician at the time of the filing of the complaint

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[32] *Rollo*, p. 433.

and a third-doctor opinion is fatal to Beja's cause, for without a binding third opinion, the assessment of the company-designated physician stands.

Further, they insist that Beja is not entitled to compensation under the parties' CBA which is only confined to injuries arising from accident.

Our Ruling

The Petition is partially meritorious.

The parties' CBA is inapplicable.

Beja based his claim for full disability benefits under the CBA, claiming that his disability resulted from an accident while in the employ of petitioners and that petitioners' belated denial cannot negate the applicability of the CBA provisions.

We are not convinced.

While, indeed, petitioners did not dispute, before the Labor Arbiter, the fact that Beja met an accident while performing his duties, they, however, disputed the same in their appeal with the NLRC by submitting the certifications of the Master of the vessel and Chief Engineer that no accident happened under their command. We have held that "rules of procedure and evidence should not be applied in a very rigid and technical sense in labor cases in order that technicalities would not stand in the way of equitably and completely resolving the rights and obligations of the parties."[33] The Court is, thus, not precluded to examine and admit this evidence, even if presented only on appeal before the NLRC, if only to dispense substantial justice.

We, however, note that Beja has not presented any proof of his allegation that he met an accident on board the vessel. There was no single evidence to show that Beja was injured due to an accident while doing his duties in the vessel. No accident report existed nor any medical report issued indicating that he met an accident while on board. Beja's claim was simply based on pure allegations. Yet, evidence was submitted by petitioners disputing

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[33] *Antiquina v. Magsaysay Maritime Corp.,* 664 Phil. 88, 100 (2011).

Beja's allegation. The certifications by the Master of the vessel and Chief Engineer affirmed that Beja never met an accident on board nor was he injured while in the performance of his duties under their command. Beja did not dispute these certifications nor presented any contrary evidence. "It is an inflexible rule that a party alleging a critical fact must support his allegation with substantial evidence, for any decision based on unsubstantiated allegation cannot stand without offending due process."[34]

The Court also takes notice of the fact that Beja's medical condition cannot be solely attributable to accidents. His injury could have possibly been caused by other factors such as chronic wear and tear[35] and aging.[36] Thus, the NLRC's conclusion that the tear and injury on Beja's knee was caused by an accident on board had no factual basis but was anchored merely on speculation. The Court cannot, however, rest its rulings on mere speculation and presumption.[37]

Thus, we find the CBA inapplicable; the determination of Beja's entitlement to disability benefits must, consequently, be governed by the POEA-SEC and relevant labor laws.

Beja is entitled to a total and permanent disability compensation of US$60,000.00 under the POEA-SEC.

Article 192(c)(1) of the Labor Code provides that:

> Art. 192. Permanent total disability. – x x x
>
> (c) The following disabilities shall be deemed total and permanent:
>
> (1) Temporary total disability lasting continuously for more than one hundred twenty days, except as otherwise provided for in the Rules;

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[34] *Gemina, Jr. v. Bankwise, Inc. (Thrift Bank),* G.R. No. 175365, October 23, 2013, 708 SCRA 403, 418-419.

[35] http://www.ivysportsmed.com/en/knee-pain/knee-pain-potential-causes/meniscal-tear; last visited September 16, 2015.

[36] http://www.healthline.com/health/meniscus-tears#Cause2; last visited September 16, 2015.

[37] *Ison v. Crewserve, Inc.,* G.R. No. 173951, April 16, 2012, 669 SCRA 481, 498.

The Rule referred to in this Labor Code provision is Section 2, Rule X of the Amended Rules on Employees Compensation (AREC) implementing Title II, Book IV of the Labor Code, which states:

> Sec. 2. Period of Entitlement — (a) The income benefit shall be paid beginning on the first day of such disability. If caused by an injury or sickness it shall not be paid longer than 120 consecutive days except where such injury or sickness still requires medical attendance beyond 120 days but not to exceed 240 days from onset of disability in which case benefit for temporary total disability shall be paid. However, the System may declare the total and permanent status at any time after 120 days of continuous temporary total disability as may be warranted by the degree of actual loss or impairment of physical or mental functions as determined by the System.

Section 20 B (3) of the POEA-SEC, meanwhile provides that:

> 3. Upon sign-off from the vessel for medical treatment, the seafarer is entitled to sickness allowance equivalent to his basic wage until he is declared fit to work or the degree of permanent disability has been assessed by the company-designated physician but in no case shall this period exceed one hundred twenty (120) days.
>
> For this purpose, the seafarer shall submit himself to a post-employment medical examination by a company-designated physician within three working days upon his return except when he is physically incapacitated to do so, in which case, a written notice to the agency within the same period is deemed as compliance. Failure of the seafarer to comply with the mandatory reporting requirement shall result in his forfeiture of the right to claim the above benefits.
>
> If a doctor appointed by the seafarer disagrees with the assessment, a third doctor may be agreed jointly between the employer and the seafarer. The third doctor's decision shall be final and binding on both parties.

In *Vergara,*[38] this Court has ruled that the aforequoted provisions should be read in harmony with each other, thus: (a) the 120 days provided under Section 20 B(3) of the POEA-SEC is the period given to the employer to determine fitness to

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[38] *Supra* note 20.

work and when the seafarer is deemed to be in a state of total and temporary disability; (b) the 120 days of total and temporary disability may be extended up to a maximum of 240 days should the seafarer require further medical treatment; and (c) a total and temporary disability becomes permanent when so declared by the company-designated physician within 120 or 240 days, as the case may be, or upon the expiration of the said periods without a declaration of either fitness to work or disability assessment and the seafarer is still unable to resume his regular seafaring duties.

Thus, although Section 32[39] of the POEA-SEC states that only those injuries or disabilities classified as Grade 1 are considered total and permanent, a partial and permanent disability could, by legal contemplation, become total and permanent.[40] The Court ruled in *Kestrel Shipping Co., Inc. v. Munar,*[41] *viz.*:

> Indeed, under Section 32 of the POEA-SEC, only those injuries or disabilities that are classified as Grade 1 may be considered as total and permanent. However, if those injuries or disabilities with a disability grading from 2 to 14, hence, partial and permanent, would incapacitate a seafarer from performing his usual sea duties for a period of more than 120 or 240 days, depending on the need for further medical treatment, then he is, under legal contemplation, totally and permanently disabled. In other words, an impediment should be characterized as partial and permanent not only under the Schedule of Disabilities found in Section 32 of the POEA-SEC but should be so under the relevant provisions of the Labor Code and the Amended Rules on Employee Compensation (AREC) implementing Title II, Book IV of the Labor Code. That while the seafarer is partially injured or disabled, he is not precluded from earning doing the same work he had before his injury or disability or that he is accustomed or trained to do. Otherwise, if his illness or injury prevents him from engaging in gainful employment for more than 120 or 240 days, as the case may be, he shall be deemed totally and permanently disabled.

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[39] Any item in the schedule classified under Grade 1 shall be considered or shall constitute total and permanent disability.

[40] *Carcedo v. Maine Marine Philippines, Inc.,* G.R. No. 203804, April 15, 2015.

[41] G.R. No. 198501, January 30, 2013, 689 SCRA 795.

Moreover, the company-designated physician is expected to arrive at a definite assessment of the seafarer's fitness to work or permanent disability within the period of 120 or 240 days. That should he fail to do so and the seafarer's medical condition remains unresolved, the seafarer shall be deemed totally and permanently disabled.[42]

Beja was repatriated on November 21, 2007. Roughly a month after his right knee operation or on May 26, 2008, Dr. Cruz rendered a Grade 10 and 13 partial disability grading of his medical condition. Thereafter, Beja's medical treatment, supervised by another company-referred doctor, Dr. Matias, continued. On August 28, 2008, Dr. Matias issued a medical report declaring that Beja has not yet fully recovered despite continued therapy. Hence, although he was given Grades 10 and 13 combined disability rating by Dr. Cruz, this assessment may only be considered as tentative because he still continued his physical therapy sessions, which even went beyond 240 days.

In *Sealanes Marine Services, Inc. v. Dela Torre,*[43] the seafarer was repatriated on August 4, 2010 and underwent rehabilitation until July 20, 2011, exceeding the 240 days allowed to declare him either fit to work or permanently disabled. A partial disability rating of Grade 11 was issued by the company-designated physician on March 10, 2011 but the Court deemed this assessment only an interim one because of De La Torre's continued physical therapy sessions. The Court then granted De La Torre the maximum disability compensation because despite his long treatment and rehabilitation, he was unable to go back to work as a seafarer. In applying the *Kestrel* ruling, the Court held that if the seafarer's illness or injury prevents him from engaging in gainful employment for more than 240 days, then he shall be deemed totally and permanently disabled. The Court ratiocinated that while the seafarer is partially injured or disabled, he must not be precluded from earning or doing the same work he had before his injury or disability or that which he is accustomed or trained to do.

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[42] *Id*. at 809-810.

[43] G.R. No. 214132, February 18, 2015.

In *Belchem Philippines, Inc. v. Zafra, Jr.*,[44] the Court stressed that partial disability exists only if a seafarer is found capable of resuming sea duties within the 120/240-day period. The premise is such that partial injuries did not disable a seafarer to earn wages in the same kind of work or similar nature for which he was trained.

In this case, there was no assessment that Beja was found fit to resume sea duties before the end of the 240-day period. Also Beja's allegation that he has not been able to perform his usual activities has not been contradicted by petitioners or by contrary documentary evidence. In fact, in his medical report dated August 28, 2008, Dr. Matias opined that there was still difficulty in Beja's knee movements. Beja should, therefore, be deemed to be suffering permanent total disability.

It must also be stressed that Dr. Cruz did not even explain how he arrived at the partial permanent disability assessment of Beja. Dr. Cruz merely stated that Beja was suffering from impediment Grades 10 and 13 disability but without any justification for such conclusion. Petitioners' claim that Beja only suffered a partial disability has undoubtedly no basis on record.

Petitioners still argue that Beja's complaint is premature and as of its filing, no cause of action for total and permanent disability benefits had set in. They contend that despite the lapse of the 120-day period, Beja was still considered under a state of temporary total disability at the time he filed his complaint. In this regard, we quote the following pronouncements in *Kestrel*, which involved the same circumstances as in the case at bar:

> In this case, the following are undisputed: (a) when Munar filed a complaint for total and permanent disability benefits on April 17, 2007, 181 days had lapsed from the time he signed-off from M/V Southern Unity on October 18, 2006; (b) Dr. Chua issued a disability grading on May 3, 2007 or after the lapse of 197 days; and (c) Munar secured the opinion of Dr. Chiu on May 21, 2007; (d) no third doctor was consulted by the parties; and (e) Munar did not question the

[44] G.R. No. 204845, June 15, 2015.

competence and skill of the company-designated physicians and their familiarity with his medical condition.

It may be argued that these provide sufficient grounds for the dismissal of Munar's complaint. Considering that the 240-day period had not yet lapsed when the NLRC was asked to intervene, Munar's complaint is premature and no cause of action for total and permanent disability benefits had set in. While beyond the 120-day period, Dr. Chua's medical report dated May 3, 2007 was issued within the 240-day period. Moreover, Munar did not contest Dr. Chua's findings using the procedure outlined under Section 20-B(3) of the POEA-SEC. For being Munar's attending physicians from the time he was repatriated and given their specialization in spine injuries, the findings of Dr. Periquet and Dr. Lim constitute sufficient bases for Dr. Chua's disability grading. As Munar did not allege, much less, prove the contrary, there exists no reason why Dr. Chiu's assessment should be preferred over that of Dr. Chua.

It must be noted, however, that when Munar filed his complaint, Dr. Chua had not yet determined the nature and extent of Munar's disability. Also, Munar was still undergoing physical therapy and his spine injury had not yet been fully addressed. Furthermore, when Munar filed a claim for total and permanent disability benefits, more than 120 days had gone by and the prevailing rule then was that enunciated by this Court in *Crystal Shipping, Inc. v. Natividad* that total and permanent disability refers to the seafarer's incapacity to perform his customary sea duties for more than 120 days. Particularly:

> **Permanent disability is the inability of a worker to perform his job for more than 120 days, regardless of whether or not he loses the use of any part of his body.** As gleaned from the records, respondent was unable to work from August 18, 1998 to February 22, 1999, at the least, or more than 120 days, due to his medical treatment. This clearly shows that his disability was permanent.
>
> Total disability, on the other hand, means the disablement of an employee to earn wages in the same kind of work or similar nature that he was trained for, or accustomed to perform, or any kind of work which a person of his mentality and attainments could do. It does not mean absolute helplessness. In disability compensation, it is not the injury which is compensated, but rather it is the incapacity to work resulting in the impairment of one's earning capacity.

x x x x x x x x x

> Petitioners tried to contest the above findings by showing that respondent was able to work again as a chief mate in March 2001. Nonetheless, this information does not alter the fact that as a result of his illness, respondent was unable to work as a chief mate for almost three years. **It is of no consequence that respondent was cured after a couple of years. The law does not require that the illness should be incurable. What is important is that he was unable to perform his customary work for more than 120 days which constitutes permanent total disability**. An award of a total and permanent disability benefit would be germane to the purpose of the benefit, which is to help the employee in making ends meet at the time when he is unable to work. x x x

Consequently, that after the expiration of the 120-day period, Dr. Chua had not yet made any declaration as to Munar's fitness to work and Munar had not yet fully recovered and was still incapacitated to work sufficed to entitle the latter to total and permanent disability benefits.

In addition, that it was by operation of law that brought forth the conclusive presumption that Munar is totally and permanently disabled, there is no legal compulsion for him to observe the procedure prescribed under Section 20-B(3) of the POEA-SEC. A seafarer's compliance with such procedure presupposes that the company-designated physician came up with an assessment as to his fitness or unfitness to work before the expiration of the 120-day or 240-day periods. Alternatively put, absent a certification from the company-designated physician, the seafarer had nothing to contest and the law steps in to conclusively characterize his disability as total and permanent.

This Court's pronouncements in *Vergara* presented a restraint against the indiscriminate reliance on *Crystal Shipping* such that a seafarer is immediately catapulted into filing a complaint for total and permanent disability benefits after the expiration of 120 days from the time he signed off from the vessel to which he was assigned. Particularly, a seafarer's inability to work and the failure of the company-designated physician to determine fitness or unfitness to work despite the lapse of 120 days will not automatically bring about a shift in the seafarer's state from total and temporary to total and permanent, considering that the condition of total and temporary disability may be extended up to a maximum of 240 days.

Nonetheless, *Vergara* was promulgated on October 6, 2008, or more than two (2) years from the time Munar filed his complaint and observance of the principle of prospectivity dictates that Vergara should not operate to strip Munar of his cause of action for total and permanent disability that had already accrued as a result of his continued inability to perform his customary work and the failure of the company-designated physician to issue a final assessment.[45] (Emphasis in the original)

More importantly, in *Montierro v. Rickmers Marine Agency Phils., Inc.*[46] and *Eyana v. Philippine Transmarine Carriers, Inc.,*[47] the Court applied the ruling in *Kestrel,* that if the maritime compensation complaint was filed prior to October 6, 2008, the rule on the 120-day period, during which the disability assessment should have been made in accordance with *Crystal Shipping, Inc. v. Natividad*,[48] that is, the doctrine then prevailing before the promulgation of *Vergara* on October 6, 2008, stands; if, on the other hand, the complaint was filed from October 6, 2008 onwards, the 240-day rule applies.

In the case at bar, Beja filed the complaint on May 15, 2008. Dr. Cruz issued his assessment only on May 26, 2008 or 187 days from Beja's repatriation on November 21, 2007. Therefore, due to Dr. Cruz's failure to issue a disability rating within the 120-day period, a conclusive presumption that Beja is totally and permanently disabled arose. Consequently, there was no need for Beja to secure an opinion from his own doctor or resort to a third doctor as prescribed under Section 20 B (3) of the POEA-SEC.

In sum, the CA is correct in affirming the NLRC's award of permanent total disability benefit to Beja. It, however, erred in pertaining to the parties' CBA in granting the award relative to the amount due. The Schedule of Disability Allowances under

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[45] *Supra* note 41 at 815-818.

[46] G.R. No. 210634, January 14, 2015.

[47] G.R. No. 193468, January 28, 2015.

[48] 510 Phil. 332 (2005).

Section 32 of the POEA-SEC should instead apply. Under this section, Beja is entitled to US$60,000.00 (US$50,000.0 x 120%) corresponding to Grade 1 Disability assessment.

The award of attorney's fees is likewise justified in accordance with Article 2208 (2)[49] and (8)[50] of the Civil Code since Beja was compelled to litigate to satisfy his claims for disability benefits.

WHEREFORE, the Petition is **PARTIALLY GRANTED.** The March 28, 2012 Decision and August 13, 2012 Resolution of the Court of Appeals in CA-G.R. SP No. 113550 are **MODIFIED** in that petitioners, Island Overseas Transport Corp./ Pine Crest Shipping Corp./Capt. Emmanuel L. Regio, are ordered to jointly and solidarily pay respondent Armando M. Beja total and permanent disability benefits in the amount of US$60,000.00 or its equivalent amount in Philippine currency at the time of payment, plus 10% thereof as attorney's fees.

SO ORDERED.

Carpio (Chairperson), Perez,[*] *Mendoza,* and *Leonen, JJ.,* concur.

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[49] Article 2208. In the absence of stipulation, attorney's fees and expenses of litigation, other than judicial costs, cannot be recovered, except:

x x x x x x x x x

(2) When the defendant's act or omission has compelled the plaintiff to litigate with third persons or to incur expenses to protect his interest;

[50] (8) In actions for indemnity under workmen's compensation and employer's liability laws;

[*] Per Special Order No. 2301 dated December 1, 2015.

THIRD DIVISION

[G.R. No. 209418. December 7, 2015]

W.M. MANUFACTURING, INC., *petitioner, vs.* **RICHARD R. DALAG and GOLDEN ROCK MANPOWER SERVICES,** *respondents.*

SYLLABUS

1. REMEDIAL LAW; SPECIAL CIVIL ACTIONS; *CERTIORARI*; A MOTION FOR RECONSIDERATION IS A PREREQUISITE FOR THE AVAILMENT OF THE PETITION FOR *CERTIORARI* UNDER RULE 65; EXCEPTIONS.— As a general rule, a motion for reconsideration is a prerequisite for the availment of a petition for certiorari under Rule 65. The intention behind the requirement is to afford the public respondent an opportunity, the NLRC in this case, to correct any error attributed to it by way of re-examination of the legal and factual aspects of the case. The Court, however, has declined from applying the rule rigidly in certain scenarios. The well-recognized exceptions are enumerated in *Romy's Freight Service v. Castro*, viz: (a) Where the order is a patent nullity, as where the court a quo has no jurisdiction; **(b) Where the questions raised in the certiorari proceeding have been duly raised and passed upon by the lower court, or are the same as those raised and passed upon in the lower court;** (c) Where there is an urgent necessity for the resolution of the question and any further delay would prejudice the interests of the Government or of the petitioner or the subject matter of the action is perishable; (d) Where, under the circumstances, a motion for reconsideration would be useless; (e) Where petitioner was deprived of due process and there is extreme urgency for relief; (f) Where, in a criminal case, relief from an order of arrest is urgent and the granting of such relief by the trial court is improbable; (g) Where the proceedings in the lower court are a nullity for lack of due process; (h) Where the proceedings were ex parte or in which the petitioner had no opportunity to object; and (i) Where the issue raised is one purely of law or where public interest is involved.

2. LABOR AND SOCIAL LEGISLATION; LABOR CODE; LABOR-ONLY CONTRACTING; DEFINED.— There is "labor-only" contracting where the person supplying workers to an employer does not have substantial capital or investment in the form of tools, equipment, machineries, work premises, among others, and the workers recruited and placed by such person are performing activities which are directly related to the principal business of such employer. In such cases, the person or intermediary shall be considered merely as an agent of the employer who shall be responsible to the workers in the same manner and extent as if the latter were directly employed by him.

3. ID.; ID.; ID.; THE ESSENTIAL ELEMENT IN LABOR-ONLY CONTRACTING IS THAT THE CONTRACTOR MERELY RECRUITS, SUPPLIES OR PLACES WORKERS TO PERFORM A JOB, WORK OR SERVICE FOR THE PRINCIPAL.— Under Art. 106 of Presidential Decree No. 442, otherwise known as the Labor Code of the Philippines, the Secretary of Labor and Employment (SOLE) may issue pertinent regulations to protect the rights of workers against the prohibited practice of labor-only contracting. Pursuant to this delegated authority, the SOLE, throughout the years, endeavored to provide clearer guidelines in distinguishing a legitimate manpower provider from a labor-only contractor, beginning with Department Order No. 10, series of 1997, issued on May 30, 1997; followed by Department Order No. 03, series of 2001, issued on May 8, 2001; Department Order 18-02, series of 2002, issued on February 21, 2002; and by Department Order No. 18-A, series of 2011, promulgated on November 14, 2011. x x x Section 5 of DO 18-02 laid down the criteria in determining whether or not labor-only contracting exists between two parties. x x x It is clear from the above section that the essential element in labor-only contracting is that the contractor merely recruits, supplies or places workers to perform a job, work or service for a principal. However, the presence of this essential element is not enough and must, in fact, be accompanied by any one of the confirmatory elements to be considered a labor-only contractor within the contemplation of the rule.

4. ID.; ID.; TERMINATION OF EMPLOYMENT BY EMPLOYER; ABANDONMENT, AS A GROUND; A

PRAYER FOR REINSTATEMENT IN A COMPLAINT FOR ILLEGAL DISMISSAL SIGNIFIES THE EMPLOYEE'S DESIRE TO CONTINUE HIS WORKING RELATION WITH HIS EMPLOYER, AND MILITATES AGAINST THE LATTER'S CLAIM OF ABANDONMENT. — The Court is not unmindful of the rule in labor cases that the employer has the burden of proving that the termination was for a valid or authorized cause; but fair evidentiary rule dictates that before an employer is burdened to prove that they did not commit illegal dismissal, it is incumbent upon the employee to first establish by substantial evidence that he or she was, in fact, dismissed. A cursory reading of the records of this case would reveal that the fact of Dalag's dismissal was sufficiently established by petitioner's own evidence. x x x A prayer for reinstatement in a complaint for illegal dismissal signifies the employee's desire to continue his working relation with his employer, and militates against the latter's claim of abandonment. Pursuant to the age-old adage that he who alleges must prove, it becomes incumbent upon the employer to rebut this seeming intention of the employee to resume his work. Hence, to prove abandonment, the onus rests on the employer to establish by substantial evidence the employee's non-interest in the continuance of his employment, which petitioner herein failed to do. On the contrary, Dalag's immediate filing of a complaint after his dismissal, done in a span of only two (2) days, convinces us of his intent to continue his work with WM MFG. With the foregoing discussion, the burden now shifts to petitioner and Golden Rock to justify the legality of Dalag's dismissal, by proving that the termination was for just cause, and that the employee was afforded ample opportunity to be heard prior to dismissal.

5. **ID.; ID.; ID.; THE LABOR CODE MANDATES THAT AN EMPLOYEE CANNOT BE TERMINATED EXCEPT FOR JUST OR AUTHORIZED CAUSE, LEST THE EMPLOYER VIOLATE THE FORMER'S CONSTITUTIONALLY GUARANTEED RIGHT TO SECURITY OF TENURE; JUST CAUSES, ENUMERATED.—** The Labor Code mandates that an employee cannot be terminated except for just or authorized cause, lest the employer violate the former's constitutionally guaranteed right to security of tenure. Relevant hereto, the just causes for termination of employment are enumerated under Art. 282 of P.D. 442, as follows: 1. Serious

misconduct or willful disobedience by the employee of the lawful orders of his employer or representative in connection with his work; **2. Gross and habitual neglect by the employee of his duties;** 3. Fraud or willful breach by the employee of the trust reposed in him by his employer or duly authorized representative; 4. Commission of a crime or offense by the employee against the person of his employer or any immediate member of his family or his duly authorized representatives; and 5. Other causes analogous to the foregoing. To constitute just cause for an employee's dismissal, the neglect of duties must not only be gross but also habitual. Gross neglect means an absence of that diligence that an ordinarily prudent man would use in his own affairs. Meanwhile, to be considered habitual, the negligence must not be a single or isolated act.

6. ID.; ID.; ID.; THE CARDINAL RULE IN OUR JURISDICTION IS THAT THE EMPLOYER MUST FURNISH THE EMPLOYEE WITH TWO WRITTEN NOTICES BEFORE THE TERMINATION OF HIS EMPLOYMENT CAN BE EFFECTED; ELUCIDATED.— Anent the conformity of Dalag's dismissal to procedural requirements, the cardinal rule in our jurisdiction is that the employer must furnish the employee with two written notices before the termination of his employment can be effected: (1) the first apprises the employee of the particular acts or omissions for which his dismissal is sought; and (2) the second informs the employee of the employer's decision to dismiss him. The twin notice rule is coupled with the requirement of a hearing, which is complied with as long as there was an opportunity to be heard, and not necessarily that an actual hearing was conducted. In the case at bar, while petitioner submitted as evidence memos that it supposedly attempted to serve Dalag, there was no proof that these were, indeed, received by the latter. By petitioner's own allegation, Dalag refused to receive the same. Under such circumstance, the more prudent recourse would have been to serve the memos through registered mail instead of directly proceeding with the investigation. x x x The non-service of notice effectively deprived Dalag of any, if not ample, opportunity to be informed of and defend himself against the administrative charges leveled against him, which element goes into the very essence of procedural due process.

7. ID.; ID.; ID.; THE EMPLOYER WILL STILL BE HELD LIABLE IF PROCEDURAL DUE PROCESS WAS NOT OBSERVED IN THE EMPLOYEE'S DISMISSAL; WHEN AWARD OF INDEMNITY IN THE FORM OF NOMINAL DAMAGES PROPER, EXPLAINED.— [A] dismissal for just cause under Art. 282 of the Labor Code implies that the employee concerned has committed, or is guilty of, some violation against the employer, i.e. the employee has committed some serious misconduct, is guilty of some fraud against the employer, or he has neglected his duties. Thus, it can be said that the employee himself initiated the dismissal process. However, the employer will still be held liable if procedural due process was not observed in the employee's dismissal. In such an event, the employer is directed to pay, in lieu of backwages, indemnity in the form of nominal damages. Nominal damages are adjudicated in order that a right of the plaintiff that has been violated or invaded by the defendant may be vindicated or recognized, and not for the purpose of indemnifying the plaintiff for any loss suffered by him. In cases such as *JAKA*, the nominal damages awarded serves as vindication or recognition of the employee's fundamental due process right, and as a deterrent against future violations of such right by the employer. The amount of nominal damages to be awarded is addressed to the sound discretion of the court, taking into account the relevant circumstances. Nonetheless, *JAKA* laid down the following guidelines in determining what amount could be considered proper: (1) if the dismissal is based on a just cause under Article 282 but the employer failed to comply with the notice requirement, the sanction to be imposed upon him should be tempered because the dismissal process was, in effect, initiated by an act imputable to the employee; and (2) if the dismissal is based on an authorized cause under Article 283 but the employer failed to comply with the notice requirement, the sanction should be stiffer because the dismissal process was initiated by the employer's exercise of his management prerogative. In the case at bar, given that there was substantial attempt on the part of WM MFG to comply with the procedural requirements, the Court, nevertheless, deems the amount of ₱30,000 as sufficient nominal damages to be awarded to respondent Dalag.

APPEARANCES OF COUNSEL

Laguesma Magsalin Consulta & Gastardo for petitioner.
Ernesto R. Arellano for Richard R. Dalag.
Rendl James C. Relucio for Golden Rock Manpower Services.

D E C I S I O N

VELASCO, JR., *J.*:

Nature of the Case

For consideration is the amended petition for review under Rule 45 of the Rules of Court, assailing the February 21, 2013 Decision[1] and September 17, 2013 Amended Decision[2] of the Court of Appeals (CA) in CA-G.R. SP No. 122425,[3] which declared petitioner W.M. Manufacturing, Inc. (WM MFG) and respondent Golden Rock Manpower Services (Golden Rock) solidarily liable to respondent Richard R. Dalag (Dalag) for the latter's alleged illegal dismissal from employment.

The Facts

On January 3, 2010, petitioner, as client, and respondent Golden Rock, as contractor, executed a contract denominated as "Service Agreement,"[4] which pertinently reads:

SERVICE AGREEMENT

KNOW ALL MEN BY THESE PRESENTS

x x x x x x x x x

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[1] *Rollo*, pp. 489-500. Penned by Associate Justice Jose C. Reyes, Jr. and concurred in by Associate Justices Mario V. Lopez and Socorro B. Inting.

[2] *Id*. at 58-61.

[3] Entitled *Richard R. Dalag v. National Labor Relations Commission, Golden Rock Manpower Services, W.M. Manufacturing, Inc., Jocelyn Hernando, and Watson Nakague*.

[4] *Rollo*, pp. 506-508.

The CONTRACTOR shall render, undertake, perform and employ the necessary number of workers as the CLIENT may need, at such dates and times as the CLIENT may deem necessary.

The CLIENT shall have the right to request for replacement to relieve such workers as the need arises for any reason whatsoever and the CONTRACTOR undertakes to furnish a replacement immediately as possible.

x x x x x x x x x

There shall be no employer-employee relationship between the CLIENT, on the one hand, and the persons assigned by the CONTRACTOR to perform the services called for hereunder, on the other hand.

In view of this, CONTRACTOR agrees to hold the CLIENT free from any liability, cause(s) o(f) action and/or claims which may failed (sic) by said workers including but not limited to those arising from injury or death of any kind of nature that may be sustained by them while in the performance of their assigned tasks.

The CONTRACTOR hereby warrants compliance with the provisions of the Labor Code of the Philippines as well as with all other presidential decrees, general orders, letters of instruction, laws rules and regulations pertaining to the employment of a labor now existing or which may hereafter be enacted, including the payment of wages, allowances, bonuses, and other fringe benefits, and the CLIENT shall not in any way be responsible for any claim for personal injury or death, for wages, allowances, bonuses and other fringe benefits, made either by the said personnel or by third parties, whether or not such injury, death or claim by third parties, whether or not such injury, death or claim arises out of, or in any way connected with, the performance of personnel's duties.

The CLIENT shall have the right to report to the CONTRACTOR and protest any untoward act, negligence, misconduct, malfeasance or nonfeasance of the said personnel and the contractor alone shall have the right to discipline the said personnel.

The CONTRACTOR shall fully and faithfully comply with the provisions of the New Labor Code, as well as with other laws, rules and regulations, pertaining to the employment of labor which is now existing or which hereafter be promulgated or enacted.

In relation to the Service Agreement, Golden Rock, on April 26, 2010, engaged the services of respondent Dalag as a factory worker to be assigned at petitioner's factory. For this purpose, respondents inked a five-month Employment Contract For Contractual Employees (Employment Contract)[5] that reads:

EMPLOYMENT CONTRACT FOR CONTRACTUAL EMPLOYEES

Dear Mr./Ms. Richard Dalag,

[Golden Rock] hire(s) you as a contractual worker/employee to work at WM MFG under these conditions:

1) You will hold the position as (sic) Factory Worker.

2) Your employment as a CONTRACTUAL EMPLOYEE takes effect on April 26, 2010 to Sept. 26, 2010. You will receive a salary of ₱328.00 per day payable weekly/15'h (sic) day monthly of the calendar month.

x x x x x x x x x

7) Your employment as a CONTRACTUAL EMPLOYEE may be terminated at any time for any cause, which may arise due to inability to learn and undertake duties and responsibilities of the position you are being employed for, inefficiency, violation of company rules, policies and regulations, personnel reduction and recession business. In either event, you will be given a notice of termination during your working hours/day.

The company undertakes to pay your compensation for the days actually worked and the company shall not be liable for the period of the contract not run for any separation pay.

Notwithstanding the five-month duration stipulated in the contract, respondent Dalag would allege in his complaint for illegal dismissal[6] that on August 7, 2010, one of WM MFG's security guards prevented him from going to his work station and, instead, escorted him to the locker room and limited his activity to withdrawing his belongings therefrom. Having been

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[5] *Id*. at 509.

[6] *Id*. at 513-516, as quoted in the January 24, 2010 Decision of Labor Arbiter Eduardo G. Magno.

denied entry to his work station without so much as an explanation from management, Dalag claimed that he was illegally dismissed, his employment having been terminated without either notice or cause, in violation of his right to due process, both substantive and procedural.

Dalag further claimed that his assignment at WM MFG as side seal machine operator was necessary and desirable for the company's plastic manufacturing business, making him a regular employee entitled to benefits under such classification.[7] He likewise alleged that WM MFG and Golden Rock engaged in the illegal act of labor-only contracting based on the following circumstances: that all the equipment, machine and tools that he needed to perform his job were furnished by WM MFG; that the jobs are to be performed at WM MFG's workplace; and that he was under the supervision of WM MFG's team leaders and supervisors.

The complaint, docketed as LAC No. 03-000673-11, was lodged against WM MFG, Golden Rock, Jocelyn Hernando (Hernando), Watson Nakague (Nakague) and Pablo Ong (Ong), the latter three individuals as officers of the impleaded companies. In their joint position paper, therein respondents argued that Dalag was not dismissed and that, on the contrary, it was he who abandoned his work. They offered as proof WM MFG's memos[8] addressed to Dalag, which ordered him to answer within 24-hours the accusations relating to the following alleged infractions: gross negligence, qualified theft, malicious mischief, incompetence, grave misbehaviour, insubordination, dishonesty, and machine sabotage.[9] Based on the memos and the affidavits submitted by his former co-workers,[10] Dalag repeatedly failed to immediately report to management the breakdowns of the

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[7] Respondent Dalag likewise alleged underpayment of wages below minimum wage, and underpayment of overtime pay.

[8] *Rollo*, pp. 701-715.

[9] *Id*. at 688-692.

[10] *Id*. at 701-720.

side-seal machine he was assigned to operate; that he did not report that the machine's thermocouple wire and conveyor belt needed repair, causing the damage on the belt to worsen and for the wire to eventually break; and that he pocketed spare parts of petitioner's machines without company management's consent.

Memo 2010-19 dated August 7, 2010, the final memo WM MFG attempted to serve Dalag, pertinently reads:[11]

> Samakatuwid, matapos ang isinagawang imbestigasyon tungkol sa mga insidenteng kinasangkutan mo. Napagdesisyunan na ng Management na magbaba ng Final Decision na ikaw ay patawan ng suspension at pinagrereport sa Golden Rock Agency, ito ay dahil sa mga alegasyon na nagpapatunay na ikaw ay nagkasala at lumabag sa Patakaran ng kumpanyang ito.

Dalag, however, allegedly refused to receive the memos, and instead turned his back on his superiors, informing them that he will no longer return, and then walked away. And on that very same day, WM MFG, through a letter addressed to Golden Rock, informed the manpower company of its intention to exercise its right to ask for replacement employees under the Service Agreement. As per the letter, WM MFG no longer needed Dalag's services.[12]

The parties would later file their respective replies in support of the allegations and arguments raised in their position papers.[13]

Ruling of the Labor Arbiter

On January 24, 2011, Labor Arbiter Eduardo G. Magno rendered a Decision[14] in LAC No. 03-000673-11 dismissing Dalag's complaint. The dispositive portion of the Decision reads:

> **WHEREFORE,** the Complaint is hereby DISMISSED for lack of merit.

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[11] *Id*. at 707.

[12] *Id*. at 721.

[13] *Id*. at 665.

[14] *Id*. at 657-668.

However, respondents are hereby ordered to pay his unpaid wages for three days in the amount of ₱1,212.00.

SO ORDERED.

Citing *Machica v. Roosevelt Center Services, Inc.*,[15] the Labor Arbiter ratiocinated that the burden of proving actual dismissal is upon the shoulders of the party alleging it; and that WM MFG and Golden Rock can only be burdened to justify a dismissal if it, indeed, took place. Unfortunately for Dalag, the Labor Arbiter did not find substantial evidence to sustain a finding that he was, in the first place, actually dismissed from employment. As observed by the Labor Arbiter:[16]

> Records show that complainant [Dalag] last reported for work on August 6, 2010 and filed his complaint for illegal dismissal on August 9, 2010. However, [Dalag] failed to establish the fact of his alleged dismissal on August 07, 2010.
>
> As established by respondents [WM MFG, Golden Rock, Hernando, Nakague, and Ong], [Dalag] was hired by [Golden Rock] as contractual employee on April 26, 2010 until September 26, 2010 and was assigned at its client [WM MFG].
>
> [Dalag] failed to present any letter of termination of his employment by his employer [Golden Rock].
>
> A party alleging a critical fact must support his allegation with substantial evidence for any decision based on unsubstantiated allegation cannot stand as it will offend due process.
>
> There is no illegal dismissal to speak of where the employee was not notified that he had been dismissed from his employment nor he was prevented from returning to his work. (words in brackets added, citations omitted)

Plainly, between WM MFG and Golden Rock, the Labor Arbiter considered the latter as Dalag's true employer. Thus, Dalag's termination from employment, if any, ought to come not from WM MFG but from Golden Rock. Without such

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[15] G.R. No. 168664, May 4, 2006, 489 SCRA 534.

[16] *Rollo*, pp. 666-667.

termination, actual or constructive, Dalag's complaint cannot prosper for there was no dismissal to begin with, legal or otherwise.

Obviously aggrieved by the Labor Arbiter's ruling, Dalag interposed an appeal with the National Labor Relations Commission (NLRC).

Rulings of the NLRC

On May 31, 2011, Dalag obtained a favorable ruling from the NLRC through its Decision[17] in NLRC NCR CASE NO. 08-11002-10, which granted his appeal in the following wise:

> WHEREFORE, in view of the foregoing premises, the appeal of the complainant is GRANTED. The assailed Decision dated January 24, 2011 is hereby REVERSED and SET ASIDE. Judgment is now rendered declaring complainant to have been illegally terminated from employment. Respondents W.M Manufacturing, Inc., et al., are hereby ordered to reinstate immediately complainant to his former position without loss of seniority rights and privileges computed from the time he was actually dismissed or his compensation withheld up to the time of actual reinstatement, which as of the decision, amounted to a total of One Hundred Seven Thousand Seven Hundred Thirty-Nine and 73/100 Pesos (₱107,739.73), as computed by the NLRC Computation Unit, exclusive of the complainant's unpaid wages from August 4-6, 2010, in the amount of ₱1,212.00 as previously awarded.
>
> All other claims are hereby dismissed for lack of merit.
>
> SO ORDERED.

In siding with respondent Dalag, the NLRC determined that Dalag's true employer was WM MFG, who merely engaged respondent Golden Rock as a labor-only contractor. To arrive at this conclusion, the NLRC utilized the control test, thusly:[18]

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[17] *Id*. at 627-655. Penned by Presiding Commissioner Raul T. Aquino and concurred in by Commissioners Teresita D. Castillon-Lora and Napoleon M. Meneses.

[18] *Id*. at 641-643.

x x x [T]he employment contract of the complainant only showed that [Golden Rockl] hired [Dalag] as a factory worker to be assigned to [WM MFG] and by all indications, Golden Rock did not provide technical or special services [WM MFG]. Moreover, [WM MFG and Golden Rock] did not deny that the machines or tools used by the complainant, including the work premises, belonged to respondent [WM MFG], and not to the agency.

[WM MFG]'s control and supervision over the work of [Dalag] is indeed explicit, and as stated by [Dalag] he was supervised not by Golden Rock but by the team leaders and supervisors of [WM MFG]. And not only that, based on the evidence submitted by respondent [WM MFG], it was the latter who even took the pains of investigating the alleged infractions of [Dalag]. By [WM MFG and Golden Rock]'s own allegation, it was [WM MFG] who issued memos to [Dalag] directing him to explain several infractions allegedly committed. All those notices and memoranda, which according to [WM MFG] [Dalag] refused to receive, emanated from [WM MFG], and not from Golden Rock. This only demonstrates that the complainant is not an employee of [Golden Rock] but of [WM MFG].

The so-called "control test" in determining employer-employee relationship is applicable in the instant case. In this case, [WM MFG] reserved the right to control the complainant not only as to the result of the work to be done but also to the means and methods by which the same is to be accomplished. Hence, clearly, there is an employer-employee between [WM MFG] and [Dalag].

Aside from applying the control test, the Commission likewise gave credence to Dalag's postulation that several other factors point to Golden Rock's nature as a labor-only contractor, a mere agent. The NLRC outlined these considerations as follows: that Golden Rock supplied WM MFG with employees that perform functions that are necessary, desirable, and directly related to the latter's main business;[19] that there is an absence of proof that Golden Rock is involved in permissible contracting services[20] and that it carries on an independent business for undertaking job contracts other than to WM MFG;[21] and that

[19] *Id*. at 643.

[20] *Id*. at 645.

[21] *Id*. at 641-642.

both WM MFG and Golden Rock even jointly submitted pleadings to the NLRC, with the same submission and defenses, and even under the same representation.[22] On account of these circumstances, the NLRC deemed the contractual relation between WM MFG and Golden Rock as one of labor-only contracting, akin to that of a principal and his agent. In light of this determination, the NLRC held that they are, therefore, jointly and severally liable[23] to WM MFG's illegally dismissed employees that were supplied by Golden Rock.

Dalag, having been prevented from reporting to work without just cause and without being afforded the opportunity to be heard, is one of such illegally dismissed employees to whom Golden Rock and petitioner are solidarily liable, so the NLRC ruled. In its initial findings, the NLRC held that the attempt to serve Dalag copies of the memoranda did not constitute sufficient notice for there was no proof of service or even of an attempt thereof. The Commission explained that assuming for the sake of argument that Dalag, indeed, refused to receive copies of the memos personally served, WM MFG's remedy was then to serve them through registered mail in order to be considered as compliance with the procedural requirement of notice.[24] WM MFG's failure to comply with the same then resulted in Dalag being deprived of his procedural due process right.

Moreover, assuming even further that there was no deviation from procedure, the NLRC held that the contents of the memos offered by petitioner in evidence do not amount to valid cause for they merely constituted allegations, not proof, of Dalag's infractions. As noted by the NLRC, no formal investigation followed the attempt to serve Dalag copies of the memoranda. Thus, to the mind of the Commission, the veracity of the allegations in the memoranda were not verified and cannot, therefore, be taken at face value.[25]

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[22] *Id*. at 645.

[23] *Id*.

[24] *Id*. at 649-650.

[25] *Id*. at 648-649.

Dalag's legal victory, however, would be short-lived, for eventually, WM MFG and Nakague would jointly move for reconsideration, which would be granted by the NLRC.

In its second Decision[26] promulgated on September 20, 2011, the NLRC absolved Dalag's alleged employers from liability, as follows:

> **WHEREFORE**, in view of the foregoing premises, the Motion for Reconsideration is hereby, **GRANTED**. The assailed Decision dated May 31, 2011 is hereby **REVERSED** and **SET ASIDE**. The Decision of Labor Arbiter Eduardo G. Magno dated January 24, 2011 is hereby **REINSTATED**.
>
> **SO ORDERED.**

To justify the turnabout, the NLRC took into consideration Certificate of Registration No. NCR-CFO-091110-0809-003[27] dated August 27, 2009 and issued by the Department of Labor and Employment (DOLE) to Golden Rock pursuant to Department Order No. 18-02, s. 2002,[28] and Articles 106-109 of the Labor Code, on job-contracting.[29] The said certificate, along with the copy of the Service Agreement between WM MFG and Golden Rock and Dalag's Employment Contract, was submitted for the first time as attachments to WM MFG and Nakague's motion for reconsideration, but were, nevertheless, admitted by the NLRC in the interest of substantial justice.[30]

With the introduction of these new pieces of evidence, the commission ruled anew that its previous observation—that there was an absence of proof that Golden Rock is a legitimate job contractor—has effectively been refuted. What is more, the NLRC

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[26] *Id*. at 615-625. Penned by Presiding Commissioner Raul T. Aquino and concurred in by Commissioners Teresita D. Castillon-Lora and Napoleon M. Meneses.

[27] *Id*. at 505.

[28] Rules Implementing Arts. 106-109 of the Labor Code, as amended.

[29] *Rollo*, p. 505.

[30] *Id*. at 577.

no longer relied solely on the control test and instead applied the four-fold test in ascertaining Dalag's true employer. And in reviewing its earlier Decision, the NLRC noted that it is Golden Rock who paid Dalag's salaries and wages; that under the Service Agreement, it reserved unto itself the power to dismiss Dalag; and that it has sole control over the exercise of Dalag's employment.[31]

The NLRC then proceeded to reiterate the Labor Arbiter's position that for the employer's burden to prove that its dismissal of an employee was for just cause to arise, the employee must first demonstrate that he was, in the first place, actually dismissed––a fact which Dalag failed to establish. Lastly, the NLRC noted that Dalag reported for work for only three (3) months and cannot, therefore, be considered a regular employee.[32]

Rulings of the Court of Appeals

Expectedly, the September 20, 2011 NLRC Decision prompted Dalag to elevate the case to the CA via a Rule 65 petition for certiorari, docketed as CA-G.R. SP No. 122425, alleging that the commission committed grave abuse of discretion when it reversed its own ruling. Specifically, Dalag argued that it was highly irregular for the Commission to have admitted the documents belatedly offered by WM MFG as evidence,[33] and insisted that the NLRC did not err in its first Decision finding that he was illegally dismissed.[34] Meanwhile, WM MFG and Nakague would counter that the petition to the CA ought to be dismissed outright since Dalag failed to file a motion for reconsideration of the NLRC's second Decision, a condition sine qua non for filing a petition for certiorari under Rule 65. They likewise point to the Entry of Judgment[35] issued by the NLRC, signifying that the second Decision of the NLRC has

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[31] *Id*. at 577-580.

[32] *Id*. at 581.

[33] *Id*. at 492.

[34] *Id*. at 492-493.

[35] *Id*. at 585.

already attained finality. To modify the same would then violate the doctrine on the immutability of judgments.

On February 21, 2013, the appellate court rendered a Decision favoring Dalag in the following wise:

> **WHEREFORE**, the petition is **GRANTED**. The Decision Dated September 20, 2011 of the National Labor Arbiter's Commission, Second Division in NLRC NCR 08-11002-10 (LAC No. 03-000673-11) is hereby **REVERSED** and **SET ASIDE**. The NLRC's Decision dated May 31, 2011 is **REINSTATED**.
>
> **SO ORDERED.**[36]

Dispensing with the procedural arguments, the CA struck down the contentions of both parties relating to the rigid application of procedural rules.[37] It held that rules of evidence prevailing in courts of law or equity are not binding in labor cases,[38] and allow the admission of additional evidence not presented before the Labor Arbiter, and submitted before the NLRC for the first time on appeal,[39] as in WM MFG's case.

As regards the alleged availability of a plain, speedy, and adequate remedy at Dalag's disposal that bars the filing of a petition for certiorari, the CA held that technical rules may be relaxed in this regard in the interest of substantial justice.[40] To quote the appellate court:

> In this case, a liberal construction of the rules is called for as records show that petitioner filed the petition as a pauper litigant. Technical rules of procedure may be relaxed to serve the demands of substantial justice particularly in labor cases, where the prevailing principle is that technical rules shall be liberally construed in favor

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[36] *Id*. at 500.

[37] *Id*. at 493.

[38] *Id*.; citing *Andaya v. NLRC*, G.R. No. 157371, July 15, 2005, 463 SCRA 577, 584.

[39] *Id*.; citing *Sasan v. NLRC*, G.R. No. 176240, October 17, 2008, 569 SCRA 670, 686.

[40] *Id*. at 494.

of the working class in accordance with the demands of substantial justice. Rules of procedure should also not be applied in a very rigid technical sense in labor cases in order that technicalities would not stand in the way of equitably and completely resolving the rights and obligations of the parties. (citations omitted)

On to the merits, the CA discussed that Golden Rock's Certificate of Registration is not conclusive evidence that the company is an independent contractor.[41] More controlling for the CA was the failure of Golden Rock to prove the concurrence of the requisites of a legitimate independent job contractor according to jurisprudence.[42] Absent proof that Golden Rock has substantial capital and that it exercised control over Dalag, the CA held that petitioner and Golden Rock miserably failed to establish the latter's status as a legitimate independent contractor.[43] Finally, the appellate court did not give credence to petitioner's claim of abandonment since it failed to discharge the burden of proving Dalag's unjustified refusal to return to work.[44]

Unfazed, WM MFG and Nakague moved for reconsideration of the CA's ruling. On September 17, 2013, the CA rendered an Amended Decision partially granting the motion and modifying the decretal portion of its earlier ruling in the following wise:

WHEREFORE, the Motion for Reconsideration is **PARTIALLY GRANTED**. The Decision dated February 21, 2013 of this Court which reads:

> WHEREFORE, the petition is GRANTED. The Decision Dated September 20, 2011 of the National Labor Arbiter's Commission, Second Division in NLRC NCR 08-11002-10 (LAC No. 03-000673-11) is hereby REVERSED and SET ASIDE. The NLRC's Decision dated May 31, 2011 is REINSTATED.
>
> SO ORDERED.

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[41] *Id*. at 496.

[42] *Id*.; citing *Babas v. Lorenzo Shipping Corp.*, G.R. No. 186091, December 15, 2010, 638 SCRA 735, 745.

[43] *Id*. at 496-498.

[44] *Id*. at 498.

is hereby **AMENDED** to read:

> WHEREFORE, the petition is GRANTED. The Decision Dated September 20, 2011 of the National Labor Arbiter's Commission, Second Division in NLRC NCR 08-11002-10 (LAC No. 03-000673-11) is hereby REVERSED and SET ASIDE. The NLRC's Decision dated May 31, 2011 is REINSTATED insofar as the liability of Golden Rock Manpower Services and W.M. Manufacturing, Inc. are concerned. The company officers, Watson Nakague and Pablo Ong are absolved of liability.
>
> SO ORDERED.

SO ORDERED.[45]

Citing *Delima v. Gois*,[46] the CA determined that the absence of malice or bad faith on the part of Nakague and Ong negated any possibility of liability for Dalag's illegal dismissal.

Grounds for the Petition

Unsatisfied with the outcome, petitioner WM MFG interposed a petition for review against respondent Dalag, anchored on the following assignment of errors:

I

WITH DUE RESPECT, THE HONORABLE COURT OF APPEALS SERIOUSLY ERRED IN DECIDING A QUESTION OF SUBSTANCE NOT IN ACCORD WITH THE LAW AND APPLICABLE DECISIONS OF THIS HONORABLE COURT WHEN IT GAVE DUE COURSE TO DALAG'S PETITION NOTWITHSTANDING THE FACT THAT HE FAILED TO FILE A MOTION FOR RECONSIDERATION OF THE NLRC'S 20 SEPTEMBER 2011 DECISION, A CONDITION *SINE QUA NON* FOR ONE TO AVAIL THE EXTRAORDINARY REMEDY OF CERTIORARI UNDER RULE 65 OF THE RULES OF COURT

II

WITH DUE RESPECT, THE HONORABLE COURT OF APPEALS SERIOUSLY ERRED IN DECIDING A QUESTION OF

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[45] *Id*. at 60-61.

[46] G.R. No. 178352, June 17, 2008, 554 SCRA 731, 737.

SUBSTANCE NOT IN ACCORD WITH THE LAW AND APPLICABLE DECISIONS OF THIS HONORABLE COURT WHEN IT GAVE DUE COURSE TO DALAG'S PETITION FOR CERTIORARI NOTWITHSTANDING THE FACT THAT THE NLRC'S 20 SEPTEMBER 2011 DECISION HAD LONG BECOME FINAL AND EXECUTORY

III

WITH DUE RESPECT, THE HONORABLE COURT OF APPEALS SERIOUSLY ERRED IN DECIDING A QUESTION OF SUBSTANCE NOT IN ACCORD WITH THE LAW AND APPLICABLE DECISIONS OF THIS HONORABLE COURT IN FINDING THAT RESPONDENT WAS AN EMPLOYEE OF THE COMPANY AND THAT HE WAS ILLEGALLY DISMISSED[47]

Petitioner maintains that the filing of a motion for reconsideration prior to resorting to certiorari cannot be dispensed with merely on account of the filer's status as a pauper litigant; that the CA violated the doctrine on the immutability of judgments when it reversed the NLRC's second final and executory Decision; that Golden Rock is Dalag's true employer, not WM MFG; that Golden Rock is a legitimate independent contractor with whom WM MFG cannot be held solidarily liable; and that Dalag abandoned his work, and was not in any way dismissed.

In his Comment, Dalag, substantially reiterating the May 31, 2011 Decision of the NLRC in NLRC NCR CASE NO. 08-11002-10 as affirmed by the appellate court, maintained that the non-filing of a motion for reconsideration in this case falls under one of the recognized exceptions in jurisprudence, and is, therefore, excused; that the CA did not err in finding that WM MFG and Golden Rock engaged in labor-only contracting and should be considered solidarily liable; and that he was illegally dismissed.

By claiming that Golden Rock is an independent contractor, the Court noted that petitioner's claim could potentially shift liability to Golden Rock alone, should the Court maintain the

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[47] *Rollo*, pp. 462-463.

finding that Dalag was illegally dismissed. Given this circumstance, and the fact that Golden Rock has actively participated in the proceedings *a quo*, the Court, by its November 24, 2014 Resolution,[48] directed petitioner to implead Golden Rock in the instant case. Petitioner, on January 28, 2015, complied with the directive and impleaded Golden Rock in its Amended Petition for Review on Certiorari.

On June 23, 2015, Golden Rock submitted its Comment alleging that all the elements of legitimate contracting are present in this case. Moreover, it joined petitioner in its claim that Dalag was not terminated, illegally or otherwise, but abandoned his post.

The Issues

The issues in this case can be summarized, thusly:

1. Whether or not Dalag is excused from not moving for reconsideration before filing a petition for certiorari;
2. Whether or not WM MFG and Golden Rock engaged in labor-only contracting;
3. Whether or not Dalag was illegally dismissed; and
4. What monetary award/s is Dalag entitled to, if any, and at what amount.

The Court's Ruling

The petition is meritorious.

Respondent Dalag was excused from filing a Motion for Reconsideration before filing a Petition for Certiorari under Rule 65 with the CA

As a general rule, a motion for reconsideration is a prerequisite for the availment of a petition for certiorari under Rule 65. The intention behind the requirement is to afford the public respondent an opportunity, the NLRC in this case, to correct any error attributed to it by way of re-examination of the legal and factual

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[48] *Id*. at 440-442.

aspects of the case.[49] The Court, however, has declined from applying the rule rigidly in certain scenarios. The well-recognized exceptions are enumerated in *Romy's Freight Service v. Castro*,[50] viz:

(a) Where the order is a patent nullity, as where the court a quo has no jurisdiction;

(b) Where the questions raised in the certiorari proceeding have been duly raised and passed upon by the lower court, or are the same as those raised and passed upon in the lower court;

(c) Where there is an urgent necessity for the resolution of the question and any further delay would prejudice the interests of the Government or of the petitioner or the subject matter of the action is perishable;

(d) Where, under the circumstances, a motion for reconsideration would be useless;

(e) Where petitioner was deprived of due process and there is extreme urgency for relief;

(f) Where, in a criminal case, relief from an order of arrest is urgent and the granting of such relief by the trial court is improbable;

(g) Where the proceedings in the lower court are a nullity for lack of due process;

(h) Where the proceedings were ex parte or in which the petitioner had no opportunity to object; and

(i) Where the issue raised is one purely of law or where public interest is involved. (emphasis added)

Verily, the CA is mistaken in looking to respondent Dalag's indigency to exempt the latter from complying with procedural rules. Under the Rules of Court, a pauper or indigent litigant is exempted from the payment of legal fees,[51] but not from filing

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[49] *Malayang Manggagawa ng Stayfast Phils., Inc. v. NLRC*, G.R. No. 155306, August 28, 2013, 704 SCRA 24.

[50] 523 Phil. 540, 545 (2006).

[51] *Algura v. City Government of Naga*, G.R. No. 150135, October 30, 2006, 506 SCRA 81; Sec. 18, Rule 141 of the Rules of Court as amended

a motion for reconsideration before resorting to the extraordinary remedy of certiorari.

Be that as it may, the second exception (i.e. that the questions raised in the certiorari proceeding have been duly raised and passed upon by the lower court, or are the same as those raised and passed upon in the lower court) may still be invoked to achieve the same result of exempting Dalag from moving for reconsideration of the September 20, 2011 NLRC Decision. As extensively discussed, the contractual relation between WM MFG and Golden Rock, as well as the validity of Dalag's dismissal, have consistently been the main issues in the flip-flopping rulings in the proceedings below. Moreover, noteworthy is that the ruling that respondent Dalag assailed by certiorari was the NLRC's **second** Decision, petitioner having already moved for reconsideration of the labor commission's May 31, 2011 findings. Thus, to settle the issues once and for all, the CA aptly deemed it prudent, and rightfully so, to dispense with the procedural requirement of reconsideration and to address the substantive issues head on.

WM MFG and Golden Rock engaged in labor-only contracting

Delving into the core of the controversy, the Court first determines whether or not petitioner WM MFG and Golden Rock engaged in labor-only contracting. Both companies claim that Golden Rock is a legitimate contractor for manpower services, relying on its Certificate of Registration and their contractual stipulation leaving Golden Rock with the power to discipline its employees.

We are not convinced.

There is "labor-only" contracting where the person supplying workers to an employer does not have substantial capital or investment in the form of tools, equipment, machineries, work premises, among others, and the workers recruited and placed by such person are performing activities which are directly related to the principal business of such employer. In such cases, the

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by Sec. 19 of Administrative Matter No. 04-2-04-SC, promulgated on July 20, 2004.

person or intermediary shall be considered merely as an agent of the employer who shall be responsible to the workers in the same manner and extent as if the latter were directly employed by him.[52]

Under Art. 106 of Presidential Decree No. 442, otherwise known as the Labor Code of the Philippines, the Secretary of Labor and Employment (SOLE) may issue pertinent regulations to protect the rights of workers against the prohibited practice of labor-only contracting. Pursuant to this delegated authority, the SOLE, throughout the years, endeavored to provide clearer guidelines in distinguishing a legitimate manpower provider from a labor-only contractor, beginning with Department Order No. 10,[53] series of 1997, issued on May 30, 1997; followed by Department Order No. 03,[54] series of 2001, issued on May 8, 2001; Department Order 18-02,[55] series of 2002, issued on February 21, 2002; and by Department Order No. 18-A,[56] series of 2011, promulgated on November 14, 2011. Of these executive edicts, Department Order 18-02 (DO 18-02) is the applicable issuance at the time respondent Dalag complained of his alleged illegal dismissal.[57]

Section 5 of DO 18-02 laid down the criteria in determining whether or not labor-only contracting exists between two parties, as follows:

> Section 5. Prohibition against labor-only contracting. Labor-only contracting is hereby declared prohibited. For this purpose, labor-only contracting shall refer to an arrangement where the contractor or subcontractor merely recruits, supplies or places workers to perform a job, work or service for a principal, and any of the following elements are present:

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[52] LABOR CODE, Art. 106.

[53] Amending The Rules Implementing Books III and VI of the Labor Code, as amended.

[54] Revoking Department Order No. 10, Series of 1997.

[55] Rules Implementing Articles 106-109 of the Labor Code, as amended.

[56] *Id*.

[57] Respondent Dalag filed his complaint on August 9, 2010.

i) The contractor or subcontractor does not have substantial capital or investment which relates to the job, work or service to be performed and the employees recruited, supplied or placed by such contractor or subcontractor are performing activities which are directly related to the main business of the principal; or

ii) the contractor does not exercise the right to control over the performance of the work of the contractual employee.

x x x x x x x x x

It is clear from the above section that the essential element in labor-only contracting is that the contractor merely recruits, supplies or places workers to perform a job, work or service for a principal. However, the presence of this essential element is not enough and must, in fact, be accompanied by any one of the confirmatory elements to be considered a labor-only contractor within the contemplation of the rule.[58]

The presence of the essential element in the extant case cannot be gainsaid. This much is clearly provided in the service agreement between WM MFG and Golden Rock:

The CONTRACTOR shall render, undertake, perform and **employ the necessary number of workers as the CLIENT may need**, at such dates and times as the CLIENT may deem necessary.

As to the presence of the confirmatory elements, Dalag draws our attention to (1) Golden Rock's lack of substantial capital, coupled with the necessity and desirability of the job he performed in WM MFG; and (2) Golden Rock's lack of control over the employees it supplied WM MFG.

i. Golden Rock lacked substantial capital

Anent the first confirmatory element, petitioner and Golden Rock refuted the latter's alleged lack of substantial capital by presenting its Certificate of Registration from the DOLE Regional Office in Valenzuela City. Although not conclusive proof of

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[58] C.A. Azucena, *EVERYONE'S LABOR CODE* 95 (5th ed., 2007).

legitimacy as a manpower provider, the certification nevertheless prevented the presumption of labor-only contracting from arising.[59] In its stead, the certification gave rise to a disputable presumption that the contractor's operations are legitimate. As provided in *Gallego v. Bayer Philippines, Inc.*:[60]

> The DOLE certificate having been issued by a public officer, it carries with it the presumption that it was issued in the regular performance of official duty. Petitioners bare assertions fail to rebut this presumption. Further, since the DOLE is the agency primarily responsible for regulating the business of independent job contractors, the Court can presume, in the absence of evidence to the contrary, that it had thoroughly evaluated the requirements submitted by PRODUCT IMAGE before issuing the Certificate of Registration. x x x

Among the requirements for registration is a copy of the contractor's audited financial statements, if the applicant is a corporation, partnership, cooperative or a union, or a copy of the latest income tax return if the applicant is a sole proprietorship.[61] Upon submission of the requirements, the DOLE

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[59] Sec. 11, Department Order No. 18-02, Series of 2002.

[60] G.R. No. 179807, July 31, 2009, 594 SCRA 736.

[61] Department Order No. 18-02, Series of 2002, Sec. 12 provides:

> Section 12. Requirements for registration. A contractor or subcontractor shall be listed in the registry of contractors and subcontractors upon completion of an application form to be provided by the DOLE. The applicant contractor or subcontractor shall provide in the application form the following information:
>
> (a) The name and business address of the applicant and the area or areas where it seeks to operate;
>
> (b) The names and addresses of officers, if the applicant is a corporation, partnership, cooperative or union;
>
> (c) The nature of the applicant's business and the industry or industries where the applicant seeks to operate;
>
> (d) The number of regular workers; the list of clients, if any; the number of personnel assigned to each client, if any and the services provided to the client;
>
> (e) The description of the phases of the contract and the number of employees covered in each phase, where appropriate; and

Regional Director concerned will then have seven (7) days to evaluate the information supplied and determine whether the application ought to be approved or denied. Since Golden Rock's application was approved, both petitioner and respondent company claimed that the DOLE Regional Office found Golden Rock's capitalization to be satisfactory and substantial, contrary to Dalag's claim.

Petitioner and Golden Rock's claim fails to convince.

It may be that the DOLE Regional Director for the National Capital Region was satisfied by Golden Rock's capitalization as reflected on its financial documents, but the basis for determining the substantiality of a company's "capital" rests not only thereon but also on the tools and equipment it owns in relation to the job, work, or service it provides. DO 18-02 defines "substantial capital or investment" in the context of labor-only contracting as referring not only to a contractor's financial capability, but also encompasses the tools, equipment, implements, machineries and work premises, actually and directly used by the contractor or subcontractor in the performance or completion of the job, work or service contracted out.[62]

Here, the Certificate of Registration may have prevented the presumption of labor-only contracting from arising, but the

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(f) A copy of audited financial statements if the applicant is a corporation, partnership, cooperative or a union, or copy of the latest ITR if the applicant is a sole proprietorship.

The application shall be supported by:

(a) A certified copy of a certificate of registration of firm or business name from the Securities and Exchange Commission (SEC), Department of Trade and Industry (DTI), Cooperative Development Authority (CDA), or from the DOLE if the applicant is a union; and

(b) A certified copy of the license or business permit issued by the local government unit or units where the contractor or subcontractor operates.

The application shall be verified and shall include an undertaking that the contractor or subcontractor shall abide by all applicable labor laws and regulations.

[62] *Id*., Sec. 5.

evidence Dalag adduced was sufficient to overcome the disputable presumption that Golden Rock is an independent contractor. To be sure, in performing his tasks, Dalag made use of the raw materials and equipment that WM MFG supplied. He also operated the side-seal machine in the workplace of WM MFG, not of Golden Rock. With these attendant circumstances, the Court rules that the first confirmatory element indubitably exists.

ii. WM MFG exercised control over the employees supplied by Golden Rock

As to the second confirmatory element (i.e. control), petitioner argues that the Service Agreement it forged with Golden Rock specifically provides that the latter exclusively exercises control over the employees it assigns to WM MFG. What is more, it is Golden Rock who paid for Dalag's salaries and wages, a badge of their employer-employee relation.

Petitioner's claim does not persuade.

The second confirmatory element under DO 18-02 does not require the application of the economic test and, even more so, the four-fold test to determine whether or not the relation between the parties is one of labor-only contracting. All it requires is that the contractor does not exercise **control** over the employees it supplies, making the control test of paramount consideration. The fact that Golden Rock pays for Dalag's wages and salaries then has no bearing in resolving the issue.

Under the same DO 18-02, the "right to control" refers to the right to determine not only the end to be achieved, but also the manner and means to be used in reaching that end.[63] Here, notwithstanding the contract stipulation leaving Golden Rock the exclusive right to control the working warm bodies it provides WM MFG, evidence irresistibly suggests that it was WM MFG who actually exercised supervision over Dalag's work performance. As culled from the records, Dalag was supervised by WM MFG's employees. Petitioner WM MFG even went as far as furnishing Dalag with not less than seven (7) memos

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[63] *Id*.

directing him to explain within twenty-four (24) hours his alleged work infractions.[64] The company likewise took pains in issuing investigation reports detailing its findings on Dalag's culpability.[65] Clearly, WM MFG took it upon itself to discipline Dalag for violation of company rules, regulations, and policies, validating the presence of the second confirmatory element.

Having ascertained that the essential element and at least one confirmatory element obtain in the extant case, there is then no other result than for the Court to rule that WM MFG and Golden Rock engaged in labor-only contracting. As such, they are, by legal fiction, considered principal and agent, respectively, jointly and severally liable to their illegally dismissed employees, in accordance with Art. 109 of the Labor Code[66] and Sec. 19 of DO 18-02.[67]

We stress, however, that this finding of labor-only contracting does not preclude the Court from re-examining, in future cases, the nature of the contractual relationship between WM MFG and Golden Rock under Department Order No. 18-A, series of 2011, which redefined the parameters of legitimate service contracting, private recruitment and placement services, and labor-only contracting.

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[64] *Rollo*, pp. 701-707.

[65] *Id*. at 708-709.

[66] **Article 109.** *Solidary liability.* The provisions of existing laws to the contrary notwithstanding, every employer or indirect employer shall be held responsible with his contractor or subcontractor for any violation of any provision of this Code. For purposes of determining the extent of their civil liability under this Chapter, they shall be considered as direct employers.

[67] Section 19. Solidary liability. The principal shall be deemed as the direct employer of the contractual employees and therefore, solidarily liable with the contractor or subcontractor for whatever monetary claims the contractual employees may have against the former in the case of violations as provided for in Sections 5 (Labor Only contracting), 6 (Prohibitions), 8 (Rights of Contractual Employees) and 16 (Delisting) of these Rules. In addition, the principal shall also be solidarily liable in case the contract between the principal and contractor or subcontractor is preterminated for reasons not attributable to the fault of the contractor or subcontractor.

WM MFG dismissed Dalag for just cause, but did not comply with the procedural requirements

This brings us to the question of whether or not Dalag was illegally dismissed.

i. Dalag did not abandon his employment, but was in fact dismissed

The Court is not unmindful of the rule in labor cases that the employer has the burden of proving that the termination was for a valid or authorized cause; but fair evidentiary rule dictates that before an employer is burdened to prove that they did not commit illegal dismissal, it is incumbent upon the employee to first establish by substantial evidence that he or she was, in fact, dismissed.[68]

A cursory reading of the records of this case would reveal that the fact of Dalag's dismissal was sufficiently established by petitioner's own evidence.

Recall that Memo 2010-19 dated August 7, 2010 indefinitely suspended Dalag from work. This is in hew with Dalag's allegation in his complaint that on even date, he was prevented by WM MFG's security guard from proceeding to his work station, and was told to withdraw his belongings from his locker. Noteworthy, however, is that while Memo 2010-19 merely imposed an indefinite period of suspension, WM MFG's true intention—to sever its ties with Dalag—is brought to the fore by its letter dated August 9, 2010, informing Golden Rock that it no longer requires respondent Dalag's services.[69]

We cannot subscribe to petitioner's contrary view that Dalag was never terminated, legally or otherwise, and that it was he who abandoned his employment. On this point, the teaching in *MZR Industries v. Colambot*[70] is apropos:

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[68] *Noblejas v. Italian Maritime Academy Phils., Inc.*, G.R. No. 207888, June 9, 2014.

[69] *Rollo*, p. 721.

[70] G.R. No. 179001, August 28, 2013, 704 SCRA 150.

In a number of cases, this Court consistently held that to constitute abandonment of work, two elements must be present: first, the employee must have failed to report for work or must have been absent without valid or justifiable reason; and **second, there must have been a clear intention on the part of the employee to sever the employer-employee relationship manifested by some overt act.**

In the instant case, other than Colambot's failure to report back to work after suspension, petitioners failed to present any evidence which tend to show his intent to abandon his work. It is a settled rule that mere absence or failure to report for work is not enough to amount to abandonment of work. There must be a concurrence of the intention to abandon and some overt acts from which an employee may be deduced as having no more intention to work. On this point, the CA was correct when it held that:

> Mere absence or failure to report for work, even after notice to return, is not tantamount to abandonment. The burden of proof to show that there was unjustified refusal to go back to work rests on the employer. Abandonment is a matter of intention and cannot lightly be presumed from certain equivocal acts. To constitute abandonment, there must be clear proof of deliberate and unjustified intent to sever the employer-employee relationship. Clearly, the operative act is still the employee's ultimate act of putting an end to his employment. Furthermore, **it is a settled doctrine that the filing of a complaint for illegal dismissal is inconsistent with abandonment of employment. An employee who takes steps to protest his dismissal cannot logically be said to have abandoned his work.** The filing of such complaint is proof enough of his desire to return to work, thus negating any suggestion of abandonment. (emphasis added)

A prayer for reinstatement in a complaint for illegal dismissal signifies the employee's desire to continue his working relation with his employer, and militates against the latter's claim of abandonment. Pursuant to the age-old adage that he who alleges must prove,[71] it becomes incumbent upon the employer to rebut this seeming intention of the employee to resume his work. Hence,

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[71] *Lim v. Equitable PCI Bank*, G.R. No. 183918, January 15, 2014.

to prove abandonment, the onus rests on the employer to establish by substantial evidence the employee's non-interest in the continuance of his employment, which petitioner herein failed to do. On the contrary, Dalag's immediate filing of a complaint after his dismissal, done in a span of only two (2) days, convinces us of his intent to continue his work with WM MFG.

With the foregoing discussion, the burden now shifts to petitioner and Golden Rock to justify the legality of Dalag's dismissal, by proving that the termination was for just cause, and that the employee was afforded ample opportunity to be heard prior to dismissal.[72]

ii. Dalag's dismissal was for just cause

The Labor Code mandates that an employee cannot be terminated except for just or authorized cause, lest the employer violate the former's constitutionally guaranteed right to security of tenure.[73] Relevant hereto, the just causes for termination of employment are enumerated under Art. 282 of P.D. 442, as follows:

1. Serious misconduct or willful disobedience by the employee of the lawful orders of his employer or representative in connection with his work;
2. **Gross and habitual neglect by the employee of his duties;**
3. Fraud or willful breach by the employee of the trust reposed in him by his employer or duly authorized representative;
4. Commission of a crime or offense by the employee against the person of his employer or any immediate member of his family or his duly authorized representatives; and
5. Other causes analogous to the foregoing. (emphasis added)

To constitute just cause for an employee's dismissal, the neglect of duties must not only be gross but also habitual. Gross neglect means an absence of that diligence that an ordinarily prudent man would use in his own affairs.[74] Meanwhile, to be

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[72] *Aliling v. Feliciano*, G.R. No. 185829, April 25, 2012, 671 SCRA 186.

[73] LABOR CODE, Art. 279, in relation to CONSTITUTION, Art. XIII , Sec. 3.

[74] *Ting v. Court of Appeals*, G.R. No. 146174, July 12, 2006, 494 SCRA 610.

considered habitual, the negligence must not be a single or isolated act.[75]

Here, WM MFG duly established that Dalag was terminated for just cause on the second ground. The litany of Dalag's infractions, as detailed in memos 2010-13 up to 2010-18 demonstrated how Dalag repeatedly failed to report to his supervisor the problems he encountered with the side-seal machine assigned to him for operation. This failure resulted in repeated machine breakdowns that caused production and delivery delays, and lost business opportunities for the company. As stated in the memos:

MEMO 2010-13[76]

Base sa inireport na insidente reference number CTRL #2010-27. Ikaw ay nakasira [ng] Conveyor Belt ng Sideseal Machine No.02 noong ika-20 ng Hulyo 2010 dahil sa iyong kapabayaan.

Lumalabas na ikaw ay nagkasala ng Gross Negligence na nagresulta sa pagkakasira ng mamahaling gamit ng kompanya.

Ang ganitong pangyayari ay nagdulot ng malaking abala sa produksyon at pagkaantala sa delivery. Sa panahong kung saan mahigpit ang kompetisyon at pabago-bagong ekonomiya, ang mga ganitong pangyayari at may lubhang epekto sa kumpanya.

Ikaw ay binibigyan ng 24-oras para magsubmite sa Admin office ng written explanation o depensa sa nangyari. Inaasahan na itong pangyayari ay hindi na mauulit. Ito rin ay babala para sa iyo at pag alala na kailangan mag ingat at umiwas sa paglabag sa Company Rules and Regulation.

MEMO 2010-14[77]

Base sa inireport na insidente reference number CTRL #2010-28 Ang pagkasira mo ng Conveyor belt ay hindi mo ginawan ng oral o written report ang pagkasira mo ng makina sa team leader

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[75] *St. Luke's Medical Center, Inc. v. Notario*, G.R. No. 152166, October 20, 2010, 634 SCRA 67.

[76] *Rollo*, p. 701.

[77] *Id*. at 702.

o sa maintenance o SINO MAN kahit na alam mo na ito ay dapat mong gawin.

Lumalabas na ikaw ay nagkasala ng sadyang pagtatago o paglilihim ng tunay na kalagayan ng makina na nagdulot ng malaking negatibong epekto sa produksyon.

Ang ganitong pangyayari ay nagdulot ng malaking abala sa produksyon at pagkaantala sa delivery. Sa panahong kung saan mahigpit ang kompetisyon at pabago-bagong ekonomiya, ang mga ganitong pangyayari at may lubhang epekto sa kumpanya.

Ikaw ay binibigyan ng 24-oras para magsubmite sa Admin office ng written explanation o depensa sa nangyari. Inaasahan na itong pangyayari ay hindi na mauulit. Ito rin ay babala para sa iyo at pag alala na kailangan mag ingat at umiwas sa paglabag sa Company Rules and Regulation.

MEMO 2010-16[78]

Base sa inireport na insidente reference number CTRL #2010-30 Ang pagkasira ng manual heater ng sideseal machine no.02 ay hindi mo nanaman pinaalam o ginawan ng report.

Lumalabas na ikaw ay nagkasala ng sadyang pagtatago o paglilihim ng tunay na kalagayan ng makina na nagdudulot ng malaking negatibong epekto sa produksyon.

Ang di pagrereport mapa-verbal o written, pagtatago o pagkukubli sa kundisyon ng makina ay nagdulot ng malaking abala sa produksyon. Amg paglilihis ng tunay na pangyayari ay nagdulot din ng pagkakaroon ng di pagkakaunawaan ng Maintenance at ni Melvin Luna. Dahil dito nagkagulo at nadelay ang produksyon.

Sa panahong kung saan mahigpit ang kumpetisyon at pabago-bagong ekonomiya, ang mga ganitong pangyayari ay lubhang nakakaapekto sa kumpanya.

Ikaw ay binibigyan ng 24-oras para magsubmite sa Admin office ng written explanation o depensa sa nangyari. Inaasahan na itong pangyayari ay hindi na mauulit. Ito rin ay babala para sa iyo at pag alala na kailangan mag ingat at umiwas sa paglabag sa Company Rules and Regulation.

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[78] *Id*. at 704.

MEMO 2010-17[79]

Base sa inireport na insidente reference number CTRL #2010-31 Ang naputol na Thermocouple wire ng sideseal machine no.02 at ang hindi mo paggawa ng report tungkol dito ay patunay na walang dahilan para ito ay masira.

Lumalabas na ikaw ay nagkasala ng sadyang pagtatago o paglilihim ng tunay na kalagayan ng makina na nagdulot ng malaking negatibong epekto sa produksyon.

Ang mga ganitong pangyayari na kahina-hinala at kaduda-duda ay hindi maganda at dapat gayahin ng sinuman. Sa panahong kung saan mahigpit ang kumpetisyon at pabago-bago ang ekonomiya, ang mga ganitong pangyayari ay lubhang nakakaapekto sa kumpanya.

Ikaw ay binibigyan ng 24-oras para magsubmite sa Admin office ng written explanation o depensa sa nangyari. Inaasahan na itong pangyayari ay hindi na mauulit. Ito rin ay babala para sa iyo at pag alala na kailangan mag ingat at umiwas sa paglabag sa Company Rules and Regulation.

MEMO 2010-18[80]

Base sa pangyayaring naganap, ang hindi pagsasabi o pag amin na nasira ang makina ay napakalaking responsibilidad ng isang operator. Sa kabila ng pagbigay ng memo sa iyo at babala, nauulit pa rin ang insidente ng hindi mo pagreport sa kahit anong paraan, mapawritten o verbal na pararan.

Ang paulit-ulit na pangyayari ay lubos na nakaapekto sa produksyon. Dahil dito, nagkaroon ng pagkaantala at di pagkadeliver ng mga produkto sa ating kliyente sa tamang oras.

Ang ganitong gawain ay isang maliwanag na isang uri ng kapabayaan, pananadya at hindi magandang halimbawa para gayahin ng sinuman.

Ikaw ay binibigyan ng 24-oras para magsubmite sa Admin office ng written explanation o depensa sa nangyari. Inaasahan na itong pangyayari ay hindi na mauulit. Ito rin ay babala para sa iyo at pag

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[79] *Id*. at 705.

[80] *Id*. at 706.

alala na kailangan mag ingat at umiwas sa paglabag sa Company Rules and Regulation.

Contrary to the NLRC's May 31, 2011 Decision, as effectively affirmed by the CA, Dalag's dismissal rested not on mere suspicion alone as the allegations in the memos were supported by written statements executed by Dalag's co-workers and immediate superiors.[81] As recounted by Melvin Luna, who operates the same side-seal machine assigned to Dalag, he frequently encounters problems when starting up the equipment after Dalag was through with it, and that Dalag usually leaves the machine unserviceable after use. This practice was observed by Danilo Acosta, one of the team leaders of WM MFG, as per his written statement. Dalag's own team leader, Bonifacio Dimaano, likewise executed a written statement to the effect that Dalag never reported any problem with his side-seal machine.

Moreover, the NLRC's finding that WM MFG took no further step in the form of administrative investigation to confirm its suspicion is refuted by the Investigation Report[82] that served as basis for Dalag's "suspension." The Court notes that from the dates the memos were issued, the earliest being July 20, 2010, until the date of Dalag's dismissal, August 7, 2010, there was reasonable time for WM MFG to look into the matter, and that it, in fact, did so. As per the Investigation Report:

Kinalabasan ng Imbestigasyon ng Insidente:

1. Noong ika-20 ng Hulyo 2010 nalaman ni Melvin Luna na nasira ang conveyor belt at di mapaandar ang Sideseal Machine No. 2.
   Ito ay nangyari dahil sa kapabayaan ng kanyang kapalitan na si Richard Dalag. Bilang isang operator isa sa mga binabantayan niya ay ang pag-ikot ng conveyor belt ngunit hindi niya napansin ang paghinto nito habang umaandar ang makina na naging sanhi ng pagkakaroon ng malaking butas ng conveyor belt.

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[81] *Id*. at 716-720.

[82] *Id*. at 708-709.

2. Nabutas ang conveyor belt sa pamamagitan ng mainit na sealing bar na siyang dumidiin dito. Ang hindi pag-ikot ng belt at madiin na puwersa ng mainit na sealing bar sa isang parte ng belt ay mag-iiwan ng malalim na hiwa sa hindi umiikot na belt.

3. Dahil sa hindi pagreport ng nakasriang si RICHARD DALAG, itong insidenteng ito ay nagdulot ng di pagkakaunawaan sa pagitan ng Maintenance Staff at ng iyong kapalitang si Melvin Luna.

4. Dahil rin dito, ito ay nagdulot ng malaking delays sa ating produksyon at di pagkakadeliver ng produkto sa tamang oras sa kliyente.

x x x x x x x x x

8. Napagalaman din ng Maintenance staff, Team Leader at Production Supervisor ang mga hindi maipaliwanag na sira ng makina sa kabila ng maayos na kondisyon nito bago ito hawakan ni RICHARD DALAG.

9. Ito ay hindi nangyari ng isang beses lamang kundi paulit ulit. Ang magkasunod na insidente ng pagkasira ng manual heater at ng thermocouple wire at hindi paggawa ni RICHARD DALAG ng report ay patunay na walang malinaw na dahilan upang masira ang mga piyesa.

10. Ang paulit-ulit na hindi pagrereport ni RICHARD DALAG sa mga nagiging sira ng makina ay hindi maganda at kahina-hinala na Gawain ng pananabotahe.

Hence, Dalag's gross and habitual neglect of his duty to report to his superiors the problems he encountered with the side-seal machine he was assigned to operate was well-documented and duly investigated by WM MFG. The Court, therefore, holds that there was, indeed, just cause to terminate Dalag's employment under Art. 282(2) of the Labor Code.

iii. Procedural requirements were not observed when Dalag's employment was terminated

Anent the conformity of Dalag's dismissal to procedural requirements, the cardinal rule in our jurisdiction is that the employer must furnish the employee with two written notices

before the termination of his employment can be effected: (1) the first apprises the employee of the particular acts or omissions for which his dismissal is sought; and (2) the second informs the employee of the employer's decision to dismiss him. The twin notice rule is coupled with the requirement of a hearing, which is complied with as long as there was an opportunity to be heard, and not necessarily that an actual hearing was conducted.[83]

In the case at bar, while petitioner submitted as evidence memos that it supposedly attempted to serve Dalag, there was no proof that these were, indeed, received by the latter.[84] By petitioner's own allegation, Dalag refused to receive the same. Under such circumstance, the more prudent recourse would have been to serve the memos through registered mail instead of directly proceeding with the investigation. As held in *NEECO II v. NLRC*:[85]

> x x x That private respondent refused to receive the memorandum is to us, too self-serving a claim on the part of petitioner in the absence of any showing of the signature or initial of the proper serving officer. Moreover, petitioner could have easily remedied the situation by the expediency of sending the memorandum to private respondent by registered mail at his last known address as usually contained in the Personal Data Sheet or any personal file containing his last known address.

The non-service of notice effectively deprived Dalag of any, if not ample, opportunity to be informed of and defend himself against the administrative charges leveled against him, which element goes into the very essence of procedural due process.[86]

Dalag is only entitled to nominal damages, not full backwages

In spite of the failure of WM MFG and Golden Rock to show that they complied with the procedural requirements of a valid

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[83] *Solid Development Corporation Workers Association v. Solid Development Corporation*, G.R. No. 165995, August 14, 2007, 530 SCRA 132.

[84] *Rollo*, p. 55.

[85] G.R. No. 157603, June 23, 2005, 461 SCRA 169.

[86] *Rollo*, p. 548.

termination under the Labor Code and its implementing rules, Dalag's dismissal cannot be deemed tainted with illegality, contrary to the CA's ruling,[87] for the circumstance merely renders the two companies solidarily liable to Dalag for nominal damages. Instructional on this point is the doctrine in *JAKA Food Processing Corp. v. Pacot (JAKA)*.[88] There, the Court expounded that a dismissal for just cause under Art. 282 of the Labor Code implies that the employee concerned has committed, or is guilty of, some violation against the employer, i.e. the employee has committed some serious misconduct, is guilty of some fraud against the employer, or he has neglected his duties. Thus, it can be said that the employee himself initiated the dismissal process. However, the employer will still be held liable if procedural due process was not observed in the employee's dismissal. In such an event, the employer is directed to pay, in lieu of backwages, indemnity in the form of nominal damages.[89]

Nominal damages are adjudicated in order that a right of the plaintiff that has been violated or invaded by the defendant may be vindicated or recognized, and not for the purpose of indemnifying the plaintiff for any loss suffered by him.[90] In cases such as *JAKA*, the nominal damages awarded serves as vindication or recognition of the employee's fundamental due process right,[91] and as a deterrent against future violations of such right by the employer.[92]

The amount of nominal damages to be awarded is addressed to the sound discretion of the court, taking into account the relevant circumstances.[93] Nonetheless, *JAKA* laid down the

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[87] *Id*. at 499.

[88] G.R. No. 151378, March 28, 2005, 454 SCRA 119.

[89] *Id*.

[90] *Celebes Japan Foods Corporation v. Yermo*, G.R. No. 175855, October 2, 2009, 602 SCRA 414.

[91] *Id*.; see also *JAKA Food Processing Corp. v. Pacot*, *supra* note 88; *Agabon v. NLRC*, G.R. No. 158693, November 17, 2004, 442 SCRA 573.

[92] *Id*.

[93] *JAKA Food Processing Corp. v. Pacot*, *supra* note 88.

following guidelines in determining what amount could be considered proper:[94]

> (1) if the dismissal is based on a just cause under Article 282 but the employer failed to comply with the notice requirement, the sanction to be imposed upon him should be tempered because the dismissal process was, in effect, initiated by an act imputable to the employee; and
>
> (2) if the dismissal is based on an authorized cause under Article 283 but the employer failed to comply with the notice requirement, the sanction should be stiffer because the dismissal process was initiated by the employer's exercise of his management prerogative.

In the case at bar, given that there was substantial attempt on the part of WM MFG to comply with the procedural requirements, the Court, nevertheless, deems the amount of ₱30,000 as sufficient nominal damages[95] to be awarded to respondent Dalag.

WHEREFORE, premises considered, the petition is **GRANTED**. The February 21, 2013 Decision and September 17, 2013 Amended Decision of the Court of Appeals in CA-G.R. SP No. 122425 are hereby **REVERSED** and **SET ASIDE**. Let a new one be entered declaring W.M. Manufacturing and Golden Rock Manpower Services jointly and severally liable to Richard R. Dalag in the amount of One Thousand Two Hundred Twelve Pesos (₱1,212) representing Richard R. Dalag's unpaid wages from August 4-6, 2010 as determined by the Labor Arbiter; and Thirty Thousand Pesos (₱30,000) as nominal damages for Dalag's dismissal with just cause, but without observing proper procedure.

SO ORDERED.

Peralta, Villarama, Jr., Reyes, and *Jardeleza, JJ.,* concur.

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[94] *Id*.

[95] *Agabon v. NLRC*, *supra* note 91.

THIRD DIVISION

[G.R. No. 210445. December 7, 2015]

NILO B. ROSIT, *petitioner, vs.* **DAVAO DOCTORS HOSPITAL and DR. ROLANDO G. GESTUVO,** *respondents.*

SYLLABUS

1. CIVIL LAW; DAMAGES; MEDICAL NEGLIGENCE; A MEDICAL NEGLIGENCE CASE IS A TYPE OF CLAIM TO REDRESS A WRONG COMMITTED BY A MEDICAL PROFESSIONAL, THAT CAUSES BODILY HARM TO OR THE DEATH OF A PATIENT; ELEMENTS.— In *Flores v. Pineda*, the Court explained the concept of a medical negligence case and the elements required for its prosecution, viz: A medical negligence case is a type of claim to redress a wrong committed by a medical professional, that has caused bodily harm to or the death of a patient. **There are four elements involved in a medical negligence case, namely: duty, breach, injury, and proximate causation.** Duty refers to the standard of behavior which imposes restrictions on one's conduct. The standard in turn refers to the amount of competence associated with the proper discharge of the profession. A physician is expected to use at least the same level of care that any other reasonably competent doctor would use under the same circumstances. Breach of duty occurs when the physician fails to comply with these professional standards. If injury results to the patient as a result of this breach, the physician is answerable for negligence.

2. ID.; ID.; ID.; TO ESTABLISH MEDICAL NEGLIGENCE, AN EXPERT TESTIMONY IS GENERALLY REQUIRED TO DEFINE THE STANDARD OF BEHAVIOR BY WHICH THE COURT MAY DETERMINE WHETHER THE PHYSICIAN HAS PROPERLY PERFORMED THE REQUISITE DUTY TOWARD THE PATIENT; EXCEPTION.— To establish medical negligence, this Court has held that an expert testimony is generally required to define the standard of behavior by which the court may determine whether the physician has properly performed the requisite

duty toward the patient. This is so considering that the requisite degree of skill and care in the treatment of a patient is usually a matter of expert opinion. *Solidum v. People of the Philippines* provides an exception. There, the Court explained that where the application of the principle of *res ipsa loquitur* is warranted, an expert testimony may be dispensed with in medical negligence cases: **Although generally, expert medical testimony is relied upon in malpractice suits to prove that a physician has done a negligent act or that he has deviated from the standard medical procedure, when the doctrine of *res ipsa loquitur* is availed by the plaintiff, the need for expert medical testimony is dispensed with because the injury itself provides the proof of negligence.** The reason is that the general rule on the necessity of expert testimony applies only to such matters clearly within the domain of medical science, and not to matters that are within the common knowledge of mankind which may be testified to by anyone familiar with the facts.

3. ID.; ID.; ID.; DOCTRINE OF *RES IPSA LOQUITUR*; REQUISITES WHEN RESORT TO THE DOCTRINE OF *RES IPSA LOQUITUR* MAY BE AVAILED OF AS AN EXCEPTION TO THE REQUIREMENT OF AN EXPERT TESTIMONY IN MEDICAL NEGLIGENCE CASES, ENUMERATED.— We have further held that resort to the doctrine of *res ipsa loquitur* as an exception to the requirement of an expert testimony in medical negligence cases may be availed of if the following essential requisites are satisfied: (1) the accident was of a kind that does not ordinarily occur unless someone is negligent; (2) the instrumentality or agency that caused the injury was under the exclusive control of the person charged; and (3) the injury suffered must not have been due to any voluntary action or contribution of the person injured.

4. ID.; ID.; ID.; DOCTRINE OF INFORMED CONSENT; EXPLAINED; ELEMENTS.— *Li v. Soliman* made the following disquisition on the relevant Doctrine of Informed Consent in relation to medical negligence cases, to wit: The **doctrine of informed consent** within the context of physician-patient relationships goes far back into English common law. x x x **From a purely ethical norm, informed consent evolved into a general principle of law that a physician has a duty to disclose what a reasonably prudent physician in the medical community in the exercise of reasonable care would**

disclose to his patient as to whatever grave risks of injury might be incurred from a proposed course of treatment, so that a patient, exercising ordinary care for his own welfare, and faced with a choice of undergoing the proposed treatment, or alternative treatment, or none at all, may intelligently exercise his judgment by reasonably balancing the probable risks against the probable benefits. x x x **There are four essential elements a plaintiff must prove in a malpractice action based upon the doctrine of informed consent: "(1) the physician had a duty to disclose material risks; (2) he failed to disclose or inadequately disclosed those risks; (3) as a direct and proximate result of the failure to disclose, the patient consented to treatment she otherwise would not have consented to; and (4) plaintiff was injured by the proposed treatment."** The gravamen in an informed consent case requires the plaintiff to "point to significant undisclosed information relating to the treatment which would have altered her decision to undergo it."

5. **ID.; ID.; ACTUAL DAMAGES; A CLAIMANT IS ENTITLED TO ACTUAL DAMAGES WHEN THE DAMAGE HE SUSTAINED IS THE NATURAL AND PROBABLE CONSEQUENCE OF THE NEGLIGENT ACT AND HE ADEQUATELY PROVED THE AMOUNT OF SUCH DAMAGES.—** For the foregoing, the trial court properly awarded Rosit actual damages after he was able to prove the actual expenses that he incurred due to the negligence of Dr. Gestuvo. In *Mendoza v. Spouses Gomez*, the Court explained that a claimant is entitled to actual damages when the damage he sustained is the natural and probable consequences of the negligent act and he adequately proved the amount of such damage.

6. **ID.; ID.; EXEMPLARY DAMAGES; THREE REQUISITES FOR THE AWARD, ENUMERATED; ESTABLISHED IN CASE AT BAR.—** As to the award of exemplary damages, the same too has to be affirmed. In *Mendoza*, the Court enumerated the requisites for the award of exemplary damages: Our jurisprudence sets certain conditions when exemplary damages may be awarded: First, they may be imposed by way of example or correction only in addition, among others, to compensatory damages, and cannot be recovered as a matter of right, their determination depending upon the amount of

compensatory damages that may be awarded to the claimant. Second, the claimant must first establish his right to moral, temperate, liquidated or compensatory damages. Third, the wrongful act must be accompanied by bad faith, and the award would be allowed only if the guilty party acted in a wanton, fraudulent, reckless, oppressive or malevolent manner. The three (3) requisites are met. Dr. Gestuvo's actions are clearly negligent. Likewise, Dr. Gestuvo acted in bad faith or in a wanton, fraudulent, reckless, oppressive manner when he was in breach of the doctrine of informed consent. Dr. Gestuvo had the duty to fully explain to Rosit the risks of using large screws for the operation. More importantly, he concealed the correct medical procedure of using the smaller titanium screws mainly because of his erroneous belief that Rosit cannot afford to buy the expensive titanium screws. Such concealment is clearly a valid basis for an award of exemplary damages.

7. REMEDIAL LAW; EVIDENCE; WEIGHT AND SUFFICIENCY; AN AFFIDAVIT IS MERELY HEARSAY EVIDENCE WHERE ITS AFFIANT DID NOT TAKE THE WITNESS STAND; APPLICATION IN CASE AT BAR.— In *Dantis v. Maghinang, Jr.*, the Court reiterated the oft-repeated rule that "an affidavit is merely hearsay evidence where its affiant/maker did not take the witness stand." Here, Dr. Pangan never took the witness stand to affirm the contents of his affidavit. Thus, the affidavit is inadmissible and cannot be given any weight. The CA, therefore, erred when it considered the affidavit of Dr. Pangan, moreso for considering the same as expert testimony.

APPEARANCES OF COUNSEL

Alabastro Olaguer & Alabastro Law Office for petitioner.
Nitorreda Law Office for respondents.

D E C I S I O N

VELASCO, JR., *J.*:

The Case

This is a petition filed under Rule 45 of the Rules of Court assailing the Decision and Resolution dated January 22, 2013[1] and November 7, 2013,[2] respectively, of the Court of Appeals, Cagayan De Oro City (CA), in CA-G.R. CV No. 00911-MIN. The CA Decision reversed the Decision dated September 14, 2004[3] of the Regional Trial Court, Branch 33 in Davao City (RTC) in Civil Case No. 27,354-99, a suit for damages thereat which Nilo B. Rosit (Rosit) commenced against Dr. Rolando Gestuvo (Dr. Gestuvo).

Factual Antecedents

On January 15, 1999, Rosit figured in a motorcycle accident. The X-ray soon taken the next day at the Davao Doctors Hospital (DDH) showed that he fractured his jaw. Rosit was then referred to Dr. Gestuvo, a specialist in mandibular injuries,[4] who, on January 19, 1999, operated on Rosit.

During the operation, Dr. Gestuvo used a metal plate fastened to the jaw with metal screws to immobilize the mandible. As the operation required the smallest screws available, Dr. Gestuvo cut the screws on hand to make them smaller. Dr. Gestuvo knew that there were smaller titanium screws available in Manila, but did not so inform Rosit supposing that the latter would not be able to afford the same.[5]

Following the procedure, Rosit could not properly open and close his mouth and was in pain. X-rays done on Rosit two (2)

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[1] *Rollo*, pp. 56-67. Penned by Associate Justice Henri Jean Paul B. Inting and concurred in by Associate Justices Edgardo T. Lloren and Jhosep Y. Lopez.

[2] *Id*. at 82-85.

[3] *Id*. at 40-54.

[4] *Id*. at 40-41.

[5] *Id*. at 41-42.

days after the operation showed that the fracture in his jaw was aligned but the screws used on him touched his molar. Given the X-ray results, Dr. Gestuvo referred Rosit to a dentist. The dentist who checked Rosit, Dr. Pangan, opined that another operation is necessary and that it is to be performed in Cebu.[6]

Alleging that the dentist told him that the operation conducted on his mandible was improperly done, Rosit went back to Dr. Gestuvo to demand a loan to defray the cost of the additional operation as well as the expenses of the trip to Cebu. Dr. Gestuvo gave Rosit ₱4,500.

Rosit went to Cebu on February 19, 1999, still suffering from pain and could hardly open his mouth.

In Cebu, Dr. Pangan removed the plate and screws thus installed by Dr. Gestuvo and replaced them with smaller titanium plate and screws. Dr. Pangan also extracted Rosit's molar that was hit with a screw and some bone fragments. Three days after the operation, Rosit was able to eat and speak well and could open and close his mouth normally.[7]

On his return to Davao, Rosit demanded that Dr. Gestuvo reimburse him for the cost of the operation and the expenses he incurred in Cebu amounting to ₱140,000, as well as for the ₱50,000 that Rosit would have to spend for the removal of the plate and screws that Dr. Pangan installed. Dr. Gestuvo refused to pay.[8]

Thus, Rosit filed a civil case for damages and attorney's fees with the RTC against Dr. Gestuvo and DDH, the suit docketed as Civil Case No. 27,354-99.

The Ruling of the Regional Trial Court

The RTC freed DDH from liability on the ground that it exercised the proper diligence in the selection and supervision of Dr. Gestuvo, but adjudged Dr. Gestuvo negligent and ruled, thus:

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[6] *Id*. at 42-43.

[7] *Id*. at 43-44.

[8] *Id*. at 44.

FOR ALL THE FOREGOING, finding the plaintiff Nilo B. Rosit to have preponderantly established his cause of action in the complaint against defendant Dr. Rolando G. Gestuvo only, judgment is hereby rendered for the plaintiff and against said defendant, ordering the defendant DR. ROLANDO G. GESTUVO to pay unto plaintiff NILO B. ROSIT the following:

a) the sum of ONE HUNDRED FORTY THOUSAND ONE HUNDRED NINETY NINE PESOS and 13/100 (₱140,199.13) representing reimbursement of actual expenses incurred by plaintiff in the operation and re-operation of his mandible;

b) the sum of TWENTY NINE THOUSAND AND SIXTY EIGHT PESOS (₱ 29,068.00) representing reimbursement of the filing fees and appearance fees;

c) the sum of ONE HUNDRED FIFTY THOUSAND PESOS (₱150,000.00) as and for attorney's fees;

d) the amount of FIFTY THOUSAND PESOS (₱50,000.00) as moral damages;

e) the amount of TEN THOUSAND PESOS (₱10,000.00) as exemplary damages; and

f) the costs of the suit.

For lack of merit, the complaint against defendant DAVAO DOCTORS HOSPITAL and the defendants' counterclaims are hereby ordered DISMISSED.

Cost against Dr. Rolando G. Gestuvo.

SO ORDERED.

In so ruling, the trial court applied the *res ipsa loquitur* principle holding that "the need for expert medical testimony may be dispensed with because the injury itself provides the proof of negligence."

Therefrom, both parties appealed to the CA.

The Ruling of the Court of Appeals

In its January 22, 2013 Decision, the CA modified the appealed judgment by deleting the awards made by the trial court, disposing as follows:

WHEREFORE, the appeal filed by Gestuvo is GRANTED. The Decision dated September 14, 2004 of the Regional Trial Court, Branch 33, Davao City, rendered in Civil Case No. 27,354-99 is hereby MODIFIED. The monetary awards adjudged in favor of Nilo B. Rosit are hereby DELETED for lack of basis.

SO ORDERED.

Unlike the RTC, the CA ruled that the *res ipsa loquitur* principle is not applicable and that the testimony of an expert witness is necessary for a finding of negligence. The appellate court also gave credence to Dr. Pangan's letter stating the opinion that Dr. Gestuvo did not commit gross negligence in his emergency management of Rosit's fractured mandible.

Rosit's motion for reconsideration was denied in the CA's November 7, 2013 Resolution.

Hence, the instant appeal.

The Issue

The ultimate issue for our resolution is whether the appellate court correctly absolved Dr. Gestuvo from liability.

The Court's Ruling

The petition is impressed with merit.

In *Flores v. Pineda*,[9] the Court explained the concept of a medical negligence case and the elements required for its prosecution, viz:

> A medical negligence case is a type of claim to redress a wrong committed by a medical professional, that has caused bodily harm to or the death of a patient. **There are four elements involved in a medical negligence case, namely: duty, breach, injury, and proximate causation.**
>
> Duty refers to the standard of behavior which imposes restrictions on one's conduct. The standard in turn refers to the amount of competence associated with the proper discharge of the profession.

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[9] G.R. No. 158996, November 14, 2008, 571 SCRA 83, 91-92.

A physician is expected to use at least the same level of care that any other reasonably competent doctor would use under the same circumstances. Breach of duty occurs when the physician fails to comply with these professional standards. If injury results to the patient as a result of this breach, the physician is answerable for negligence. (emphasis supplied)

An expert witness is not necessary as the *res ipsa loquitur* doctrine is applicable

To establish medical negligence, this Court has held that an expert testimony is generally required to define the standard of behavior by which the court may determine whether the physician has properly performed the requisite duty toward the patient. This is so considering that the requisite degree of skill and care in the treatment of a patient is usually a matter of expert opinion.[10]

Solidum v. People of the Philippines[11] provides an exception. There, the Court explained that where the application of the principle of *res ipsa loquitur* is warranted, an expert testimony may be dispensed with in medical negligence cases:

Although generally, expert medical testimony is relied upon in malpractice suits to prove that a physician has done a negligent act or that he has deviated from the standard medical procedure, when the doctrine of *res ipsa loquitur* is availed by the plaintiff, the need for expert medical testimony is dispensed with because the injury itself provides the proof of negligence. The reason is that the general rule on the necessity of expert testimony applies only to such matters clearly within the domain of medical science, and not to matters that are within the common knowledge of mankind which may be testified to by anyone familiar with the facts. x x x

Thus, courts of other jurisdictions have applied the doctrine in the following situations: leaving of a foreign object in the body of the patient after an operation, injuries sustained on a healthy part of the body which was not under, or in the area, of treatment, removal of the wrong part of the body when another part was intended, knocking out a tooth while a patient's jaw was under anesthetic for

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[10] *Id*.

[11] G.R. No. 192123, March 10, 2014.

the removal of his tonsils, and loss of an eye while the patient plaintiff was under the influence of anesthetic, during or following an operation for appendicitis, among others.

We have further held that resort to the doctrine of *res ipsa loquitur* as an exception to the requirement of an expert testimony in medical negligence cases may be availed of if the following essential requisites are satisfied: (1) the accident was of a kind that does not ordinarily occur unless someone is negligent; (2) the instrumentality or agency that caused the injury was under the exclusive control of the person charged; and (3) the injury suffered must not have been due to any voluntary action or contribution of the person injured.[12]

In its assailed Decision, the CA refused to acknowledge the application of the *res ipsa loquitur* doctrine on the ground that the foregoing elements are absent. In particular, the appellate court is of the position that post-operative pain is not unusual after surgery and that there is no proof that the molar Dr. Pangan removed is the same molar that was hit by the screw installed by Dr. Gestuvo in Rosit's mandible. Further, a second operation was conducted within the 5-week usual healing period of the mandibular fracture so that the second element cannot be considered present. Lastly, the CA pointed out that the X-ray examination conducted on Rosit prior to his first surgery suggests that he had "chronic inflammatory lung disease compatible," implying that the injury may have been due to Rosit's peculiar condition, thus effectively negating the presence of the third element.[13]

After careful consideration, this Court cannot accede to the CA's findings as it is at once apparent from the records that the essential requisites for the application of the doctrine of *res ipsa loquitur* are present.

The first element was sufficiently established when Rosit proved that one of the screws installed by Dr. Gestuvo struck

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[12] *Id*.

[13] *Rollo*, p. 64.

his molar. It was for this issue that Dr. Gestuvo himself referred Rosit to Dr. Pangan. In fact, the affidavit of Dr. Pangan presented by Dr. Gestuvo himself before the trial court narrated that the same molar struck with the screw installed by Dr. Gestuvo was examined and eventually operated on by Dr. Pangan. Dr. Gestuvo cannot now go back and say that Dr. Pangan treated a molar different from that which was affected by the first operation.

Clearly, had Dr. Gestuvo used the proper size and length of screws and placed the same in the proper locations, these would not have struck Rosit's teeth causing him pain and requiring him to undergo a corrective surgery.

Dr. Gestuvo knew that the screws he used on Rosit were too large as, in fact, he cut the same with a saw.[14] He also stated during trial that common sense dictated that the smallest screws available should be used. More importantly, he also knew that these screws were available locally at the time of the operation.[15] Yet, he did not avail of such items and went ahead with the larger screws and merely sawed them off. Even assuming that the screws were already at the proper length after Dr. Gestuvo cut the same, it is apparent that he negligently placed one of the screws in the wrong area thereby striking one of Rosit's teeth.

In any event, whether the screw hit Rosit's molar because it was too long or improperly placed, both facts are the product of Dr. Gestuvo's negligence. An average man of common intelligence would know that striking a tooth with any foreign object much less a screw would cause severe pain. Thus, the first essential requisite is present in this case.

Anent the second element for the *res ipsa loquitur* doctrine application, it is sufficient that the operation which resulted in the screw hitting Rosit's molar was, indeed, performed by Dr. Gestuvo. No other doctor caused such fact.

The CA finds that Rosit is guilty of contributory negligence in having Dr. Pangan operate on him during the healing period

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[14] *Id*. at 42.

[15] *Id*.

of his fractured mandible. What the CA overlooked is that it was Dr. Gestuvo himself who referred Rosit to Dr. Pangan. Nevertheless, Dr. Pangan's participation could not have contributed to the reality that the screw that Dr. Gestuvo installed hit Rosit's molar.

Lastly, the third element that the injury suffered must not have been due to any voluntary action or contribution of the person injured was satisfied in this case. It was not shown that Rosit's lung disease could have contributed to the pain. What is clear is that he suffered because one of the screws that Dr. Gestuvo installed hit Rosit's molar.

Clearly then, the ***res ipsa loquitur*** **doctrine finds application in the instant case and no expert testimony is required to establish the negligence of defendant Dr. Gestuvo**.

Petitioner was deprived of the opportunity to make an "informed consent"

What is more damning for Dr. Gestuvo is his failure to inform Rosit that such smaller screws were available in Manila, albeit at a higher price.[16] As testified to by Dr. Gestuvo himself:

Court	Alright. This titanium materials according to you were already available in the Philippines since the time of Rosit's accident?
Witness	Yes, your Honor.
x x x	x x x x x x
Court	Did you inform Rosit about the existence of titanium screws and plates which according to you is the screws and plates of choice?
Witness	No, your Honor.
x x x	x x x x x x
Witness	The reason I did not inform him anymore Judge because what I thought he was already hard up with the down

[16] TSN, July 4, 2002, pp. 40-42.

payment. And if I will further introduce him this screws, the more he will not be able to afford the operation.

x x x x x x x x x

Court This titanium screws and plates were available then it is up to Rosit to decide whether to use it or not because after all the material you are using is paid by the patient himself, is it not?

Witness Yes, that is true.

Li v. Soliman[17] made the following disquisition on the relevant Doctrine of Informed Consent in relation to medical negligence cases, to wit:

The **doctrine of informed consent** within the context of physician-patient relationships goes far back into English common law. x x x **From a purely ethical norm, informed consent evolved into a general principle of law that a physician has a duty to disclose what a reasonably prudent physician in the medical community in the exercise of reasonable care would disclose to his patient as to whatever grave risks of injury might be incurred from a proposed course of treatment, so that a patient, exercising ordinary care for his own welfare, and faced with a choice of undergoing the proposed treatment, or alternative treatment, or none at all, may intelligently exercise his judgment by reasonably balancing the probable risks against the probable benefits.**

x x x x x x x x x

There are four essential elements a plaintiff must prove in a malpractice action based upon the doctrine of informed consent: "(1) the physician had a duty to disclose material risks; (2) he failed to disclose or inadequately disclosed those risks; (3) as a direct and proximate result of the failure to disclose, the patient consented to treatment she otherwise would not have consented to; and (4) plaintiff was injured by the proposed treatment." The gravamen in an informed consent case requires the plaintiff to "point to significant undisclosed information relating to the treatment which would have altered her decision to undergo it." (emphasis supplied)

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[17] G.R. No. 165279, June 7, 2011, 651 SCRA 32, 56-59.

The four adverted essential elements above are present here.

First, Dr. Gestuvo clearly had the duty of disclosing to Rosit the risks of using the larger screws for the operation. This was his obligation as the physician undertaking the operation.

Second, Dr. Gestuvo failed to disclose these risks to Rosit, deciding by himself that Rosit could not afford to get the more expensive titanium screws.

Third, had Rosit been informed that there was a risk that the larger screws are not appropriate for the operation and that an additional operation replacing the screws might be required to replace the same, as what happened in this case, Rosit would not have agreed to the operation. It bears pointing out that Rosit was, in fact, able to afford the use of the smaller titanium screws that were later used by Dr. Pangan to replace the screws that were used by Dr. Gestuvo.

Fourth, as a result of using the larger screws, Rosit experienced pain and could not heal properly because one of the screws hit his molar. This was evident from the fact that just three (3) days after Dr. Pangan repeated the operation conducted by Dr. Gestuvo, Rosit was pain-free and could already speak. This is compared to the one (1) month that Rosit suffered pain and could not use his mouth after the operation conducted by Dr. Gestuvo until the operation of Dr. Pangan.

Without a doubt, Dr. Gestuvo is guilty of withholding material information which would have been vital in the decision of Rosit in going through with the operation with the materials at hand. Thus, Dr. Gestuvo is also guilty of negligence on this ground.

Dr. Pangan's Affidavit is not admissible

The appellate court's Decision absolving Dr. Gestuvo of negligence was also anchored on a letter signed by Dr. Pangan who stated the opinion that Dr. Gestuvo did not commit gross negligence in his emergency management of Mr. Rosit's fractured mandible.[18] Clearly, the appellate court overlooked the elementary principle against hearsay evidence.

[18] *Id*. at 63.

In *Dantis v. Maghinang, Jr.*,[19] the Court reiterated the oft-repeated rule that "an affidavit is merely hearsay evidence where its affiant/maker did not take the witness stand." Here, Dr. Pangan never took the witness stand to affirm the contents of his affidavit. Thus, the affidavit is inadmissible and cannot be given any weight. The CA, therefore, erred when it considered the affidavit of Dr. Pangan, moreso for considering the same as expert testimony.

Moreover, even if such affidavit is considered as admissible and the testimony of an expert witness, the Court is not bound by such testimony. As ruled in *Ilao-Quianay v. Mapile*:[20]

> Indeed, courts are not bound by expert testimonies. They may place whatever weight they choose upon such testimonies in accordance with the facts of the case. The relative weight and sufficiency of expert testimony is peculiarly within the province of the trial court to decide, considering the ability and character of the witness, his actions upon the witness stand, the weight and process of the reasoning by which he has supported his opinion, his possible bias in favor of the side for whom he testifies, and any other matters which serve to illuminate his statements. The opinion of an expert should be considered by the court in view of all the facts and circumstances of the case. The problem of the evaluation of expert testimony is left to the discretion of the trial court whose ruling thereupon is not reviewable in the absence of an abuse of that discretion.

Thus, the belief of Dr. Pangan whether Dr. Gestuvo is guilty of negligence or not will not bind the Court. The Court must weigh and examine such testimony and decide for itself the merits thereof.

As discussed above, Dr. Gestuvo's negligence is clearly demonstrable by the doctrines of *res ipsa loquitur* and informed consent.

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[19] G.R. No. 191696, April 10, 2013, 695 SCRA 599, 610 ; see also *Unchuan v. Lozada*, G.R. No. 172671, April 16, 2009, 585 SCRA 421, 435; *People v. Quidato, Jr.*, G.R. No. 117401, October 1, 1998, 297 SCRA 1, 8. See also *People v. Manhuyod*, G.R. No. 124676, May 20, 1998, 290 SCRA 257, 270-271.

[20] G.R. No. 154087, October 25, 2005, 474 SCRA 246, 255.

Damages

For the foregoing, the trial court properly awarded Rosit actual damages after he was able to prove the actual expenses that he incurred due to the negligence of *Dr. Gestuvo. In Mendoza v. Spouses Gomez*,[21] the Court explained that a claimant is entitled to actual damages when the damage he sustained is the natural and probable consequences of the negligent act and he adequately proved the amount of such damage.

Rosit is also entitled to moral damages as provided under Article 2217 of the Civil Code,[22] given the unnecessary physical suffering he endured as a consequence of defendant's negligence.

To recall, from the time he was negligently operated upon by Dr. Gestuvo until three (3) days from the corrective surgery performed by Dr. Pangan, or for a period of one (1) month, Rosit suffered pain and could not properly use his jaw to speak or eat.

The trial court also properly awarded attorney's fees and costs of suit under Article 2208 of the Civil Code,[23] since Rosit was compelled to litigate due to Dr. Gestuvo's refusal to pay for Rosit's damages.

As to the award of exemplary damages, the same too has to be affirmed. In *Mendoza*,[24] the Court enumerated the requisites for the award of exemplary damages:

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[21] G.R. No. 160110, June 18, 2014, 726 SCRA 505, 521-522.

[22] Article 2217. Moral damages include **physical suffering**, mental anguish, fright, serious anxiety, besmirched reputation, wounded feelings, moral shock, social humiliation, and similar injury. Though incapable of pecuniary computation, **moral damages may be recovered if they are the proximate result of the defendant's wrongful act for omission**. (emphasis supplied)

[23] Art. 2208. In the absence of stipulation, attorney's fees and expenses of litigation, other than judicial costs, cannot be recovered, except:

x x x x x x x x x

(2) When the defendant's act or omission has compelled the plaintiff to litigate with third persons or to incur expenses to protect his interest.

[24] *Supra* note 21, at 525.

Our jurisprudence sets certain conditions when exemplary damages may be awarded: First, they may be imposed by way of example or correction only in addition, among others, to compensatory damages, and cannot be recovered as a matter of right, their determination depending upon the amount of compensatory damages that may be awarded to the claimant. Second, the claimant must first establish his right to moral, temperate, liquidated or compensatory damages. Third, the wrongful act must be accompanied by bad faith, and the award would be allowed only if the guilty party acted in a wanton, fraudulent, reckless, oppressive or malevolent manner.

The three (3) requisites are met. Dr. Gestuvo's actions are clearly negligent. Likewise, Dr. Gestuvo acted in bad faith or in a wanton, fraudulent, reckless, oppressive manner when he was in breach of the doctrine of informed consent. Dr. Gestuvo had the duty to fully explain to Rosit the risks of using large screws for the operation. More importantly, he concealed the correct medical procedure of using the smaller titanium screws mainly because of his erroneous belief that Rosit cannot afford to buy the expensive titanium screws. Such concealment is clearly a valid basis for an award of exemplary damages.

WHEREFORE, the instant petition is **GRANTED**. The CA Decision dated January 22, 2013 and Resolution dated November 7, 2013 in CA-G.R. CV No. 00911-MIN are hereby **REVERSED** and **SET ASIDE**. Further, the Decision dated September 14, 2004 of the Regional Trial Court, Branch 33 in Davao City in Civil Case No. 27,354-99 is hereby **REINSTATED** and **AFFIRMED.**

SO ORDERED.

Peralta, Villarama, Jr., Reyes, and *Jardeleza, JJ.,* concur.

THIRD DIVISION

[G.R. No. 212058. December 7, 2015]

STAR ELECTRIC CORPORATION, *petitioner, vs.* **R & G CONSTRUCTION DEVELOPMENT AND TRADING, INC.,** *respondent*.

SYLLABUS

1. **REMEDIAL LAW; APPEALS; PETITION FOR REVIEW ON *CERTIORARI*; THE COURT ONLY RESOLVES QUESTIONS OF LAW AND NOT QUESTIONS OF FACTS; EXCEPTIONS.—**It is an established rule that in the exercise of its power of review under Rule 45, the Court only resolves questions of law and not questions of facts. However, this rule is not absolute. Jurisprudence has recognized several exceptions in which factual issues may be resolved by the Supreme Court, such as: (1) when the findings are grounded entirely on speculation, surmises or conjectures; (2) when the inference made is manifestly mistaken, absurd or impossible; (3) when the judgment is based on a misapprehension of facts; (4) when the findings of facts are conflicting; (5) when in making its findings the Court of Appeals went beyond the issues of the case, or its findings are contrary to the admissions of both the appellant and the appellee; (6) when the findings are contrary to the trial court; (7) when the facts set forth in the petition as well as in the petitioner's main and reply briefs are not disputed by the respondent; (8) when the findings of fact are premised on the supposed absence of evidence and contradicted by the evidence on record; or (9) when the Court of Appeals manifestly overlooked certain relevant facts not disputed by the parties, which, if properly considered, would justify a different conclusion.

2. **CIVIL LAW; DAMAGES; ATTORNEY'S FEES; THE AWARD OF ATTORNEY'S FEES TO THE WINNING PARTY LIES WITHIN THE DISCRETION OF THE COURT, TAKING INTO ACCOUNT THE CIRCUMSTANCES OF EACH CASE; ESTABLISHED IN CASE AT BAR.—** It is settled that the award of attorney's fees is the exception rather than the general rule, and counsel's fees are not awarded every

time a party prevails in a suit because of the policy that no premium should be placed on the right to litigate. Still, the award of attorney's fees to the winning party lies within the discretion of the court, taking into account the circumstances of each case. This means that such an award demands factual, legal, and equitable justification, such as those instances specified in Article 2208 of the Civil Code, as when the defendant's act or omission has compelled the plaintiff to incur expenses to protect his interest or where the defendant acted in gross and evident bad faith in refusing to satisfy the plaintiff's plainly valid, just, and demandable claim. As earlier discussed, petitioner has the legal right and basis to collect for the work it accomplished under the Construction Contract. However, respondent persistently and clearly violated the terms of its contract with petitioner when it unreasonably refused to pay petitioner's progress billings, forcing the petitioner to incur litigation expenses for 12 long years, from April 4, 2003 when the complaint was filed up to the present, in order to protect its interest. In view of the unjustified refusal of respondent to honor its commitment under the contract, the Court finds it just and equitable to award attorney's fees to petitioner in the reduced amount of Fifty Thousand Pesos (₱50,000), in line with the policy enunciated in Article 2208 of the Civil Code that attorney's fees must always be reasonable, and in accordance with jurisprudence.

APPEARANCES OF COUNSEL

Nicolas A. Gotera for petitioner.
Tec Rodriguez Law Office for respondent.

D E C I S I O N

VELASCO, JR., *J.*:

Nature of the Case

This is a Petition for Review under Rule 45 of the Rules of Court assailing the Decision of the Court of Appeals (CA) in CA-G.R. CV No. 95008, reversing and setting aside the Decision of the Regional Trial Court of Parañaque City, Branch 196 (RTC) which granted petitioner Star Electric Corporation's

complaint for collection of sum of money against respondent R & G Construction Development and Trading, Inc.

The Facts

In May 2002, petitioner, as sub-contractor, entered into a Construction Contract with respondent where it undertook the installation of electrical, plumbing, and mechanical works in a commercial building known as Grami Empire Hotel (the Project) for the amount of ₱2,571,457.21[1] payable via the progress billing method.[2] As stipulated, construction of the project commenced upon the signing of the contract, and respondent paid petitioner ₱500,000 and ₱80,000 as downpayment and advance payment, respectively.

Subsequent developments saw respondent refusing to pay petitioner's progress billings despite repeated demands. Because of this, petitioner informed respondent through a letter dated September 20, 2002 that it would be stopping its work at the project site until the amount due under the progress billings is fully paid. Petitioner made it clear, however, that it is amenable to terminate their contract, without prejudice to its claim for payment.[3]

The next day, on September 21, 2002, petitioner received a letter from respondent formally terminating the Construction Contract.[4] In the said letter, respondent informed petitioner that it had conducted a detailed inspection of its work and found that: (1) most of the delivered breakers were secondhand; and

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[1] *Rollo*, pp. 49-54.

[2] Article 3, Section 3.1 of the Construction Contract – 20% Downpayment shall be paid upon signing of the contract, and the remaining balance shall be paid thru progress billing based on actual accomplishment done by the "Second Party." First Party shall withhold 10% of every request progress payments by the Second Party until full completion and final acceptance of the project and shall be released upon furnished by warranty bond covering 1 year period from acceptance. Amortization for down payment paid, shall also be proportionately deducted from every progress billing based on the presented and approved progress of work.

[3] *Rollo*, p. 60.

[4] Annex 2 of respondent's Comment.

(2) the rough-in materials such as full-boxes and PVC conduit pipes were installed improperly. Further, respondent stated that it found petitioner's overall progress of work to be 23.13% and, thus, the downpayment of ₱580,000 already fully compensated petitioner's effort.

In its reply letter of September 24, 2002,[5] petitioner attributed project delay to the several modifications in the building's construction plan. It argued that respondent should have rejected the electrical panel boards right away and before delivery. Petitioner also insisted that without the electrical panel boards, the extent of its completion should be at least 40%, including all unused materials on site. Petitioner also suggested the appointment of an independent appraiser to evaluate and finally resolve the rate of completion. Finally, petitioner requested that it be allowed to pull-out from the project site its tools and equipment, enumerated in the letter.

As its demand letter dated October 14, 2002[6] went unheeded, petitioner filed, on April 4, 2003, a complaint for the payment of sum of money against respondent before the RTC. In the complaint, petitioner, as plaintiff, prayed that respondent be ordered to pay it ₱1,235,052.70 representing the amount due under the following progress billings:

Progress Billing No. 1[7]	August 18, 2002	₱356,129.26
Change Order No. 1[8]	August 18, 2002	50,000.00
Progress Billing No. 2[9]	September 12, 2002	278,250.66
Progress Billing No. 3[10]	September 13, 2002	345,100.00
Progress Billing No. 4[11]	October 1, 2002	205,472.82
	Total	**₱1,235,052.70**

[5] *Rollo*, pp. 63-64.

[6] Records, p. 653.

[7] *Rollo*, p. 55.

[8] *Id*. at 56.

[9] *Id*. at 57.

[10] *Id*. at 58.

[11] *Id*. at 59.

On October 20, 2003, petitioner filed an **amended complaint** where it lowered the amount of its claim to ₱771,152.48. In arriving at this lower figure, petitioner subtracted respondent's downpayment of ₱580,000 from ₱1,235,052.70 and added ₱116,100 which, allegedly, represented the cost of petitioner's tools and equipment withheld by respondent at the project site.[12]

On August 29, 2004, petitioner sent respondent another letter demanding payment for a final billing dated November 3, 2002[13] in the amount of ₱498,581.35.[14] Petitioner explained that this final billing was presented sometime in November 2002 to respondent's Project Engineer, Ronnie Lauzon, who, however, refused to receive the billing document.

On October 4, 2004, petitioner filed a **second amended complaint** increasing its claim to ₱1,269,734.05.[15] It alleged that it should have included in its computation the amount of ₱498,581 which was reflected in the November 3, 2002 final billing. In its Motion to Admit Second Amended Complaint,[16] petitioner explained that it failed to include this final billing in its original complaint and first amended complaint because the same was misplaced and was discovered only sometime during the 2nd week of August 2004.

For its part, respondent asserted that it disapproved the payment for the progress billings for a reason and not arbitrarily.[17] As alleged, petitioner was guilty of delay and unacceptable workmanship of its alleged finished work. Further, respondent insisted that it already made a complete payment of ₱580,000, proportionate to respondent's actual finished work which passed

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[12] Records, pp. 137-143.

[13] *Id*. at 332.

[14] *Id*. at 656.

[15] *Id*. at 265-273.

[16] *Id*. at 263-264.

[17] *Id*. at 28.

the generally accepted standards of good workmanship and which was 23.13% of the contract amount, ₱2,571,457.21.[18]

Respondent said that it has expressed its dissatisfaction to petitioner, first, through a September 12, 2002 memo addressed to the latter's general manager, Gerald R. Martinez (Martinez), complaining of delay,[19] and thereafter, through a September 17, 2002 memo rejecting the room panel boards in the building's third floor due to uneven surface finish and ordering rectification at petitioner's cost.

To remedy petitioner's defective work, respondent allegedly engaged the services of CP Giron Enterprises (CP Giron) and PTL Power Corporation (PTL Power), which respectively charged ₱558,730 and ₱161,810 for the reworks, restorations, and rectifications these two sub-contractors had undertaken on the project. Thus, as counterclaim, respondent sought for the reimbursement of the foregoing expenses it incurred to repair and complete the work of petitioner.

RTC Decision

On November 16, 2009, the RTC rendered judgment in favor of petitioner, respondent being ordered to pay the former ₱1,153,534.09,[20] with legal interest plus attorney's fees and cost of suit.[21]

The trial court found respondent's allegation of defective works as self-serving and considered petitioner to have faithfully performed its obligations in accordance with the Construction Contract. Further, the RTC explained that respondent could not benefit from its allegation of delay when it allowed petitioner to work up to November 3, 2002 and caused a number of changes in the project. The RTC expounded:

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[18] *Id*. at 31.

[19] Annex 3 of Respondent's Comment.

[20] Amount claimed in the Second Amended complaint minus ₱116,000. which represents the cost of tools, etc.

[21] CA *rollo*, pp. 14-22.

With the mild objection by defendant on alleged defective works, defendant is not entirely opposed to the line of evidence of plaintiff in squarely proving the line of construction activity made by the latter to the construction project which services remained partially unpaid. In fact, born by the testimony of defendant's witness, Engineer Lauson he evaluated the project to be 30% complete to his satisfaction at the time that 4th progress billing was given to him for liquidation to signify that plaintiff had complied with the contract of services to October 1, 2002, or two (2) months beyond the original contract period, and it was only unfortunate that the principal owner of the hotel was unsatisfied with the work of plaintiff who was contracted out by defendant company, nevertheless, the engagement and consummation of the sub-contract agreement was properly undertaken by plaintiff up to November 3, 2002, or beyond the original period for construction.

It cannot be gainsaid that plaintiff was in delay considering defendant permitted the continuity of construction activity up to the time of the progress billing of November 3, 2002, despite the fact that there might be minor objections to the construction activity of plaintiff. Defendant cannot gain premium to an alleged delay in the project when it had caused numerous renovation on the installation projects and even raised the level of the floor area of the construction works which would practically cause an implied amendment to the construction period and the activity attending the same given the multitude of activities confronting plaintiff. The interpretation of the extended period for the contract period should be interpreted in favor of both parties, and the period of five months for the construction project which was substantially performed by plaintiff is reasonable enough to undertake the various electrical, plumbing, mechanical and related works.

Defendants self-serving statements over its claimed defective works of plaintiff does not stand the test of evidence when the project engineer of defendant failed to present better or cogent evidence to really show that the circuit breakers installed in the project were second hand and the pipe installation and electrical boxes were defective. In effect, plaintiff is considered to have regularly and faithfully installed materials in good working condition in accordance with the contract entered into by the parties. Furthermore, in the absence of substantial line of objection other than a bare notice or other defective works, there remains no reason for defendant to insist

on the same which remains entirely imaginary if not untrue for want of evidence.[22]

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WHEREFORE, premises considered, judgment is herewith rendered in favor of plaintiff Star Electric Corporation and defendant R&G Construction Development and Trading, Inc. is ordered to pay plaintiff the amount of One Million One Hundred Fifty-Three Thousand Six Hundred Thirty-four pesos and Nine Centavos (Php 1,153,634.09) representing the unpaid value of the service contract to the defendant company, with legal interest from demand; the amount of One Hundred Twenty Thousand Pesos (Php 120,000) representing Attorney's fees and costs of suit.[23]

Respondent then appealed to the CA.

CA Decision

By Decision dated July 17, 2013,[24] the CA reversed and set aside the RTC Decision and entered a new one dismissing petitioner's complaint and ordering the latter to pay respondent ₱540,009.75 as liquidated damages.

The appellate court predicated its ruling on the following premises: petitioner's work was, indeed, defective and that the materials it installed in the building were substandard. On the other hand, respondent likewise violated its obligations under the Construction Contract when it entered into agreements with CP Giron and PTL Power without giving petitioner the opportunity to repair its defective work. Being both guilty of breach of contract, the CA declared that each party should bear its own loss. The CA held:

What is clear was that the works performed by the plaintiff-appellee were defective and the materials it used were of poor quality leaving the defendant-appellant with no choice but to demand for the

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[22] *Id*. at 19-20.

[23] *Id*. at 22.

[24] Penned by Associate Justice Edwin D. Sorongon and concurred in by Associate Justices Hakim S. Abdulwahid and Marlene Gonzales-Sison.

rectification of the same at plaintiff-appellee's expense and thereafter engaged the services of another contractor to remedy the defective works and finish the project as well. In fact, when defendant-appellant obtained the services of CP Giron Enterprises and PTL Power Corporation, it was charged Php 558,730.00 and Php 161,810.00, respectively, for the reworks, restorations, repairs, and rectifications these two sub-contractors had undertaken on the project.

At any rate, we find that the defendant-appellant has its own share of breach of the Construction Contract. Like the plaintiff-appellee, it likewise failed to comply with its undertaking to afford the plaintiff-appellee the opportunity to rectify the defects in their works and proceeded instead to unilaterally hire another contractor to finish the project. In its letter dated September 24, 2004, plaintiff-appellee explained that it had tried to replace and correct immediately the works which defendant-appellant found unacceptable. Yet, the former found their efforts and works still way below their standard notwithstanding defendant-appellant's close monitoring.

x x x x x x x x x

Using as yardstick the foregoing ruling, we are of the view that both parties committed breach of certain provisions in their Construction Contract and each shall bear their own loss. Thus, whatever collectible plaintiff-appellee has with defendant-appellant, the same shall be reasonably offset to the expenses the latter had shouldered in securing the services of other contractors who undertook the remedial works on the project.[25]

The CA, however, found that, indeed, petitioner incurred delay in the construction of the project, in the process disagreeing with the RTC's disquisition on the implied extension of the project when respondent "permitted the continuity of the construction activity up to the time of the progress billing of November 2002 x x x." According to the CA, the RTC's holding would imply a partial novation due to the change in the period of the contract. The appellate court explained, however, that novation is never presumed and requires an overt or explicit act to bind the parties. Here, the CA held that there was no novation of the contract especially as to the period agreed upon.

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[25] *Rollo*, pp. 39-40, 44.

Thus, the appellate court assessed petitioner ₱540,009.75 as liquidated damages in accordance with the formula stated in the Construction Contract. The dispositive portion of the CA Decision reads:

> **WHEREFORE**, above premises duly considered, the instant appeal is **GRANTED**. The impugned decision of the Regional Trial Court of Paranaque City, Brach 196 dated November 16, 2009 is **REVERSED AND SET ASIDE** and a new one is entered **DISMISSING** plaintiff-appellee's complaint and ordering the latter to pay defendant-appellant the sum of ₱540,009.75 as liquidated damages.[26]

The CA denied petitioner's motion for reconsideration on April 1, 2014.[27] Thus, petitioner filed the instant petition.

Issue

Whether the CA erred in setting aside the RTC Decision and in ordering petitioner to pay respondent liquidated damages for its alleged delay in the construction of the project.

The Court's Ruling

Petitioner tags as untrue respondent's allegations accusing its liability for poor workmanship, utilization of inferior material, and delay. Hence, it insists that respondent should be ordered to pay the balance due under the Construction Contract.

The resolution of the issues raised in this case requires a re-examination of the evidence presented during the trial of the case.

It is an established rule that in the exercise of its power of review under Rule 45, the Court only resolves questions of law and not questions of facts. However, this rule is not absolute. Jurisprudence has recognized several exceptions in which factual issues may be resolved by the Supreme Court, such as: (1) when the findings are grounded entirely on speculation, surmises or

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[26] *Id*. at 45.

[27] *Id*. at 47-48.

conjectures; (2) when the inference made is manifestly mistaken, absurd or impossible; (3) when the judgment is based on a misapprehension of facts; (4) when the findings of facts are conflicting; (5) when in making its findings the Court of Appeals went beyond the issues of the case, or its findings are contrary to the admissions of both the appellant and the appellee; (6) when the findings are contrary to the trial court; (7) when the facts set forth in the petition as well as in the petitioner's main and reply briefs are not disputed by the respondent; (8) when the findings of fact are premised on the supposed absence of evidence and contradicted by the evidence on record; or (9) when the Court of Appeals manifestly overlooked certain relevant facts not disputed by the parties, which, if properly considered, would justify a different conclusion.[28]

In this case, the findings of the CA are contrary to those of the trial court. Further, it appears that the appellate court manifestly overlooked undisputed facts which, when properly considered, would justify a different conclusion. With the foregoing exceptions to the general rule present in this case, the resolution of this petition through a review of the facts is in order.

After a careful evaluation of the records of this case, the Court finds merit in the petition.

Here, the CA found that both parties were in breach of the Construction Contract; thus, each should bear its own loss.[29] In arriving at this conclusion, the appellate court applied Art. 1192 of the Civil Code which provides:

> Art. 1192. In case both parties have committed a breach of the obligation, the liability of the first infractor shall be equitably tempered by the courts. If it cannot be determined which of the parties first violated the contract, the same shall be deemed extinguished, and each shall bear his own damages.

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[28] *Almendrala v. Wing On Ngo*, G.R. No. 142408, September 30, 2005, 471 SCRA 311, 322.

[29] *Rollo*, p. 44.

The appellate court misapplied the aforesaid provision because the facts and evidence before the Court fail to prove that **both** parties committed breach of their contractual obligations.

The CA wrongly held petitioner liable for liquidated damages for causing delays, but as will be discussed below, it was actually respondent who caused the delay in the construction of the project.

Respondent failed to prove petitioner's poor workmanship and use of substandard materials

Respondent failed to prove by preponderant evidence petitioner's alleged poor quality of work and utilization of substandard materials for the project.

To support its assertions, respondent presented its September 15, 2002 memo to petitioner rejecting certain panel boards installed in the building's third floor as well as its September 21, 2002 letter, this time complaining about the breakers which were allegedly secondhand and the improper installation of full-boxes and conduit pipes.

Respondent, however, did not dispute petitioner's contention that it inspected the panel boards in petitioner's workshop on September 4, 2002 before they were delivered to the project site and that it (respondent) even insisted that the panel boards be included in petitioner's next progress billing. Neither did respondent deny petitioner's allegation that the latter promptly repaired the installation of the electrical pull boxes complained of in respondent's September 17, 2002 letter.

It was likewise undisputed that respondent's president, Mr. Kyung Sung Lee and project manager, Mr. Ronnie Lauzon, worked closely with petitioner's general manager, Gerardo Martinez, at the project site to monitor the progress of the construction. It was Kyung Sung Lee's usual practice to inform Martinez, right then and there at the project site, of work and materials he found defective or substandard. Likewise, Martinez addressed Kyung Sung Lee's complaints immediately upon being informed thereof. Considering that this was their usual practice, it appears that respondent's rejection of petitioner's work was merely an afterthought since it was made known to petitioner

only on September 15, 2002 or after it received petitioner's progress billings dated August 18, 2002, September 12, 2002 and September 13, 2002. This rejection was very inconsistent with how they worked at the project site.

What is more, respondent did not deny petitioner's claim that the alleged inferior and substandard materials were still installed in the building.[30] Neither did it contest petitioner's argument that if respondent's complaints were true, it should have rejected the materials upon delivery or on the spot, or returned all these materials to petitioner.

Respondent presented its unnotarized construction contracts with CP Giron and PTL Power as well as several purchase orders and sales invoices to prove petitioner's substandard work and the fact that it was forced to enter into these contracts to rectify, improve, and repair said work and the cost therefor. However, these documents, without more, are not enough to prove that, indeed, petitioner's work was poor. There is nothing in the records pointing to the specific defective works repaired by these contractors. Respondent did not even allege or expound on this matter in its pleadings or testimonies. If at all, these documents merely show that respondent entered into agreements with these contractors and incurred expenses pursuant thereto.

Moreover, these construction contracts with CP Giron and PTL Power should not have been considered by the trial court since they were not properly authenticated in accordance with Section 20, Rule 132 of the Revised Rules of Court which states:

> Sec. 20. *Proof of private document.* – Before any private document offered as authentic is received in evidence, its due execution and authenticity must be proved either:
>
> (a) By anyone who saw the document executed or written; or
> (b) By evidence of the genuineness of the signature or handwriting of the maker.
>
> Any other private document need only be identified as that which it is claimed to be.

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[30] *Id*. at 15.

While respondent presented Engr. Ronnie Lauzon to authenticate the construction contracts, he expressly stated during his testimony taken on April 21, 2009 that he had no participation in the execution of the same.[31] It was not established that Engr. Lauzon saw the writing or execution of the said construction contracts. Also, there was no evidence on the genuineness of the signature or handwriting of the signatories of the contracts.

Taken altogether, the allegations of respondent on petitioner's defective work fail to convince since they were bare and self-serving assertions, uncorroborated by any other evidence.

Delay was caused by respondent

It may be true that petitioner's work went beyond the agreed three-month period in the Construction Contract. Evidence discloses, however, that the delay in the project was caused by respondent, not by petitioner.

Respondent did not deny that the project went through a number of major and minor modifications. It was not disputed that when respondent was negotiating its Construction Contract with petitioner, the parties based their quotations on a construction plan for a building with four (4) floors (original plan). However, the construction plan actually approved by the City Engineer's Office of Parañaque included a fifth floor (approved plan). Thereafter, while the project was ongoing, respondent altered the plan again by adding a sixth floor to the building[32] and extending its frontage by 60 centimeters and its back, by 50 centimeters (revised plan).[33]

Due to the said revisions, the architectural and sewerage plans of the building were correspondingly altered; thus, petitioner had to change the vertical length of some of its materials and relocate the power outlets, pipes, and electrical control systems.[34]

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[31] TSN, April 21, 2009, p. 15.

[32] TSN, October 9, 2007, pp. 32-34.

[33] *Id*. at 40.

[34] *Id*.

Moreover, there were instances when petitioner had to wait for the completion of certain structures in the building before it could proceed with its installation of electrical and plumbing materials.[35]

That there were changes in the project's plans was also proved by the Inspection Report of the Office of the City Building Official of the City of Paranaque (Inspection Report) finding that:

> 4. The roofdeck area was made into another floor level, converting the structure from Five (5) Storey to Six (6) Storey Building;
>
> 5. Likewise, alteration of partitions on ground floor was also noted.[36]

It appears that these changes were not submitted to the Paranaque City Building Official for approval which eventually led to the revocation of respondent's building permit on March 14, 2003.[37]

While the Inspection Report[38] states that the building is seventy percent (70%) complete, nothing therein shows the completion rate of the project's electrical and plumbing works alone. Further, there is nothing in the records showing that the parties appointed a third party to inspect and evaluate the completion rate of petitioner's work. Considering that respondent contributed to petitioner's delay and no evidence is on record establishing the rate of completion of petitioner's electrical and plumbing work, the CA's award of liquidated damages in favor of respondent has no basis.

Respondent committed breach in refusing to pay petitioner

The facts and evidence before the Court fail to prove petitioner's alleged violation of its contractual obligations. On the contrary, they tend to show that respondent's refusal to pay

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[35] *Id*. at 6.

[36] Records, p. 696.

[37] *Id*. at 698.

[38] *Id*. at 696.

petitioner's progress billings were without basis. Thus, the RTC did not err in directing respondent to pay petitioner One Million One Hundred Fifty-Three Thousand Six Hundred Thirty-Four Pesos and Nine Centavos (₱1,153,634.09) representing the amount covered by all of petitioner's progress billings from August 18, 2002 to November 3, 2002.

There is, however, nothing to support the CA's finding that respondent breached its obligation under the Construction Contract for failing to afford petitioner an opportunity to rectify its defective works before it contracted with a third party to repair the same. Quite the contrary, petitioner even stated that respondent's representatives called its attention, right there at the construction site, whenever the latter found the former's work defective precisely to give petitioner the opportunity to fix the same. Petitioner itself impliedly admitted in its letter dated September 24, 2004 that it was given an opportunity to rectify its defective works when it tried to replace and immediately correct the works which respondent found unacceptable.

Award of attorney's fees and cost of suit is proper

It is settled that the award of attorney's fees is the exception rather than the general rule, and counsel's fees are not awarded every time a party prevails in a suit because of the policy that no premium should be placed on the right to litigate.[39] Still, the award of attorney's fees to the winning party lies within the discretion of the court, taking into account the circumstances of each case.[40] This means that such an award demands factual, legal, and equitable justification, such as those instances specified in Article 2208 of the Civil Code,[41] as when the defendant's act

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[39] *Benedicto v. Villaflores*, G.R. No. 185020, October 6, 2010, 632 SCRA 446.

[40] *Alcatel Philippines, Inc. v. I.M. Bongar & Co., Inc. and Stronghold Insurance Co., Inc.*, G.R. No. 182946, October 5, 2011, 658 SCRA 741.

[41] ART. 2208. In the absence of stipulation, attorney's fees and expenses of litigation, other than judicial costs, cannot be recovered, except:

1. When exemplary damages are awarded;

or omission has compelled the plaintiff to incur expenses to protect his interest or where the defendant acted in gross and evident bad faith in refusing to satisfy the plaintiff's plainly valid, just, and demandable claim.

As earlier discussed, petitioner has the legal right and basis to collect for the work it accomplished under the Construction Contract. However, respondent persistently and clearly violated the terms of its contract with petitioner when it unreasonably refused to pay petitioner's progress billings, forcing the petitioner to incur litigation expenses for 12 long years, from April 4, 2003 when the complaint was filed up to the present, in order to protect its interest. In view of the unjustified refusal of respondent to honor its commitment under the contract, the Court finds it just and equitable to award attorney's fees to petitioner in the reduced amount of Fifty Thousand Pesos (₱50,000), in line with the policy enunciated in Article 2208 of the Civil Code that attorney's fees must always be reasonable, and in accordance with jurisprudence.[42]

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2. When the defendant's act or omission has compelled the plaintiff to litigate with third persons or to incur expenses to protect his interest;
3. In criminal cases of malicious prosecution against the plaintiff;
4. In case of a clearly unfounded civil action or proceeding against the plaintiff;
5. Where the defendant acted in gross and evident bad faith in refusing to satisfy the plaintiff's plainly valid, just and demandable claim;
6. In actions for legal support;
7. In actions for the recovery of wages of household helpers, laborers and skilled workers;
8. In actions for indemnity under workmen's compensation and employer's liability laws;
9. In a separate civil action to recover civil liability arising from a crime;
10. When at least double judicial costs are awarded;
11. In any other case where the court deems it just and equitable that attorney's fees and expenses of litigation should be recovered.

    In all cases, the attorney's fees and expenses of litigation must be reasonable.

[42] *Diego v. Diego*, G.R. No. 179965, February 20, 2013, 691 SCRA 361; *Estores v. Spouses Supangan*, G.R. No. 175139, April 18, 2012, 670 SCRA 95.

As regards the cost of suit, Section 1, Rule 142[43] of the Rules of Court provide that costs shall be allowed to the prevailing party as a matter of course. Accordingly, the award of costs of suit to petitioner, as the prevailing party, is in order.

WHEREFORE, premises considered, the Court resolves to **GRANT** the petition. The Decision and Resolution of the Court of Appeals dated July 17, 2013 and April 1, 2014, respectively, in CA-G.R. CV No. 95008 are hereby **REVERSED** and **SET ASIDE**. The RTC Decision is **REINSTATED** with **MODIFICATION**.

As thus modified, the Decision of the Regional Trial Court dated November 16, 2009 shall read, as follows:

> WHEREFORE, premises considered, judgment is herewith rendered in favor of plaintiff Star Electric Corporation and defendant R&G Construction Development and Trading, Inc. is ordered to pay plaintiff the amount of One Million One Hundred Fifty-Three Thousand Six Hundred Thirty-Four pesos and Nine Centavos (₱1,153,634.09) representing the unpaid value of the service contract to the defendant company, with legal interest from demand; the amount of Fifty Thousand Pesos (₱50,000) representing attorney's fees; and costs of suit.

SO ORDERED.

Peralta, Villarama, Jr., Reyes, and *Jardeleza, JJ.,* concur.

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[43] Section 1. Costs ordinarily follow results of suit.—Unless otherwise provided in these rules, costs shall be allowed to the prevailing party as a matter of course, but the court shall have power, for special reasons, to adjudge that either party shall pay the costs of an action, or that the same be divided, as may be equitable. No costs shall be allowed against the Republic of the Philippines, unless otherwise provided by law.

THIRD DIVISION

[G.R. No. 212825. December 7, 2015]

COMMISSIONER OF INTERNAL REVENUE, *petitioner, vs.* **NEXT MOBILE, INC. (formerly Nextel Communications Phils., Inc.),** *respondent*.

SYLLABUS

1. TAXATION; NATIONAL INTERNAL REVENUE CODE (NIRC); ASSESSMENT OF INTERNAL REVENUE TAXES; THE NIRC MANDATES THE BUREAU OF INTERNAL REVENUE (BIR) TO ASSESS INTERNAL REVENUE TAXES WITHIN THREE YEARS FROM THE LAST DAY PRESCRIBED BY LAW FOR THE FILING OF THE TAX RETURN OR THE ACTUAL DATE OF FILING OF SUCH RETURN, WHICHEVER COMES LATER; EXCEPTION.— Section 203 of the 1997 NIRC mandates the BIR to assess internal revenue taxes within three years from the last day prescribed by law for the filing of the tax return or the actual date of filing of such return, whichever comes later. Hence, an assessment notice issued after the three-year prescriptive period is not valid and effective. Exceptions to this rule are provided under Section 222 of the NIRC. Section 222(b) of the NIRC provides that the period to assess and collect taxes may only be extended upon a written agreement between the CIR and the taxpayer executed before the expiration of the three-year period. RMO 20-90 issued on April 4, 1990 and RDAO 05-01 issued on August 2, 2001 provide the procedure for the proper execution of a waiver.

2. ID.; ID.; ID.; WAIVER OF THE STATUTE OF LIMITATIONS; THE REQUIREMENTS FOR THE WAIVER OF THE STATUTE OF LIMITATONS MUST BE FAITHFULLY COMPLIED WITH IN ORDER TO BE VALID AND BINDING; ELUCIDATED.— The Court has consistently held that a waiver of the statute of limitations must faithfully comply with the provisions of RMO No. 20-90 and RDAO 05-01 in order to be valid and binding. *Philippine Journalists, Inc. v. Commissioner of Internal Revenue* tells us that since a waiver of the statute of limitations is a derogation of the taxpayer's

right to security against prolonged and unscrupulous investigations, waivers of this kind must be carefully and strictly construed. *Philippine Journalists* also clarifies that a waiver of the statute of limitations is not a waiver of the right to invoke the defense of prescription but rather an agreement between the taxpayer and the BIR that the period to issue an assessment and collect the taxes due is extended to a date certain. It is not a unilateral act by the taxpayer of the BIR but is a bilateral agreement between two parties. x x x The Court explained that the date of acceptance by the CIR is a requisite necessary to determine whether the waiver was validly accepted before the expiration of the original period.

3. ID.; ID.; ID.; ALTHOUGH THE PARTIES ARE *IN PARI DELICTO*, THE COURT MAY INTERFERE AND GRANT RELIEF AT THE SUIT OF ONE OF THEM, WHERE PUBLIC POLICY REQUIRES ITS INTERVENTION, EVEN THOUGH THE RESULT MAY BE THAT A BENEFIT WILL BE DERIVED BY ONE PARTY WHO IS IN EQUAL GUILT WITH THE OTHER; APPLICATION IN CASE AT BAR.— *In pari delicto* connotes that the two parties to a controversy are equally culpable or guilty and they shall have no action against each other. However, although the parties are *in pari delicto*, the Court may interfere and grant relief at the suit of one of them, where public policy requires its intervention, even though the result may be that a benefit will be derived by one party who is in equal guilt with the other. Here, to uphold the validity of the Waivers would be consistent with the public policy embodied in the principle that taxes are the lifeblood of the government, and their prompt and certain availability is an imperious need. Taxes are the nation's lifeblood through which government agencies continue to operate and which the State discharges its functions for the welfare of its constituents. As between the parties, it would be more equitable if petitioner's lapses were allowed to pass and consequently uphold the Waivers in order to support this principle and public policy.

4. ID.; ID.; ID.; DOCTRINE OF ESTOPPEL; IN ORDER TO PROMOTE THE ADMINISTRATION OF THE LAW, PREVENT INJUSTICE AND AVERT THE ACCOMPLISHMENT OF A WRONG AND UNDUE ADVANTAGE, THE COURT FINDS THE APPLICATION

OF THE DOCTRINE OF ESTOPPEL JUSTIFIED; CASE AT BAR.— While it is true that the Court has repeatedly held that the doctrine of estoppel must be sparingly applied as an exception to the statute of limitations for assessment of taxes, the Court finds that the application of the doctrine is justified in this case. Verily, the application of estoppel in this case would promote the administration of the law, prevent injustice and avert the accomplishment of a wrong and undue advantage. Respondent executed *five* Waivers and delivered them to petitioner, one after the other. It allowed petitioner to rely on them and did not raise any objection against their validity until petitioner assessed taxes and penalties against it. Moreover, the application of estoppel is necessary to prevent the undue injury that the government would suffer because of the cancellation of petitioner's assessment of respondent's tax liabilities.

APPEARANCES OF COUNSEL

The Solicitor General for petitioner.
Angara Abello Concepcion Regala & Cruz for respondent.

D E C I S I O N

VELASCO, JR., *J.*:

This is a Petition for Review under Rule 45 of the Rules of Court seeking to reverse and set aside the Decision of the Court of Tax Appeals *En Banc* affirming the earlier decision of its First Division in CTA Case No. 7965, cancelling and withdrawing petitioner's formal letter of demand and assessment notices to respondent for having been issued beyond the prescriptive period provided by law.

The Facts

On April 15, 2002, respondent filed with the Bureau of Internal Revenue (BIR) its Annual Income Tax Return (ITR) for taxable year ending December 31, 2001. Respondent also filed its Monthly Remittance Returns of Final Income Taxes Withheld (BIR Form No. 1601-F), its Monthly Remittance Returns of Expanded Withholding Tax (BIR Form No. 1501-E) and its Monthly

Remittance Return of Income Taxes Withheld on Compensation (BIR Form No. 1601-C) for year ending December 31, 2001.

On September 25, 2003, respondent received a copy of the Letter of Authority dated September 8, 2003 signed by Regional Director Nestor S. Valeroso authorizing Revenue Officer Nenita L. Crespo of Revenue District Office 43 to examine respondent's books of accounts and other accounting records for income and withholding taxes for the period covering January 1, 2001 to December 31, 2001.

Ma. Lida Sarmiento (Sarmiento), respondent's Director of Finance, subsequently executed several waivers of the statute of limitations to extend the prescriptive period of assessment for taxes due in taxable year ending December 31, 2001 (Waivers), the details of which are summarized as follows:

Waiver	Extended Date of Prescription	Date of Execution	Date of Acknowledgment	BIR Signatory
First Waiver	March 30, 2005	August 26, 2004	August 30, 2004	Revenue District Officer
Second Waiver	June 30, 2005	October 22, 2004	October 22, 2004	Revenue District Officer
Third Waiver	September 30, 2005	January 12, 2005	January 18, 2005	Revenue District Officer
Fourth Waiver	September 30, 2005	None	May 3, 2005	Revenue District Officer
Fifth Waiver	October 31, 2005	March 17, 2005	May 3, 2005	Revenue District Officer

On September 26, 2005, respondent received from the BIR a Preliminary Assessment Notice dated September 16, 2005 to which it filed a Reply.

On October 25, 2005, respondent received a Formal Letter of Demand (FLD) and Assessment Notices/Demand No. 43-734 both dated October 17, 2005 from the BIR, demanding payment of deficiency income tax, final withholding tax (FWT), expanded withholding tax (EWT), increments for late remittance of taxes withheld, and compromise penalty for failure to file returns/late filing/late remittance of taxes withheld, in the total

amount of ₱313,339,610.42 for the taxable year ending December 31, 2001.

On November 23, 2005, respondent filed its protest against the FLD and requested the reinvestigation of the assessments. On July 28, 2009, respondent received a letter from the BIR denying its protest. Thus, on August 27, 2009, respondent filed a Petition for Review before the CTA docketed as CTA Case No. 7965.

Ruling of the CTA Former First Division

On December 11, 2012, the former First Division of the CTA (CTA First Division) rendered a Decision granting respondent's Petition for Review and declared the FLD dated October 17, 2005 and Assessment Notices/Demand No. 43-734 dated October 17, 2005 cancelled and withdrawn for being issued beyond the three-year prescriptive period provided by law.

It was held that based on the date of filing of respondent's Annual ITR as well as the dates of filing of its monthly BIR Form Nos. 1601-F, 1601-E and 1601-C, it is clear that the adverted FLD and the Final Assessment Notices both dated October 17, 2005 were issued beyond the three-year prescriptive period provided under Section 203 of the 1997 National Internal Revenue Code (NIRC), as amended.

The tax court also rejected petitioner's claim that this case falls under the exception as to the three-year prescriptive period for assessment and that the 10-year prescriptive period should apply on the ground of filing a false or fraudulent return. Under Section 222(a) of the 1997 NIRC, as amended, in case a taxpayer filed a false or fraudulent return, the Commissioner of Internal Revenue (CIR) may assess a taxpayer for deficiency tax within ten (10) years after the discovery of the falsity or the fraud. The tax court explained that petitioner failed to substantiate its allegation by clear and convincing proof that respondent filed a false or fraudulent return.

Furthermore, the CTA First Division held that the Waivers executed by Sarmiento did not validly extend the three-year prescriptive period to assess respondent for deficiency income

tax, FWT, EWT, increments for late remittance of tax withheld and compromise penalty, for, as found, the Waivers were not properly executed according to the procedure in Revenue Memorandum Order No. 20-90 (RMO 20-90)[1] and Revenue Delegation Authority Order No. 05-01 (RDAO 05-01).[2]

The tax court declared that, in this case, the Waivers have no binding effect on respondent for the following reasons:

First, Sarmiento signed the Waivers without any notarized written authority from respondent's Board of Directors. Petitioner's witness explicitly admitted that he did not require Sarmiento to present any notarized written authority from the Board of Directors of respondent, authorizing her to sign the Waivers. Petitioner's witness also confirmed that Revenue District Officer Raul Vicente L. Recto (RDO Recto) accepted the Waivers as submitted.

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[1] SUBJECT: PROPER EXECUTION OF THE WAIVER OF THE STATUTE OF LIMITATIONS UNDER THE NATIONAL INTERNAL REVENUE CODE, dated April 4, 1990.

[2] I. Revenue Officials Authorized to Sign the Waiver

The following revenue officials are authorized to sign and accept the Waiver of the Defense of Prescription Under the Statute of Limitations (Annex A) prescribed in Sections 203, 222 and other related provisions of the National Internal Revenue Code of 1997:

A. For National Office cases Designated Revenue Official

1. Assistant Commissioner (ACIR), — For tax fraud and policy Enforcement Service cases

x x x x x x x x x

In order to prevent undue delay in the execution and acceptance of the waiver, the assistant heads of the concerned offices are likewise authorized to sign the same under meritorious circumstances in the absence of the abovementioned officials.

The authorized revenue official shall ensure that the waiver is duly accomplished and signed by the taxpayer or his authorized representative before affixing his signature to signify acceptance of the same. In case the authority is delegated by the taxpayer to a representative, the concerned revenue official shall see to it that such delegation is in writing and duly notarized. The "WAIVER" should not be accepted by the concerned BIR office and official unless duly notarized.

Second, even assuming that Sarmiento had the necessary board authority, the Waivers are still invalid as the respective dates of their acceptance by RDO Recto are not indicated therein.

Third, records of this case reveal additional irregularities in the subject Waivers:

(1) The fact of receipt by respondent of its copy of the Second Waiver was not indicated on the face of the original Second Waiver;

(2) Respondent received its copy of the First and the Third Waivers on the same day, May 23, 2005; and

(3) Respondent received its copy of the Fourth and the Fifth Waivers on the same day, May 13, 2005.

Finally, the CTA held that estoppel does not apply in questioning the validity of a waiver of the statute of limitations. It stated that the BIR cannot hide behind the doctrine of estoppel to cover its failure to comply with RMO 20-90 and RDAO 05-01.

Petitioner's Motion for Reconsideration was denied on March 14, 2013.

Petitioner filed a Petition for Review before the CTA *En Banc*.

On May 28, 2014, the CTA *En Banc* rendered a Decision denying the Petition for Review and affirmed that of the former CTA First Division.

It held that the five (5) Waivers of the statute of limitations were not valid and binding; thus, the three-year period of limitation within which to assess deficiency taxes was not extended. It also held that the records belie the allegation that respondent filed false and fraudulent tax returns; thus, the extension of the period of limitation from three (3) to ten (10) years does not apply.

Issue

Petitioner has filed the instant petition on the issue of whether or not the CIR's right to assess respondent's deficiency taxes had already prescribed.

Our Ruling

The petition has merit.

Section 203[3] of the 1997 NIRC mandates the BIR to assess internal revenue taxes within three years from the last day prescribed by law for the filing of the tax return or the actual date of filing of such return, whichever comes later. Hence, an assessment notice issued after the three-year prescriptive period is not valid and effective. Exceptions to this rule are provided under Section 222[4] of the NIRC.

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[3] **SEC. 203. Period of Limitation Upon Assessment and Collection**. – Except as provided in Section 222, internal revenue taxes shall be assessed within three (3) years after the last day prescribed by law for the filing of the return, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period: Provided, That in a case where a return is filed beyond the period prescribed by law, the three (3)-year period shall be counted from the day the return was filed. For purposes of this Section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day.

[4] **SEC. 222. Exceptions as to Period of Limitation of Assessment and Collection of Taxes.**

(a) In the case of a false or fraudulent return with intent to evade tax or of failure to file a return, the tax may be assessed, or a preceeding in court for the collection of such tax may be filed without assessment, at any time within ten (10) years after the discovery of the falsity, fraud or omission: Provided, That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof.

(b) If before the expiration of the time prescribed in Section 203 for the assessment of the tax, both the Commissioner and the taxpayer have agreed in writing to its assessment after such time, the tax may be assessed within the period agreed upon. The period so agreed upon may be extended by subsequent written agreement made before the expiration of the period previously agreed upon.

(c) Any internal revenue tax which has been assessed within the period of limitation as prescribed in paragraph (a) hereof may be collected by distraint or levy or by a proceeding in court within five (5) years following the assessment of the tax.

(d) Any internal revenue tax, which has been assessed within the period agreed upon as provided in paragraph (b) herein above, may be collected by distraint or levy or by a proceeding in court within the period agreed

Section 222(b) of the NIRC provides that the period to assess and collect taxes may only be extended upon a written agreement between the CIR and the taxpayer executed before the expiration of the three-year period. RMO 20-90 issued on April 4, 1990 and RDAO 05-01[5] issued on August 2, 2001 provide the procedure for the proper execution of a waiver. RMO 20-90 reads:

April 4, 1990
REVENUE MEMORANDUM ORDER NO. 20-90
Subject: Proper Execution of the Waiver of the Statute of Limitations under the National Internal Revenue Code
To : All Internal Revenue Officers and Others Concerned

Pursuant to Section 223 of the Tax Code, internal revenue taxes may be assessed or collected after the ordinary prescriptive period, if before its expiration, both the Commissioner and the taxpayer have agreed in writing to its assessment and/or collection after said period. The period so agreed upon may be extended by subsequent written agreement made before the expiration of the period previously agreed upon. This written agreement between the Commissioner and the taxpayer is the so-called Waiver of the Statute of Limitations. In the execution of said waiver, the following procedures should be followed:

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upon in writing before the expiration of the five (5)-year period. The period so agreed upon may be extended by subsequent written agreements made before the expiration of the period previously agreed upon.

(e) Provided, however, That nothing in the immediately preceding and paragraph (a) hereof shall be construed to authorize the examination and investigation or inquiry into any tax return filed in accordance with the provisions of any tax amnesty law or decree.

[5] August 2, 2001

REVENUE DELEGATION AUTHORITY ORDER NO. 05-01

SUBJECT: Delegation of Authority to Sign and Accept the Waiver of the Defense of Prescription Under the Statute of Limitations

TO: All Internal Revenue Officers and Employees and Others Concerned

I. Revenue Officials Authorized to Sign the Waiver. The following revenue officials are authorized to sign and accept the Waiver of the Defense of Prescription Under the Statute of Limitations (Annex A) prescribed in Sections 203, 222 and other related provisions of the National Internal Revenue Code of 1997:

A. For National Office cases

Designated Revenue Official

1. The waiver must be in the form identified hereof. This form may be reproduced by the Office concerned but there should be no deviation from such form. The phrase "but not after _____ 19 ___" should be filled up. This indicates the expiry date of the period

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1. Assistant Commissioner (ACIR) — For tax fraud and policy Enforcement Service cases

2. ACIR, Large Taxpayers Service — For large taxpayers cases other than those cases falling under Subsection B hereof

3. ACIR, Legal Service — For cases pending verification and awaiting resolution of certain legal issues prior to prescription and for issuance/compliance of Subpoena *Duces Tecum*

4. ACIR, Assessment Service (AS) — For cases which are pending in or subject to review or approval by the ACIR, AS

5. ACIR, Collection Service — For cases pending action in the Collection Service

B. For cases in the Large Taxpayers District Office (LTDO)

The Chief of the LTDO shall sign and accept the waiver for cases pending investigation/action in his possession.

C. For Regional cases

Designated Revenue Official

1. Revenue District Officer — Cases pending investigation/verification/ reinvestigation in the Revenue District Offices

2. Regional Director — Cases pending in the Divisions in the Regional Office, including cases pending approval by the Regional Director.

In order to prevent undue delay in the execution and acceptance of the waiver, the assistant heads of the concerned offices are likewise authorized to sign the same under meritorious circumstances in the absence of the abovementioned officials.

The authorized revenue official shall ensure that the waiver is duly accomplished and signed by the taxpayer or his authorized representative before affixing his signature to signify acceptance of the same. In case the authority is delegated by the taxpayer to a representative, the concerned revenue official shall see to it that such delegation is in writing and duly notarized. The "WAIVER" should not be accepted by the concerned BIR office and official unless duly notarized.

II. Repealing Clause

All other issuances and/or portions thereof inconsistent herewith are hereby repealed and amended accordingly.

III. Effectivity

This revenue delegation authority order shall take effect immediately upon approval.

(SGD.)
RENE G. BAÑEZ
Commissioner of Internal Revenue

agreed upon to assess/collect the tax after the regular three-year period of prescription. The period agreed upon shall constitute the time within which to effect the assessment/collection of the tax in addition to the ordinary prescriptive period.

2. The waiver shall be signed by the taxpayer himself or his duly authorized representative. In the case of a corporation, the waiver must be signed by any of its responsible officials.

Soon after the waiver is signed by the taxpayer, the Commissioner of Internal Revenue or the revenue official authorized by him, as hereinafter provided, shall sign the waiver indicating that the Bureau has accepted and agreed to the waiver. The date of such acceptance by the Bureau should be indicated. Both the date of execution by the taxpayer and date of acceptance by the Bureau should be before the expiration of the period of prescription or before the lapse of the period agreed upon in case a subsequent agreement is executed.

3. The following revenue officials are authorized to sign the waiver:

x x x x x x x x x

4. The waiver must be executed in three (3) copies, the original copy to be attached to the docket of the case, the second copy for the taxpayer and the third copy for the Office accepting the waiver. The fact of receipt by the taxpayer of his/her file copy shall be indicated in the original copy.

5. The foregoing procedures shall be strictly followed. Any revenue official found not to have complied with this Order resulting in prescription of the right to assess/collect shall be administratively dealt with.

This Revenue Memorandum Order shall take effect immediately.

(SGD.) JOSE U. ONG
Commissioner of Internal Revenue

The Court has consistently held that a waiver of the statute of limitations must faithfully comply with the provisions of RMO No. 20-90 and RDAO 05-01 in order to be valid and binding.

In *Philippine Journalists, Inc. v. Commissioner of Internal Revenue*[6] the Court declared the waiver executed by petitioner

[6] G.R. No. 162852, December 16, 2004, 447 SCRA 214.

therein invalid because: (1) it did not specify a definite agreed date between the BIR and petitioner within which the former may assess and collect revenue taxes; (2) it was signed only by a revenue district officer, not the Commissioner; (3) there was no date of acceptance; and (4) petitioner was not furnished a copy of the waiver.

Philippine Journalists tells us that since a waiver of the statute of limitations is a derogation of the taxpayer's right to security against prolonged and unscrupulous investigations, waivers of this kind must be carefully and strictly construed. *Philippine Journalists* also clarifies that a waiver of the statute of limitations is not a waiver of the right to invoke the defense of prescription but rather an agreement between the taxpayer and the BIR that the period to issue an assessment and collect the taxes due is extended to a date certain. It is not a unilateral act by the taxpayer of the BIR but is a bilateral agreement between two parties.

In *Commissioner of Internal Revenue v. FMF Development Corporation*[7] the Court found the waiver in question defective because: (1) it was not proved that respondent therein was furnished a copy of the BIR-accepted waiver; (2) the waiver was signed by a revenue district officer instead of the Commissioner as mandated by the NIRC and RMO 20-90 considering that the case involved an amount of more than ₱1,000,000.00, and the period to assess was not yet about to prescribe; and (3) it did not contain the date of acceptance by the CIR. The Court explained that the date of acceptance by the CIR is a requisite necessary to determine whether the waiver was validly accepted before the expiration of the original period.[8]

In *CIR v. Kudos Metal Corporation*,[9] the waivers executed by Kudos were found ineffective to extend the period to assess or collect taxes because: (1) the accountant who executed the waivers had no notarized written board authority to sign the

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[7] G.R. No. 167765, June 30, 2008, 556 SCRA 698.

[8] *Id*. at 708-709.

[9] G.R. No. 178087, May 5, 2010, 620 SCRA 232.

waivers in behalf of respondent corporation; (2) there was no date of acceptance indicated on the waivers; and (3) the fact of receipt by respondent of its file copy was not indicated in the original copies of the waivers.

The Court rejected the CIR's argument that since it was the one who asked for additional time, Kudos should be considered estopped from raising the defense of prescription. The Court held that the BIR cannot hide behind the doctrine of estoppel to cover its failure to comply with its RMO 20-90 and RDAO 05-01. Having caused the defects in the waivers, the Court held that the BIR must bear the consequence.[10] Hence, the BIR assessments were found to be issued beyond the three-year period and declared void.[11] Further, the Court stressed that there is compliance with RMO 20-90 only after the taxpayer receives a copy of the waiver accepted by the BIR, viz:

> The flaw in the appellate court's reasoning stems from its assumption that the waiver is a unilateral act of the taxpayer when it is in fact and in law an agreement between the taxpayer and the BIR. When the petitioner's comptroller signed the waiver on September 22, 1997, it was not yet complete and final because the BIR had not assented. There is compliance with the provision of RMO No. 20-90 only after the taxpayer received a copy of the waiver accepted by the BIR. The requirement to furnish the taxpayer with a copy of the waiver is not only to give notice of the existence of the document but of the acceptance by the BIR and the perfection of the agreement.[12]

The deficiencies of the Waivers in this case are the same as the defects of the waiver in *Kudos*. In the instant case, the CTA found the Waivers because of the following flaws: (1) they were executed without a notarized board authority; (2) the dates of acceptance by the BIR were not indicated therein; and (3) the fact of receipt by respondent of its copy of the Second Waiver was not indicated on the face of the original Second Waiver.

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[10] *Id*. at 247.

[11] *Id*. at 244.

[12] *Id*. at 230-231.

To be sure, both parties in this case are at fault.

Here, respondent, through Sarmiento, executed *five* Waivers in favor of petitioner. However, her authority to sign these Waivers was not presented upon their submission to the BIR. In fact, later on, her authority to sign was questioned by respondent itself, the very same entity that caused her to sign such in the first place. Thus, it is clear that respondent violated RMO No. 20-90 which states that in case of a corporate taxpayer, the waiver must be signed by its responsible officials[13] and RDAO 01-05 which requires the presentation of a written and notarized authority to the BIR.[14]

Similarly, the BIR violated its own rules and was careless in performing its functions with respect to these Waivers. It is very clear that under RDAO 05-01 it is the duty of the authorized revenue official **to ensure that the waiver is duly accomplished and signed by the taxpayer or his authorized representative** before affixing his signature to signify acceptance of the same. It also instructs that **in case the authority is delegated by the taxpayer to a representative, the concerned revenue official shall see to it that such delegation is in writing and duly notarized**. Furthermore, it mandates that **the waiver should not be accepted by the concerned BIR office and official unless duly notarized**.[15]

Vis-à-vis the five Waivers it received from respondent, the BIR has failed, for five times, to perform its duties in relation

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[13] Paragraph 2. The waiver shall be signed by the taxpayer himself or his duly authorized representative. In case of a corporation, the waiver must be signed by any of its responsible officials.

[14] See last paragraph under I(C)(2) of RDAO 05-01: The authorized revenue official shall ensure that the waiver is duly accomplished and signed by the taxpayer or his authorized representative before affixing his signature to signify acceptance of the same. In case the authority is delegated by the taxpayer to a representative, the concerned revenue official shall see to it that such delegation is in writing and duly notarized. The "WAIVER" should not be accepted by the concerned BIR office and official unless duly notarized.

[15] *Id*.

thereto: to verify Ms. Sarmiento's authority to execute them, demand the presentation of a notarized document evidencing the same, refuse acceptance of the Waivers when no such document was presented, affix the dates of its acceptance on each waiver, and indicate on the Second Waiver the date of respondent's receipt thereof.

Both parties knew the infirmities of the Waivers yet they continued dealing with each other on the strength of these documents without bothering to rectify these infirmities. In fact, in its Letter Protest to the BIR, respondent did not even question the validity of the Waivers or call attention to their alleged defects.

In this case, respondent, after deliberately executing defective waivers, raised the very same deficiencies it caused to avoid the tax liability determined by the BIR during the extended assessment period. It must be remembered that by virtue of these Waivers, respondent was given the opportunity to gather and submit documents to substantiate its claims before the CIR during investigation. It was able to postpone the payment of taxes, as well as contest and negotiate the assessment against it. Yet, after enjoying these benefits, respondent challenged the validity of the Waivers when the consequences thereof were not in its favor. In other words, respondent's act of impugning these Waivers after benefiting therefrom and allowing petitioner to rely on the same is an act of bad faith.

On the other hand, the stringent requirements in RMO 20-90 and RDAO 05-01 are in place precisely because the BIR put them there. Yet, instead of strictly enforcing its provisions, the BIR defied the mandates of its very own issuances. Verily, if the BIR was truly determined to validly assess and collect taxes from respondent after the prescriptive period, it should have been prudent enough to make sure that all the requirements for the effectivity of the Waivers were followed not only by its revenue officers but also by respondent. The BIR stood to lose millions of pesos in case the Waivers were declared void, as they eventually were by the CTA, but it appears that it was too negligent to even comply with its most basic requirements.

The BIR's negligence in this case is so gross that it amounts to malice and bad faith. Without doubt, the BIR knew that waivers should conform strictly to RMO 20-90 and RDAO 05-01 in order to be valid. In fact, the mandatory nature of the requirements, as ruled by this Court, has been recognized by the BIR itself in its issuances such as Revenue Memorandum Circular No. 6-2005,[16] among others. Nevertheless, the BIR allowed respondent to submit, and it duly received, five defective Waivers when it was its duty to exact compliance with RMO 20-90 and RDAO 05-01 and follow the procedure dictated therein. It even openly admitted that it did not require respondent to present any notarized authority to sign the questioned Waivers.[17] The BIR failed to demand respondent to follow the requirements for the validity of the Waivers when it had the duty to do so, most especially because it had the highest interest at stake. If it was serious in collecting taxes, the BIR should have meticulously complied with the foregoing orders, leaving no stone unturned.

The general rule is that when a waiver does not comply with the requisites for its validity specified under RMO No. 20-90 and RDAO 01-05, it is invalid and ineffective to extend the prescriptive period to assess taxes. However, due to its peculiar circumstances, We shall treat this case as an exception to this rule and find the Waivers valid for the reasons discussed below.

First, the parties in this case are *in pari delicto* or "in equal fault." *In pari delicto* connotes that the two parties to a controversy are equally culpable or guilty and they shall have no action against each other. However, although the parties are *in pari delicto*, the Court may interfere and grant relief at the suit of one of them, where public policy requires its intervention, even though the result may be that a benefit will be derived by one party who is in equal guilt with the other.[18]

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[16] SUBJECT: Salient Features of Supreme Court Decision on Waiver of the Statute of Limitations under Tax Code, issued on February 2, 2005.

[17] *Rollo*, pp. 175-176.

[18] *Enrique T. Yuchengco, Inc. v. Velayo*, G.R. No. 50439, July 20, 1982, 115 SCRA 307.

Here, to uphold the validity of the Waivers would be consistent with the public policy embodied in the principle that taxes are the lifeblood of the government, and their prompt and certain availability is an imperious need.[19] Taxes are the nation's lifeblood through which government agencies continue to operate and which the State discharges its functions for the welfare of its constituents.[20] As between the parties, it would be more equitable if petitioner's lapses were allowed to pass and consequently uphold the Waivers in order to support this principle and public policy.

Second, the Court has repeatedly pronounced that parties must come to court with clean hands.[21] Parties who do not come to court with clean hands cannot be allowed to benefit from their own wrongdoing.[22] Following the foregoing principle, respondent should not be allowed to benefit from the flaws in its own Waivers and successfully insist on their invalidity in order to evade its responsibility to pay taxes.

Third, respondent is estopped from questioning the validity of its Waivers. While it is true that the Court has repeatedly held that the doctrine of estoppel must be sparingly applied as an exception to the statute of limitations for assessment of taxes, the Court finds that the application of the doctrine is justified in this case. Verily, the application of estoppel in this case would promote the administration of the law, prevent injustice and avert the accomplishment of a wrong and undue advantage. Respondent executed *five* Waivers and delivered them to petitioner, one after the other. It allowed petitioner to rely on them and did not raise any objection against their validity until

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[19] *Gerochi v. Department of Energy*, G.R. No. 159796, July 17, 2007, 527 SCRA 696.

[20] *Visayas Geothermal Power Company v. Commissioner of Internal Revenue*, G.R. No. 197525, June 4, 2014, 725 SCRA 130.

[21] *Osmeña v. Osmeña*, G.R. No. 171911, January 26, 2010, 611 SCRA 164, 168.

[22] *Department of Public Works and Highways v. Quiwa*, G.R. No. 183444, February 8, 2012, 665 SCRA 479.

petitioner assessed taxes and penalties against it. Moreover, the application of estoppel is necessary to prevent the undue injury that the government would suffer because of the cancellation of petitioner's assessment of respondent's tax liabilities.

Finally, the Court cannot tolerate this highly suspicious situation. In this case, the taxpayer, on the one hand, after voluntarily executing waivers, insisted on their invalidity by raising the very same defects it caused. On the other hand, the BIR miserably failed to exact from respondent compliance with its rules. The BIR's negligence in the performance of its duties was so gross that it amounted to malice and bad faith. Moreover, the BIR was so lax such that it seemed that it consented to the mistakes in the Waivers. Such a situation is dangerous and open to abuse by unscrupulous taxpayers who intend to escape their responsibility to pay taxes by mere expedient of hiding behind technicalities.

It is true that petitioner was also at fault here because it was careless in complying with the requirements of RMO No. 20-90 and RDAO 01-05. Nevertheless, petitioner's negligence may be addressed by enforcing the provisions imposing administrative liabilities upon the officers responsible for these errors.[23] The BIR's right to assess and collect taxes should not be jeopardized merely because of the mistakes and lapses of its officers, especially in cases like this where the taxpayer is obviously in bad faith.[24]

As regards petitioner's claim that the 10-year period of limitation within which to assess deficiency taxes provided in Section 222(a) of the 1997 NIRC is applicable in this case as respondent allegedly filed false and fraudulent returns, there is no reason to disturb the tax court's findings that **records failed to establish, even by prima facie evidence, that respondent Next Mobile filed false and fraudulent returns on the ground**

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[23] Paragraph 5 of RMO 20-90.

[24] *Visayas Geothermal Power Company v. Commission of Internal Revenue*, *supra* note 20.

of substantial underdeclaration of income in respondent Next Mobile's Annual ITR for taxable year ending December 31, 2001.[25]

While the Court rules that the subject Waivers are valid, We, however, refer back to the tax court the determination of the merits of respondent's petition seeking the nullification of the BIR Formal Letter of Demand and Assessment Notices/ Demand No. 43-734.

WHEREFORE, premises considered, the Court resolves to **GRANT** the petition. The Decision of the Court of Tax Appeals *En Banc* dated May 28, 2014 in CTA EB Case No. 1001 is hereby **REVERSED** and **SET ASIDE**. Accordingly, let this case be remanded to the Court of Tax Appeals for further proceedings in order to determine and rule on the merits of respondent's petition seeking the nullification of the BIR Formal Letter of Demand and Assessment Notices/Demand No. 43-734, both dated October 17, 2005.

SO ORDERED.

Peralta, Villarama, Jr., Perez,[*] and *Reyes, JJ.,* concur.

THIRD DIVISION

[G.R. No. 213832. December 7, 2015]

PEOPLE OF THE PHILIPPINES, *plaintiff-appellee, vs.* **GILBERT MERCADO a.k.a. "Bong,"** *accused-appellant.*

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[25] *Rollo*, p. 144.

[*] Jardeleza, *J.*, no part, due to his prior action as Solicitor General; Perez, *J.,* designated Additional Member per Raffle dated January 7, 2015.

SYLLABUS

1. **REMEDIAL LAW; EVIDENCE; FACTUAL FINDINGS OF THE TRIAL COURT; CREDIBILITY OF WITNESSES; THE COURT ACCORDS GREAT RESPECT AND EVEN FINALITY TO THE FINDINGS OF THE TRIAL COURT, MORE SO IF THE SAME IS AFFIRMED BY THE COURT OF APPEALS; APPLICATION IN CASE AT BAR.—** It is a settled doctrine that "factual findings of the trial court, its assessment of the credibility of witnesses and the probative weight of their testimonies and the conclusions based on these factual findings are to be given highest respect." The Court considers the RTC's "unique position in directly observing the demeanor of a witness on the stand. From its vantage point, the trial court is in the best position to determine the truthfulness of witnesses." Thus, the Court "accords great respect and even finality to the findings of credibility of the trial court, more so if the same were affirmed by the CA, as in this case." Although jurisprudence cites certain exceptions to this doctrine, none of these exceptional circumstances attend the present case.

2. **CRIMINAL LAW; MURDER; ALIBI, AS A DEFENSE; JURISPRUDENCE HOLDS THAT FOR ALIBI TO PROSPER, IT IS NECESSARY THAT THE CORROBORATION IS CREDIBLE; SUSTAINED.—** Jurisprudence holds that for *alibi* to prosper, it is necessary that the corroboration is credible, the same having been offered preferably by disinterested witnesses. The defense failed in this regard, as only the testimony of Mercado's father was presented to substantiate his claim. More importantly, the Court has emphasized in a line of cases that the appreciation of a claim of *alibi* shall be guided by the following parameters: For the defense of alibi to prosper, "the accused must prove (a) that he was present at another place at the time of the perpetration of the crime, and (b) that it was physically impossible for him to be at the scene of the crime" during its commission. "Physical impossibility refers to distance and the facility of access between the *situs criminis* and the location of the accused when the crime was committed. He must demonstrate that he was so far away and could not have been physically present at the scene of the crime and its immediate vicinity when the crime was committed." x x x As the Court ruled in *People v. Adallom*, "denial and alibi are self-serving

negative evidence; they cannot prevail over the spontaneous, positive, and credible testimonies of the prosecution witnesses who pointed to and identified the accused-appellant as the malefactor."

3. ID.; ID.; IMPOSABLE PENALTY.— Section 3 of Republic Act No. 9346 provides that "[p]erson convicted of offenses punished with *reclusion perpetua*, or whose sentences will be reduced to *reclusion perpetua*, by reason of this Act, shall not be eligible for parole under Act No. 4103, otherwise known as the Indeterminate Sentence Law, as amended."

4. ID.; ID.; CIVIL LIABILITY; AWARD OF CIVIL INDEMNITY AND OTHER DAMAGES, WHEN PROPER. — Exemplary damages, on the other hand, may be granted under Article 2230 of the Civil Code when the crime was committed with one or more aggravating circumstance. Although there are instances when it may be granted despite the absence of any aggravating circumstance, the circumstances attending the present case fail to warrant an award. Several modifications, however, need to be effected on the other damages. The award of civil indemnity should be reduced from ₱75,000.00 to ₱50,000.00, consistent with prevailing jurisprudence. Considering that no aggravating circumstance was found to attend the subject killings, the award of moral damages is also decreased to ₱50,000.00. The amount of temperate damages is likewise reduced from ₱30,000.00 to ₱25,000.00. Further to these, interest at the rate of six percent (6%) *per annum* is imposed on all damages awarded, to be computed from the date of finality of judgment until full payment.

APPEARANCES OF COUNSEL

The Solicitor General for plaintiff-appellee.
Public Attorney's Office for accused-appellant.

R E S O L U T I O N

REYES, *J.*:

Subject of this appeal[1] is the Decision[2] dated November 29, 2013 of the Court of Appeals (CA) in CA-GR CR-HC No. 00941-MIN, which affirmed with modification the Decision[3] dated March 28, 2011 of the Regional Trial Court (RTC) of Zamboanga City, Branch 16, in Criminal Case Nos. 18497 and 18498, convicting accused-appellant Gilbert Mercado a.k.a. "Bong" (Mercado) for two counts of Murder.

Mercado was charged in separate informations with two counts of Murder for the deaths of Victor Dulap *y* Vargas (Victor) and Charlie Dulap *y* Vargas (Charlie) on October 31, 2001 in Zamboanga City, specifically:

IN CRIMINAL CASE NO. 18497

That on or about October 31, 2001, in the City of Zamboanga, Philippines, and within the jurisdiction of this Honorable Court, the above named accused, armed with a handgun, by means of treachery and with intent to kill, did then and there willfully, unlawfully and feloniously, suddenly and without any warning, assault, attack and shoot with the use of said weapon that he was then armed with, at the person of [Victor], thereby inflicting mortal gunshot wound on the fatal part of the latter's body which directly caused his death, to the damage and prejudice of the heirs of said victim; furthermore, there being present an aggravating circumstance in that the weapon used in the commission of the crime is an unlicensed firearm.[4]

IN CRIMINAL CASE NO. 18498

That on or about October 31, 2001, in the City of Zamboanga, Philippines, and within the jurisdiction of this Honorable Court, the above named accused, armed with a handgun, by means of treachery

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[1] *Rollo*, pp. 14-15.

[2] Penned by Associate Justice Renato C. Francisco, with Associate Justices Romulo V. Borja and Oscar V. Badelles concurring; *id*. at 3-13.

[3] Rendered by Judge Jesus C. Carbon, Jr.; CA *rollo*, pp. 44-62.

[4] *Id*. at 44-45.

and with intent to kill, did then and there willfully, unlawfully and feloniously, suddenly and without any warning, assault, attack and shoot with the use of said weapon that he was then armed with, at the person of [Charlie], thereby inflicting mortal gunshot wounds on the fatal part of the latter's body which directly caused his death, to the damage and prejudice of the heirs of said victim; furthermore, there being present an aggravating circumstance in that the weapon used in the commission of the crime is an unlicensed firearm.[5]

During the arraignment, Mercado pleaded "not guilty" to both charges. After pre-trial, trial on the merits ensued.[6]

The prosecution presented several witnesses to support their cases against Mercado. Based on the witnesses' testimonies, the killings happened on the evening of October 31, 2011 at the residence of Rosario Isad *y* Solis (Rosario) in Gemelina Drive, San Roque, Zamboanga City. Rosario had visitors on that day because it was her daughter Restie Ann's birthday. Among those present were her neighbors Victor and Charlie, Analiza Sahibul (Analiza) with boyfriend Mercado and companions Edwin Udja and a certain "Eddie." The visitors were at the *sala*, sitting on the floor and singing while having food and alcoholic drinks.[7]

While Rosario was at the kitchen reheating more food, she heard three gunshots. She then went to the *sala* and there found Victor and Charlie; her other visitors had left. Rosario saw Charlie still holding a glass of *tuba*, while Victor's head was bowed down, like he was drunk. She saw blood on Victor, Charlie, and the floor. She shouted, "*Hay Sangre*" (Oh, blood), collapsed and lost her consciousness. She later learned that both Victor and Charlie had died.[8] In their death certificates, it was stated that the victims died due to hemorrhage secondary to gunshot wounds.[9]

Witnesses Rosario and Analiza identified in court Mercado as the same "Bong" who was with them on October 31, 2011.

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[5] *Id*. at 45.

[6] *Id*.

[7] *Id*. at 46-50.

[8] *Id*. at 46-47.

[9] *Rollo*, p. 6.

Analiza further identified Mercado as the person who shot Victor and Charlie. She claimed that no fight or altercation ensued between Mercado and his victims before the shooting. Mercado also did not say anything before he fired gunshots at them.[10]

The victims' deaths were reported to the Sta. Maria Police Station by their sister at about 11:00 p.m. on October 31, 2001. Among the policemen who proceeded to the crime scene was Senior Police Officer 3 Fernando Gregorio, who claimed to have seen the victims with gunshot wounds on their faces. Victor had a gunshot wound on his right nostril, while Charlie had gunshot wounds on both eyeballs.[11] Prior to their demise, Victor and Charlie worked as carpenters. Victor was married to one Rowena and had one child, while Charlie was married to one Gigi, with whom he had two children.[12]

To refute the prosecution's claims, the defense presented two witnesses, namely Mercado and his father, Carlos Mercado *y* Torres.[13] Mercado denied material points in the testimonies of the prosecution witnesses, particularly: *first*, knowing prosecution witness Analiza; *second*, being at Rosario's residence on October 31, 2001; and, *third*, shooting Victor and Charlie.[14] The defense claimed that on the evening of October 31, 2001, Mercado was at his family's home in *Barangay* Tetuan,[15] then to his father's home that was also within the area. By 9:00 p.m., he was back to his house, where he then slept together with his wife and four children. The following day, he worked at his father's shop in Sta. Catalina, Zamboanga City, where he painted motor vehicles. Mercado did not know of any reason why Rosario and Analiza would falsely testify against him and implicate him in the killings.[16]

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[10] CA *rollo*, pp. 47-50.

[11] *Id*. at 53-54.

[12] *Id*. at 51.

[13] *Id*. at 45.

[14] *Id*. at 54-55.

[15] *Rollo*, p. 10.

[16] CA *rollo*, pp. 55-57.

On March 28, 2011, the RTC rendered its joint Decision,[17] with dispositive portion that reads:

WHEREFORE, the Court finds accused **GILBERT MERCADO *y* CABUCOS GUILTY** beyond reasonable doubt, as principal, of the crimes of Murder charged in Criminal Case No. 18497 and Criminal Case No. 18498, with the aggravating circumstance in both cases of use of an unlicensed firearm, and SENTENCES said accused as follows:

1. In Criminal Case No. 18497 for Murder, in connection with the untimely death of **VICTOR DULAP *y* VARGAS**, to suffer the penalty of **RECLUSION PERPETUA** and its accessory penalties, without eligibility for parole; to pay the heirs of Victor Dulap *y* Vargas Php75,000.00 as indemnity for his death; Php75,000.00 as moral damages; Php50,000.00 as exemplary damages; Php30,000.00 as temperate damages in lieu of actual damages and to pay the costs; and

2. In Criminal Case No. 18498 for Murder, in connection with the untimely death of **CHARLIE DULAP *y* VARGAS**, to suffer the penalty of **RECLUSION PERPETUA** and its accessory penalties, without eligibility for parole; to pay the heirs of [Charlie] Dulap y Vargas Php75,000.00 as indemnity for his death; Php75,000.00 as moral damages; Php50,000.00 as exemplary damages; Php30,000.00 as temperate damages in lieu of actual damages and to pay the costs.

SO ORDERED.[18]

Upon appeal, the CA affirmed with modification the RTC's judgment. The CA affirmed Mercado's conviction for two counts of murder; however, it ruled that the aggravating circumstance of use of an unlicensed firearm was wrongly considered by the RTC. It explained:

The aggravating circumstance must be proved with equal certainty as the commission of the crime charged. The prosecution is burdened to prove that [Mercado] used an unlicensed firearm to perpetrate the crime of murder. Unfortunately, the prosecution failed to discharge such burden. It has offered no documents which would prove such

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[17] *Id*. at 44-62.

[18] *Id*. at 61-62.

allegation when it could have easily secured a certification from the Philippine National Police to the effect that no firearm license was issued to [Mercado] to possess and carry the gun used in the killing.[19] (Citation omitted)

Given the prosecution's failure to establish the aggravating circumstance, the CA likewise modified the amount of damages due the victims' heirs, through the deletion of the award of exemplary damages. Thus, the dispositive portion of its Decision dated November 29, 2013 reads:

WHEREFORE, premises considered, the appeal is **DENIED**. The appealed joint Decision dated March 28, 2011 of the [RTC], Branch 16 of Zamboanga City, in Criminal Case Nos. 18497 and 18498 is hereby **AFFIRMED** with modification as to the damages awarded, such that [Mercado] is ORDERED to pay the heirs of Victor Dulap *y* Vargas, in Criminal Case No. 18497, the following: 1) Moral damages of ₱75,000.00; 2) Civil indemnity of ₱75,000.00[;] and 3) Temperate damages in the amount of ₱30,000.00. Moreover, he is ORDERED to pay the heirs of Charlie Dulap *y* Vargas, in Criminal Case No. 18498, the following: 1) Moral damages of ₱75,000.00; 2) Civil indemnity of ₱75,000.00[;] and 3) Temperate damages of ₱30,000.00.

SO ORDERED.[20]

Hence, this appeal.

Upon review, the Court finds the appeal bereft of merit.

In challenging his conviction, Mercado's arguments delve primarily on the matter of the prosecution witnesses' account that he was responsible for the shooting of the deceased brothers, Victor and Charlie. Particularly, he maintained that the prosecution failed to prove the identity of the victims' assailant. He specifically questioned the credibility of witness Analiza and the truth of her accusations against him.

These arguments of Mercado fail to persuade the Court to rule on his acquittal. *First*, it is a settled doctrine that "factual

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[19] *Rollo*, pp. 10-11.

[20] *Id*. at 12-13.

findings of the trial court, its assessment of the credibility of witnesses and the probative weight of their testimonies and the conclusions based on these factual findings are to be given highest respect."[21] The Court considers the RTC's "unique position in directly observing the demeanor of a witness on the stand. From its vantage point, the trial court is in the best position to determine the truthfulness of witnesses."[22] Thus, the Court "accords great respect and even finality to the findings of credibility of the trial court, more so if the same were affirmed by the CA, as in this case."[23] Although jurisprudence cites certain exceptions to this doctrine, none of these exceptional circumstances attend the present case.[24]

In addition to the foregoing, jurisprudence tells us that where there is no evidence that the witnesses of the prosecution were actuated by ill motive, it is presumed that they were not so actuated and their testimony is entitled to full faith and credit.[25] It bears stressing that the defense failed to present any possible reason for Analiza, Rosario, and the other prosecution witnesses to wrongly implicate Mercado in the crimes. The prosecution's case against Mercado was not even weakened by the mere fact that he was the lone accused sitting on the prisoners' bench at the time he was identified by prosecution witnesses inside the courtroom during hearings. The prosecution witnesses sufficiently explained in court how they came to know of Mercado, and their degree of familiarity with him, especially Analiza who was his girlfriend.[26]

Given the credibility of the prosecution witnesses and their testimonies, as against the denial and *alibi* presented by the defense, there is no reason for the Court to reverse the conviction

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[21] *People v. Mamaruncas, et al.,* 680 Phil. 192, 211 (2012).

[22] *People v. Sanchez*, 681 Phil. 631, 635 (2012).

[23] *Kummer v. People*, G.R. No. 174461, September 11, 2013, 705 SCRA 490, 500.

[24] See *Lazaro, et al. v. Agustin, et al.,* 632 Phil. 310, 322 (2010).

[25] *People v. Dadao*, G.R. No. 201860, January 22, 2014, 714 SCRA 524, 535.

[26] CA *rollo*, pp. 47-48.

of Mercado. His denial and the *alibi* that he was at some other place at the time the shootings happened failed to sufficiently support his plea for an acquittal. Jurisprudence holds that for *alibi* to prosper, it is necessary that the corroboration is credible, the same having been offered preferably by disinterested witnesses.[27] The defense failed in this regard, as only the testimony of Mercado's father was presented to substantiate his claim. More importantly, the Court has emphasized in a line of cases that the appreciation of a claim of *alibi* shall be guided by the following parameters:

> For the defense of alibi to prosper, "the accused must prove (a) that he was present at another place at the time of the perpetration of the crime, and (b) that it was physically impossible for him to be at the scene of the crime" during its commission. "Physical impossibility refers to distance and the facility of access between the *situs criminis* and the location of the accused when the crime was committed. He must demonstrate that he was so far away and could not have been physically present at the scene of the crime and its immediate vicinity when the crime was committed."[28] (Citations omitted)

Such physical impossibility was not established in this case, given the RTC's finding that *Barangay* Tetuan, where Mercado claimed to be at when the killings happened on the evening of October 31, 2001, was a mere seven kilometers away from *Barangay* San Roque. As the Court ruled in *People v. Adallom,*[29] "denial and alibi are self-serving negative evidence; they cannot prevail over the spontaneous, positive, and credible testimonies of the prosecution witnesses who pointed to and identified the accused-appellant as the malefactor."[30]

As to the penalties imposed and damages awarded, the CA correctly affirmed the pronouncement that Mercado was ineligible

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[27] *People v. Jacinto*, 661 Phil. 224, 246 (2011).

[28] *People of the Philippines v. Virgilio Amora y Viscarra,* G.R. No. 190322, November 26, 2014; See also *People v. Jumawan,* G.R. No. 187495, April 21, 2014, 722 SCRA 108, 169; *People v. Ramos*, G.R. No. 190340, July 24, 2013, 702 SCRA 204, 217.

[29] 683 Phil. 618 (2012).

[30] *Id*. at 644.

for parole, and in deleting the award of exemplary damages. Section 3 of Republic Act No. 9346[31] provides that "[p]erson convicted of offenses punished with *reclusion perpetua*, or whose sentences will be reduced to *reclusion perpetua*, by reason of this Act, shall not be eligible for parole under Act No. 4103, otherwise known as the Indeterminate Sentence Law, as amended." Exemplary damages, on the other hand, may be granted under Article 2230 of the Civil Code when the crime was committed with one or more aggravating circumstance.[32] Although there are instances when it may be granted despite the absence of any aggravating circumstance,[33] the circumstances attending the present case fail to warrant an award.

Several modifications, however, need to be effected on the other damages. The award of civil indemnity should be reduced from ₱75,000.00 to ₱50,000.00, consistent with prevailing jurisprudence.[34] Considering that no aggravating circumstance was found to attend the subject killings, the award of moral damages is also decreased to ₱50,000.00.[35] The amount of temperate damages is likewise reduced from ₱30,000.00 to ₱25,000.00.[36] Further to these, interest at the rate of six percent (6%) *per annum* is imposed on all damages awarded, to be computed from the date of finality of judgment until full payment.[37]

WHEREFORE, the Decision dated November 29, 2013 of the Court of Appeals in CA-G.R. CR-HC No. 00941-MIN is **AFFIRMED** with **MODIFICATION** in that the damages that

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[31] AN ACT PROHIBITING THE IMPOSITION OF DEATH PENALTY IN THE PHILIPPINES.

[32] *People v. Del Castillo, et al*., 679 Phil. 233, 258 (2012).

[33] See *People v. Alfredo*, 653 Phil. 435, 454 (2010).

[34] *People of the Philippines v. Randy Bañez y Baylon and Ramil Bañez y Baylon, and Felix Rufino* (at large), G.R. No. 198057, September 21, 2015.

[35] *People v. Dadao, supra* note 25, at 541.

[36] *Guevarra v. People*, G.R. No. 170462, February 5, 2014, 715 SCRA 384, 397; *People v. Zulieta*, G.R. No. 192183, November 11, 2013, 709 SCRA 202, 212.

[37] *Guevarra v. People, id.* at 398; *People v. Zulieta, id.*

accused-appellant Gilbert Mercado is ordered to pay the heirs of Victor Dulap *y* Vargas are as follows: (1) civil indemnity of ₱50,000.00; (2) moral damages of ₱50,000.00; (3) temperate damages of ₱25,000.00; and (4) interest on all damages at the legal rate of six percent (6%) *per annum* from the date of finality of this judgment until full payment.

Similarly, the damages that accused-appellant Gilbert Mercado is ordered to pay the heirs of Charlie Dulap *y* Vargas are as follows: (1) civil indemnity of ₱50,000.00; (2) moral damages of ₱50,000.00; (3) temperate damages of ₱25,000.00; and (4) interest on all damages at the legal rate of six percent (6%) *per annum* from the date of finality of this judgment until full payment.

SO ORDERED.

Velasco, Jr. (Chairperson), Peralta, Bersamin,[*] and *Villarama, Jr., JJ.*, concur.

SECOND DIVISION

[G.R. No. 214915. December 7, 2015]

OIKONOMOS INT'L. RESOURCES CORPORATION (FORMERLY HILTON CEBU RESORT AND SPA), *petitioner, vs.* **ANTONIO Y. NAVAJA, JR.,** *respondent*.

SYLLABUS

1. REMEDIAL LAW; APPEALS; PETITION FOR REVIEW ON *CERTIORARI*; THE COURT'S FUNCTION IN A PETITION FOR REVIEW ON *CERTIORARI* IS LIMITED TO REVIEWING ERRORS OF LAW THAT MAY HAVE

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[*] Additional Member per Raffle dated September 10, 2014 vice Associate Justice Francis H. Jardeleza.

BEEN COMMITTED BY THE LOWER COURTS; EXCEPTIONS.— Well settled is the rule that the Court is not a trier of facts. Its function in petitions for review on *certiorari* is limited to reviewing errors of law that may have been committed by the lower courts. Nevertheless, the Court has enumerated several exceptions to this rule: (1) the conclusion is grounded on speculations, surmises or conjectures; (2) the inference is manifestly mistaken, absurd or impossible; (3) there is grave abuse of discretion; (4) the judgment is based on misapprehension of facts; (5) the findings of fact are conflicting; (6) there is no citation of specific evidence on which the factual findings are based; (7) the findings of absence of facts are contradicted by the presence of evidence on record; (8) the findings of the CA are contrary to those of the trial court; (9) the CA manifestly overlooked certain relevant and undisputed facts that, if properly considered, would justify a different conclusion; (10) the findings of the CA are beyond the issues of the case; and (11) such findings are contrary to the admissions of both parties. Here, one of the exceptions exists – that the findings of the CA are contrary to those of the NLRC and the LA. They obviously differ in their appreciation of the evidence in determining the propriety of Navaja's dismissal. To finally resolve the dispute, the Court deems it proper to tackle the factual question presented.

2. **LABOR AND SOCIAL LEGISLATION; LABOR RELATIONS; TERMINATION OF EMPLOYMENT BY THE EMPLOYER; SERIOUS MISCONDUCT, AS A GROUND; WHEN JUSTIFIED.—** The just causes for dismissing an employee are provided under Article 282 of the Labor Code. In Article 282 (a), serious misconduct by the employee justifies the employer in terminating his or her employment. Misconduct is defined as improper and wrongful conduct. It is the transgression of some established and definite rule of action, a forbidden act, a dereliction of duty, willful in character, and implies wrongful intent and not mere error in judgment. Ordinary misconduct would not justify the termination of the services of an employee as the law is explicit that the misconduct should be serious. It is settled that in order for the misconduct to be considered serious, it must be of such grave and aggravated character and not merely trivial or unimportant. As amplified by jurisprudence, the misconduct must (1) be serious; (2) relate to the performance of the employee's duties;

and (3) show that the employee has become unfit to continue working for the employer.

3. **ID.; ID.; ID.; THE EMPLOYER MUST SHOW SUBSTANTIAL EVIDENCE THAT THE DISMISSAL IS FOR A JUSTIFIABLE CAUSE; EXPLAINED.—** Where there is no showing of a clear, valid and legal cause for termination of employment, however, the law considers the case a matter of illegal dismissal. If doubt exists in the appreciation of the evidence presented by the employer as against that of the employee, the scales of justice must be tilted in favor of the latter. The employer must affirmatively show substantial evidence that the dismissal was for a justifiable cause. Substantial evidence is more than a mere scintilla of evidence or relevant evidence as a reasonable mind might accept as adequate to support a conclusion, even if other minds, equally reasonable, might conceivably opine otherwise.

4. **ID.; ID.; ID.; PREVIOUS INFRACTIONS MAY BE USED AS JUSTIFICATION FOR AN EMPLOYEE'S DISMISSAL FROM WORK IN CONNECTION WITH A SUBSEQUENT SIMILAR OFFENSE; THE LAW IN PROTECTING THE RIGHTS OF THE EMPLOYEES, AUTHORIZES NEITHER OPPRESSION NOR SELF-DESTRUCTION OF THE EMPLOYER; APPLICATION IN CASE AT BAR.—** In determining the imposable penalty, previous infractions may be used as justification for an employee's dismissal from work in connection with a subsequent similar offense. In the case at bench, some of the past violations committed by Navaja were (1) failing to return lost and found items, (2) acts of inefficiency and (3) insubordination. Navaja, albeit with protest, recognized that he had been struck with various penalties for past offenses. Despite the warnings on his prior infractions and Oikonomos' forbearance, Navaja unfortunately continued his transgressions. In fine, the dismissal of Navaja due to the theft of a jacket was reasonable in light of his serious lapses. After all those infractions, with the latest incident of theft as the last straw, the Court understands Oikonomos' position that it could not anymore accept Navaja as one of its trusted employees. "While it is true that compassion and human consideration should guide the disposition of cases involving termination of employment, since that it affects one's source or means of livelihood, it should not be overlooked that the benefits accorded to labor do not include compelling an employer

to retain the services of an employee who has been shown to be a gross liability to the employer. The law, in protecting the rights of the employees, authorizes neither oppression nor self-destruction of the employer. It should be made clear that when the law tilts the scale of justice in favor of labor, it is but a recognition of the inherent economic inequality between labor and management. The intent is to balance the scale of justice; to put the two parties on relatively equal positions. There may be cases where the circumstances warrant favoring labor over the interests of management but never should the scale be so tilted if the result is an injustice to the employer. *Justitia nemini neganda est.* (Justice is to be denied to none.)"

APPEARANCES OF COUNSEL

Cordero Bael Acuña & Sepulveda Law Office for petitioner.
Cuizon Law Office for respondent.

D E C I S I O N

MENDOZA, *J.*:

This petition for review on *certiorari* seeks to reverse and set aside the May 29, 2013 Decision[1] and the September 4, 2014 Resolution[2] of the Court of Appeals *(CA)* in CA-G.R. SP No. 06844, which nullified the December 29, 2011 Decision[3] of the National Labor Relations Commission *(NLRC),* finding the dismissal of respondent Antonio Y. Navaja, Jr. *(Navaja)* from his employment by petitioner Oikonomos Int'l. Resources Corporation *(Oikonomos)* valid and legal.

The Facts

On December 27, 2004, Oikonomos, then known as Hilton Cebu Resort and Spa, hired Navaja as a room attendant. Navaja

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[1] Penned by Associate Justice Pampio A. Abarintos with Associate Justice Gabriel T. Ingles and Associate Justice Marilyn B. Lagura-Yap of Court of Appeals 18th Division, concurring; *rollo,* pp. 96-111.

[2] *Id*. at 49-50.

[3] *Id*. at 205-216. Penned by Presiding Commissioner Violate Ortiz-Bantug.

performed housekeeping and cleaning duties in the hotel and reported for a graveyard shift from 11:00 o'clock in the evening up to 7:00 o'clock in the morning.

Employee's Position

On August 25, 2010, at around 6:00 o'clock in the morning, the front office ordered Navaja to check the minibar in Room 1202 after the guests checked out early. He went and checked Room 1202. At around 6:50 o'clock in the morning, after checking another room, he went back to Room 1202 to double check if the Sebu Fish Mascot was still there. It was then that he saw a white Nike jacket left in the room.

At that point, Navaja remembered that he was tasked to bring a wine crate from the ground floor to the housekeeping office, a chore that required both of his hands. He decided to place the jacket at the back of his pants to free both his hands to enable him to carry the wine crate. With the jacket clearly visible at his back, he rode the elevator down to the first floor, took the wine crate to the housekeeping office, and there, placed the jacket inside a black plastic bag and left it beside a divider within the office to be brought to the Lost and Found Section later. Afterwards, he accomplished his duty report, went home around 7:30 o'clock in the morning, and totally forgot about the jacket as he needed to bring his children to school before 8:00 o'clock in the morning.

In his following shift, on August 26, 2010, at around 1:00 o'clock in the morning, the security department called Navaja to answer a Q&A form[4] concerning his whereabouts on August 25, 2010. He felt that the questioning might have something to do with the jacket he found earlier. He decided to wait for the executive housekeeper so that he could turn over the jacket to him. At around 8:00 o'clock, he brought the jacket to their Lost and Found Section and made a second statement,[5] following the advice of their executive housekeeper.

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[4] *Id*. at 171.

[5] *Id*. at 172.

On the same day, Navaja was served a memorandum[6] by Oikonomos notifying him that he was being preventively suspended for suspicion of theft, and that he had to explain in writing why he should not be dismissed from service and to attend the administrative hearing scheduled on September 6, 2010. He then submitted his written explanation[7] and appeared at the Human Resources Department for the administrative hearing of his case.

On September 24, 2010, Navaja received the memorandum[8] from Oikonomos dismissing him from the service after he was found guilty of theft and dishonesty which were violations of company rules and regulations.

Thereafter, Navaja filed an illegal dismissal complaint before the Regional Arbitration Board No. VII, Cebu City.

Employer's Position

Oikonomos asserted that, prior to the incident of August 25, 2010, Navaja had a history of committing infractions, as follows:

1. January 18, 2008 – Lost and found items were retrieved from Navaja's pantry. He was verbally reprimanded.
2. March 21, 2008 – Lost and found items were retrieved from inside his cart. Navaja was issued a written warning.
3. March 23, 2009 – Acts of inefficiency and incompetence on the part of Navaja which resulted in the complaints from guests. He was suspended for 15 days.
4. July 9, 2009 – Insubordination for which he was suspended for 7 days.[9]

On August 25, 2010, at around 7:30 o'clock in the morning, the hotel received a call from a guest, who just checked-out, informing it that she left a white Nike jacket in Room 1202. The said room was examined but the jacket was not found. The

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[6] *Id*. at 173.

[7] *Id*. at 174-176.

[8] *Id*. at 179.

[9] *Id*. at 23-24.

hotel's closed circuit television camera *(CCTV)* footage showed Navaja entering Room 1202 twice after the guests had left. After coming out from the room the second time, he acted suspiciously and made an effort to hide his back from the view of the CCTV.[10]

On August 26, 2010, at around 1:30 o'clock in the morning, the hotel security office asked him about his work details and whereabouts in his previous shift. Navaja, however, never mentioned that he found a white Nike jacket in Room 1202. It was only around 8:00 o'clock of the same morning that he handed the jacket to the security office and issued another statement.[11]

After issuing a memorandum of suspension and conducting an administrative hearing, Oikonomos dismissed Navaja for apparent violation of the hotel's rules and regulations based on the following findings: (1) that Navaja intentionally hid the item to avoid detection; (2) that he did not follow company procedure regarding lost and found items; and (3) that he made a falsified or mistaken report.

The Labor Arbiter Ruling

In its May 25, 2011 Decision,[12] the Labor Arbiter *(LA)* found that Navaja was validly dismissed because he committed an act of theft or dishonesty. The CCTV footage and his deliberate failure to report the missing item showed his intention to appropriate the jacket. The LA opined that Navaja's defense of simple forgetfulness was not a credible excuse to refute the evidence presented by Oikonomos. In deciding against Navaja, the LA also considered his past infractions.

Nevertheless, the LA awarded Navaja with his corresponding 13th month pay and service incentive leave pay because Oikonomos failed to show proof of payment. The LA also awarded attorney's fees at 10% of the total awards. The decretal portion of the decision reads:

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[10] Still photos submitted. *Id*. at 170.

[11] *Id*. at 172.

[12] Penned by Labor Arbiter Philip B. Montances; *id*. at 181-189.

WHEREFORE, premises considered, judgment is hereby rendered —

1. Finding the dismissal of complainant to be legal;
2. Awarding complainant the following:

a.	13th month pay	₱5,374.00
b.	SILP	₱1,378.00
	Sub-total	₱6,752.00
c.	Attorney's fees	₱ 675.00
	Total	₱7,427.00

3. Ordering respondents to pay complainant the total awards of ₱7,427.00 within ten (10) days from receipt of this Decision and coursed through the Cashier of this Labor Court, RAB VII.

SO ORDERED.[13]

Aggrieved, Navaja elevated the case on appeal before the NLRC.

The NLRC Ruling

In its decision, dated December 29, 2011, the NLRC declared that Navaja's dismissal was valid. The labor tribunal recognized the employer's right to dismiss an employee for violating company rules. Navaja clearly failed to follow company procedure on reporting lost items. He also provided false information even when he was given the opportunity to disclose the occurrences regarding the missing item. The NLRC also noted that the previous infractions of Navaja were relevant matters in determining the imposable penalty by Oikonomos.

Navaja moved for reconsideration, but his motion was denied by the NLRC in a Resolution,[14] dated February 29, 2012.

Undaunted, Navaja filed a petition for *certiorari* before the CA.

The CA Ruling

In its assailed decision, the CA *nullified* and *set aside* the December 29, 2011 Decision and the February 29, 2012

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[13] *Id*. at 189.

[14] *Id*. at 218-220.

Resolution of the NLRC. The appellate court opined that Navaja was able to justify the delay in reporting the missing jacket. The CA stated that Navaja, based on the statements of his co-employees, did not intentionally conceal it. The element of intent to take was absent because Navaja did not bring the item outside the hotel premises. Moreover, the appellate court did not give credence to the CCTV clippings as these were arbitrarily chosen by Oikonomos. Thus, the CA concluded that Navaja was illegally dismissed which entitled him to reinstatement, full backwages and other monetary benefits. Thus, the CA disposed:

> WHEREFORE, premises considered, the petition is hereby GRANTED and the Decision and Resolution of herein public respondent NLRC, 7th Division relative to NLRC Case No. VAC-08-000671-2011 (RAB Case No. VII-09-2011-2010) which were respectively promulgated on 29 December 2011 and 29 February 2012 are NULLIFIED and SET ASIDE.
>
> A new one is entered in its stead declaring petitioner as illegally dismissed from his employment. As such, he is ENTITLED to reinstatement and full backwages, inclusive of allowances and other benefits, or their monetary equivalent computed from the time the compensation was not paid up to the time of actual reinstatement. Considering that there may already be strained relations between the parties, petitioner is then AWARDED separation pay equivalent to one month salary per year of service in lieu of reinstatement.
>
> SO ORDERED.[15]

Oikonomos filed its motion for reconsideration, but the CA denied the same in its assailed Resolution, dated September 4, 2014.

Hence, this petition.

ISSUES

I

WHETHER A QUESTION OF FACT COULD BE ENTERTAINED IN A PETITION FOR REVIEW ON *CERTIORARI* UNDER RULE 45 OF THE RULES OF COURT.

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[15] *Id*. at 110.

II

WHETHER THE DISMISSAL OF NAVAJA BASED ON A JUST CAUSE OF SERIOUS MISCONDUCT WAS PROVEN BY OIKONOMOS WITH SUBSTANTIAL EVIDENCE.

Oikonomos argues that it has established with substantial evidence that Navaja committed serious misconduct under Article 282 (a) of the Labor Code; that Navaja had several opportunities to report the missing white jacket but he knowingly failed to do so; that he issued inconsistent statements regard the missing jacket; that he tucked the jacket at the back of his pants and later placed it in a black plastic bag to intentionally conceal the same; that his co-employees could not even see that he was carrying a white jacket; and that the CA failed to consider his past infractions.

In his Comment,[16] Navaja asserted that the issues raised by Oikonomos were factual in nature and could not be subject of an appeal before the Court; that there was no substantial evidence that he committed theft; that his co-employees attested that they saw him with the white jacket in plain sight, thus, he was not hiding it; that the CCTV snapshots were arbitrarily isolated by Oikonomos and these did not convey the real events that transpired; and that he refuted the minutes of the administrative hearing conducted by Oikonomos.

In its Reply,[17] Oikonomos reiterated that Navaja had several opportunities to disclose that he found the missing item, but he opted not to; that the CA simply focused on the fact that Navaja did not dispose the item; and that his act constituted a violation of company policy, not merely the crime of theft.

The Court's Ruling

The Court finds merit in the petition.

Generally, a question of fact cannot be entertained by the Court; exceptions

[16] *Id*. at 433-448.

[17] *Id*. at 455-491.

Oikonomos essentially raises the issue of whether there was substantial evidence to uphold the legality of Navaja's dismissal. The question posited is evidently factual because it requires an examination of the evidence on record. Well settled is the rule that the Court is not a trier of facts. Its function in petitions for review on *certiorari* is limited to reviewing errors of law that may have been committed by the lower courts.[18]

Nevertheless, the Court has enumerated several exceptions to this rule: (1) the conclusion is grounded on speculations, surmises or conjectures; (2) the inference is manifestly mistaken, absurd or impossible; (3) there is grave abuse of discretion; (4) the judgment is based on misapprehension of facts; (5) the findings of fact are conflicting; (6) there is no citation of specific evidence on which the factual findings are based; (7) the findings of absence of facts are contradicted by the presence of evidence on record; (8) the findings of the CA are contrary to those of the trial court; (9) the CA manifestly overlooked certain relevant and undisputed facts that, if properly considered, would justify a different conclusion; (10) the findings of the CA are beyond the issues of the case; and (11) such findings are contrary to the admissions of both parties.[19] Here, one of the exceptions exists – that the findings of the CA are contrary to those of the NLRC and the LA. They obviously differ in their appreciation of the evidence in determining the propriety of Navaja's dismissal. To finally resolve the dispute, the Court deems it proper to tackle the factual question presented.

Serious misconduct was proven with substantial evidence

The just causes for dismissing an employee are provided under Article 282 of the Labor Code.[20] In Article 282 (a), serious

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[18] *Gepulle-Garbo v. Spouses Garabato,* G.R. No. 200013, January 14, 2015.

[19] *Carbonell v. Carbonell-Mendes,* G.R. No. 205681, July 1, 2015.

[20] Now Article 296 of the Labor Code.

misconduct by the employee justifies the employer in terminating his or her employment.[21]

Misconduct is defined as improper and wrongful conduct. It is the transgression of some established and definite rule of action, a forbidden act, a dereliction of duty, willful in character, and implies wrongful intent and not mere error in judgment. Ordinary misconduct would not justify the termination of the services of an employee as the law is explicit that the misconduct should be serious. It is settled that in order for the misconduct to be considered serious, it must be of such grave and aggravated character and not merely trivial or unimportant. As amplified by jurisprudence, the misconduct must (1) be serious; (2) relate to the performance of the employee's duties; and (3) show that the employee has become unfit to continue working for the employer.[22]

Where there is no showing of a clear, valid and legal cause for termination of employment, however, the law considers the case a matter of illegal dismissal. If doubt exists in the appreciation of the evidence presented by the employer as against that of the employee, the scales of justice must be tilted in favor of the latter.[23] The employer must affirmatively show substantial evidence that the dismissal was for a justifiable cause. Substantial evidence is more than a mere scintilla of evidence or relevant evidence as a reasonable mind might accept as adequate to support a conclusion, even if other minds, equally reasonable, might conceivably opine otherwise.[24]

After a painstaking review of the records of the case, the Court finds that Oikonomos was able to establish with substantial

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[21] *Imasen Phil. Manufacturing Corp. v. Alcon,* G.R. No. 194884, October 22, 2014.

[22] *Colegio de San Juan de Letran-Calamba v. Tardeo*, G.R. No. 190303, July 9, 2014, 729 SCRA 497, 505.

[23] *Hocheng Philippines Corp. v. Farrales,* G.R. No. 211497, March 18, 2015.

[24] *Tongko v. Manufacturer's Life Insurance Co.,* 591 Phil. 476, 502 (2008).

evidence that Navaja committed serious misconduct, specifically, theft, dishonesty and violation of company policy, as shown by the following facts and circumstances:

First, it was undisputed that Navaja took the jacket from Room 1202 on August 25, 2010. From the time he obtained the said item, he began to perform certain acts to willfully conceal the same. Upon his discovery of the jacket, it was strange that he placed it at the back of his pants. His flimsy explanation that he needed to free both his hands to carry the wine crate was simply incredible considering that there were various and more convenient ways to carry the jacket in a conspicuous manner.

The CCTV footages would also show that Navaja acted strangely outside the elevator. Under normal circumstances, a person would not stand in such an awkward position to hide his back from a camera's view while waiting for an elevator ride.[25] Even if the CCTV images were completely disregarded, there were still numerous pieces of evidence to establish Navaja's acts of theft.

Further, the statements[26] of his co-employees, Diala and Silawan, contrary to the explanation of the CA, did not prove that there was no intent to hide the item. Their statements did not categorically indicate that they actually saw Navaja carrying a jacket at the back of his pants. They merely stated that there was something dangling at the back of Navaja's pants and that he was seen placing something inside a plastic bag. Glaringly, Navaja even placed the jacket inside a black plastic bag when he arrived at the housekeeping office and placed it beside the divider to keep it out of sight.

Second, Navaja had several opportunities to report the missing item to the management. The first instance was when Navaja accomplished his daily report at the housekeeping office before he went home on August 25, 2010.[27] Considering that the black

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[25] *Rollo,* p. 170.

[26] *Id*. at 303-304.

[27] *Id*. at 151.

plastic bag containing the jacket was in the same room where he wrote his report, it was unbelievable that he still failed to recall and indicate the lost item in the said report. Navaja could not also feign amnesia as only a couple of minutes had elapsed from the time he took the missing jacket, until he completed his daily report.

Another instance was during his next shift on August 26, 2010, around 1:00 o'clock in the morning, when he was made to answer a Q&A form by the security department. At that specific point, Navaja admitted that he remembered the missing jacket[28] as he already had the feeling that the questioning was about the jacket that he found, but still failed to disclose the same to the management. He waited for six (6) hours, until their executive housekeeper arrived, before divulging his discovery of the jacket. Navaja could no longer claim the benefit of spontaneity due to the substantial lapse of time in reporting the missing item.

Third, Navaja violated company policy regarding their lost and found procedure. The hotel required its employee to immediately report lost and found items to the security or front office.[29] To recapitulate, Navaja had several encounters with the security and front office before he belatedly reported the jacket. At the time he went home on August 25, 2010, he passed by the front office and, on the next day, August 26, 2010, the security office called him to fill out a Q&A form. Still, Navaja kept silent about it.

Notably, he could have also immediately reported and surrendered the item to the housekeeping office at the time of his discovery to establish his claim of good faith. Ironically, he insisted that the jacket should only be ceded to the security office.[30]

Fourth, the Court finds itself unable to agree with the CA that there was no intent to take because Navaja did not bring

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[28] *Id*. at 152.

[29] *Id*. at 326.

[30] *Id*. at 442.

the jacket outside the hotel premises. In the landmark case of *Valenzuela v. People,*[31] it was stated that "[t]he ability of the offender to freely dispose of the property stolen is not a constitutive element of the crime of theft."[32] Consequently, as intent to dispose is not an integral element of theft, it is of no moment that Navaja failed to bring the stolen item outside the premises. As discussed, there was substantial evidence that Navaja had the intent to take the missing item.

The company policy that Navaja violated was "[R]ule C-1 DISHONESTY: Theft, attempting theft or removing from Company premises, any food, beverage, material, equipment, tools or any other property of the Company, another colleague or customer."[33] Apparently, even attempted theft, where theft was not consummated, could be considered as a violation of Oikonomos' policy warranting disciplinary measures.

Based on the foregoing, the misconduct of Navaja, coupled with his conscious concealment of the missing item, was serious in character and constituted a violation of company policy.

Past infractions may be considered in the imposition of penalties

In determining the imposable penalty, previous infractions may be used as justification for an employee's dismissal from work in connection with a subsequent similar offense.[34] In the case at bench, some of the past violations committed by Navaja were (1) failing to return lost and found items, (2) acts of inefficiency and (3) insubordination. Navaja, albeit with protest, recognized that he had been struck with various penalties for past offenses.[35] Despite the warnings on his prior infractions

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[31] 552 Phil. 381 (2006).

[32] *Id*. at 415.

[33] *Rollo,* p. 15.

[34] *PLDT, Inc. v. Balbastro,* 548 Phil.168, 181(2007).

[35] *Rollo*, pp. 412-416.

and Oikonomos' forbearance, Navaja unfortunately continued his transgressions.

In fine, the dismissal of Navaja due to the theft of a jacket was reasonable in light of his serious lapses. After all those infractions, with the latest incident of theft as the last straw, the Court understands Oikonomos' position that it could not anymore accept Navaja as one of its trusted employees.

"While it is true that compassion and human consideration should guide the disposition of cases involving termination of employment, since that it affects one's source or means of livelihood, it should not be overlooked that the benefits accorded to labor do not include compelling an employer to retain the services of an employee who has been shown to be a gross liability to the employer. The law, in protecting the rights of the employees, authorizes neither oppression nor self-destruction of the employer. It should be made clear that when the law tilts the scale of justice in favor of labor, it is but a recognition of the inherent economic inequality between labor and management. The intent is to balance the scale of justice; to put the two parties on relatively equal positions. There may be cases where the circumstances warrant favoring labor over the interests of management but never should the scale be so tilted if the result is an injustice to the employer. *Justitia nemini neganda est.* (Justice is to be denied to none.)"[36]

WHEREFORE, the petition is **GRANTED.** The May 29, 2013 Decision and the September 4, 2014 Resolution of the Court of Appeals in CA-G.R. SP No. 06844 are hereby **REVERSED** and **SET ASIDE**. The May 25, 2011 Decision of the Labor Arbiter in RAB Case No. VII-09-2011-2010, is **REINSTATED.**

SO ORDERED.

Carpio (Chairperson), del Castillo, Perez, and *Leonen, JJ.,* concur.

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[36] *Philippine Geothermal, Inc. v. NLRC*, G.R. No. 106370, September 8, 1994, 236 SCRA 371, 378-379.

EN BANC

[G.R. No. 207112. December 8, 2015]

PILIPINAS TOTAL GAS, INC., *petitioner, vs.* **COMMISSIONER OF INTERNAL REVENUE,** *respondent*.

SYLLABUS

1. TAXATION; NATIONAL INTERNAL REVENUE CODE; TAX CREDITS; REFUNDS OR TAX CREDITS OF INPUT TAX; THE 120-DAY PERIOD GRANTED TO THE COMMISSIONER OF INTERNAL REVENUE (CIR) TO DECIDE THE ADMINISTRATIVE CLAIM UNDER SECTION 112 IS PRIMARILY INTENDED TO BENEFIT THE TAXPAYER; TO ALLOW THE CIR TO DETERMINE THE COMPLETENESS OF THE DOCUMENTS SUBMITTED AND, THUS, DICTATE THEN RUNNING OF THE 120-DAY PERIOD, WOULD UNDERMINE THE OBJECTIVES, AS IT WOULD PROVIDE THE CIR THE UNBRIDLED POWER TO INDEFINITELY DELAY THE ADMINISTRATIVE CLAIM.— It is apparent that the CIR has 120 days **from the date of submission of complete documents** to decide a claim for tax credit or refund of creditable input taxes. The taxpayer may, within 30 days from receipt of the denial of the claim or after the expiration of the 120-day period, which is considered a "denial due to inaction," appeal the decision or unacted claim to the CTA. To be clear, Section 112 (C) categorically provides that the 120-day period is counted "**from the date of submission of complete documents** in support of the application." Contrary to this mandate, the CTA *En Banc* counted the running of the period from the date the application for refund was filed or May 15, 2008, and, thus, ruled that the judicial claim was belatedly filed. This should be corrected. Indeed, the 120-day period granted to the CIR to decide the administrative claim under the Section 112 is primarily intended to benefit the taxpayer, to ensure that his claim is decided judiciously and expeditiously. After all, the sooner the taxpayer successfully processes his refund, the sooner can such resources be further

reinvested to the business translating to greater efficiencies and productivities that would ultimately uplift the general welfare. To allow the CIR to determine the completeness of the documents submitted and, thus, dictate the running of the 120-day period, would undermine these objectives, as it would provide the CIR the unbridled power to indefinitely delay the administrative claim, which would ultimately prevent the filing of a judicial claim with the CTA.

2. ID.; ID.; ID.; REVENUE MEMORANDUM CIRCULAR NO. 49-2003 SHOULD STILL BE OBSERVED.— With the amendments only with respect to its place under Section 112, the Court finds that RMC No. 49-2003 should still be observed. Thus, taking the foregoing changes to the law altogether, it becomes apparent that, for purposes of determining ***when*** the supporting documents have been completed — *it is the taxpayer who ultimately determines when complete documents have been submitted for the purpose of commencing and continuing the running of the 120-day period*. After all, he may have already completed the necessary documents the moment he filed his administrative claim, in which case, the 120-day period is reckoned from the date of filing. The taxpayer may have also filed the complete documents on the 30th day from filing of his application, pursuant to RMC No. 49-2003. He may very well have filed his supporting documents on the first day he was notified by the BIR of the lack of the necessary documents. In such cases, the 120-day period is computed from the date the taxpayer is able to submit the complete documents in support of his application. Then, except in those instances where the BIR would require additional documents in order to fully appreciate a claim for tax credit or refund, in terms ***what*** additional document must be presented in support of a claim for tax credit or refund — it is the taxpayer who has that right and the burden of providing any and all documents that would support his claim for tax credit or refund. After all, in a claim for tax credit or refund, it is the taxpayer who has the burden to prove his cause of action. As such, he enjoys relative freedom to submit such evidence to prove his claim. The foregoing conclusion is but a logical consequence of the due process guarantee under the Constitution. Corollary to the guarantee that one be afforded the opportunity to be heard, it goes without saying that the applicant should be allowed reasonable freedom as to when and how to present his claim within the allowable

period. **Thereafter, whether these documents are *actually* complete as required by law — is for the CIR and the courts to determine.** Besides, as between a taxpayer-applicant, who seeks the refund of his creditable input tax and the CIR, it cannot be denied that the former has greater interest in ensuring that the complete set of documentary evidence is provided for proper evaluation of the State. Lest it be misunderstood, the benefit given to the taxpayer to determine when it should complete its submission of documents is not unbridled. Under RMC No. 49-2003, if in the course of the investigation and processing of the claim, additional documents are required for the proper determination of the legitimacy of the claim, the taxpayer-claimants shall submit such documents within thirty (30) days from request of the investigating/processing office. **Again, notice, by way of a request from the tax collection authority to produce the complete documents in these cases, is essential.**

3. **ID.; ID.; ID.; REVENUE MEMORANDUM CIRCULAR NO. 54-2012; CANNOT BE APPLIED RETROACTIVELY TO THE CASE AT BAR SINCE IT IMPOSES NEW OBLIGATIONS UPON TAXPAYERS IN ORDER TO PERFECT THEIR ADMINISTRATIVE CLAIM.—** Under the current rule, the reckoning of the 120-day period has been withdrawn from the taxpayer by RMC 54-2014, since it requires him at the time he files his claim to complete his supporting documents and attest that he will no longer submit any other document to prove his claim. Further, the taxpayer is barred from submitting additional documents after he has filed his administrative claim. On this score, the Court finds that the foregoing issuance **cannot be applied rectroactively to the case at bar** since *it imposes new obligations upon taxpayers in order to perfect their administrative claim*, that is, [1] compliance with the mandate to submit the "supporting documents" enumerated under RMC 54-2014 under its "Annex A"; and [2] the filing of "a statement under oath attesting to the completeness of the submitted documents," referred to in RMC 54-2014 as "Annex B." This should not prejudice taxpayers who have every right to pursue their claims in the manner provided by existing regulations at the time it was filed.

4. **ID.; ID.; ID.; PETITIONER TIMELY FILED ITS JUDICIAL CLAIM ON JANUARY 23, 2009.—** As provided under Section

246 of the Tax Code: **SEC. 246.*Non-Retroactivity of Rulings***. — Any revocation, modification or reversal *of any of the rules and regulations* promulgated in accordance with the preceding Sections *or any of the rulings or circulars promulgated by the Commissioner* **shall not be given retroactive application if the revocation, modification or reversal will be prejudicial to the taxpayers,** except in the following cases: (a) Where the taxpayer deliberately misstates or omits material facts from his return or any document required of him by the Bureau of Internal Revenue; (b) Where the facts subsequently gathered by the Bureau of Internal Revenue are materially different from the facts on which the ruling is based; or (c) Where the taxpayer acted in bad faith. Applying the foregoing precepts to the case at bench, it is observed that the CIR made no effort to question the inadequacy of the documents submitted by Total Gas. It neither gave notice to Total Gas that its documents were inadequate, nor ruled to deny its claim for failure to adequately substantiate its claim. Thus, for purposes of counting the 120-day period, it should be reckoned from August 28, 2008, the date when Total Gas made its "submission of complete documents to support its application" for refund of excess unutilized input VAT. Consequently, counting from this later date, the BIR had 120 days to decide the claim or until December 26, 2008. With absolutely no action or notice on the part of the BIR for 120 days, Total Gas had 30 days or until January 25, 2009 to file its judicial claim. Total Gas, thus, timely filed its judicial claim on January 23, 2009.

5. ID.; ID.; ID.; TAXPAYERS CANNOT SIMPLY BE FAULTED FOR FAILING TO SUBMIT THE COMPLETE DOCUMENTS ENUMERATED IN REVENUE MEMORANDUM CIRCULAR NO. 53-98, ABSENT NOTICE FROM A REVENUE OFFICER OR EMPLOYEE THAT OTHER DOCUMENTS ARE REQUIRED.— As explained earlier and underlined in *Team Sual* above, taxpayers cannot simply be faulted for failing to submit the complete documents enumerated in RMO No. 53-98, absent notice from a revenue officer or employee that other documents are required. Granting that the BIR found that the documents submitted by Total Gas were inadequate, it should have notified the latter of the inadequacy by sending it a request to produce the necessary documents in order to make a just and expeditious resolution of the claim. Indeed, a taxpayer's failure with the requirements

listed under RMO No. 53-98 is not fatal to its claim for tax credit or refund of excess unutilized excess VAT. This holds especially true when the application for tax credit or refund of excess unutilized excess VAT has arrived at the judicial level. After all, in the judicial level or when the case is elevated to the Court, the Rules of Court governs. Simply put, the question of whether the evidence submitted by a party is sufficient to warrant the granting of its prayer lies within the sound discretion and judgment of the Court.

6. **ID.; ID.; ID.; THE FAILURE OF THE RECEIVING OFFICER OF THE BUREAU OF INTERNAL REVENUE (BIR) TO INDICATE THE PRECISE DATE AND TIME WHEN THE DOCUMENTS WERE RECEIVED SHOULD NOT PREJUDICE PETITIONER.—** At this point, it is worth emphasizing that the reckoning of the 120-day period from August 28, 2008 cannot be doubted. *First,* a review of the records of the case undubitably show that Total Gas filed its supporting documents on August 28, 2008, together with a transmittal letter bearing the same date. These documents were then *stamped* and *signed* as received by the appropriate officer of the BIR. *Second*, contrary to RMO No. 40-94, which mandates officials of the BIR to indicate the date of receipt of documents received by their office in every claim for refund or credit of VAT, the receiving officer failed to indicate the precise date and time when he received these documents. Clearly, the error is attributable to the BIR officials and should not prejudice Total Gas.

7. **ID.; ID.; ID.; JUDICIAL CLAIM NOT PREMATURELY FILED.—** It should be mentioned that the appeal made by Total Gas to the CTA cannot be said to be premature on the ground that it did not observe the otherwise mandatory and jurisdictional 120+30 day period. When Total Gas filed its appeal with the CTA on January 23, 2009, it simply relied on BIR Ruling No. DA-489-03, **which, at that time, was not yet struck down** by the Court's ruling in *Aichi*. As explained in *San Roque*, this Court recognized a period in time wherein the 120-day period need not be strictly observed.

8. **ID.; ID.; ID.; THE CASE IS REMANDED TO THE COURT OF TAX APPEALS FOR TRIAL *DE NOVO* ON THE AMOUNT OF REFUND OR TAX CREDIT PETITIONER IS ENTITLED TO.—** In the present case, however, Total

Gas filed its judicial claim due to the inaction of the BIR. Considering that the administrative claim was never acted upon; there was no decision for the CTA to review on appeal per se. Consequently, the CTA may give credence to all evidence presented by Total Gas, including those that may not have been submitted to the CIR as the case is being essentially decided in the first instance. The Total Gas must prove every minute aspect of its case by presenting and formally offering its evidence to the CTA, which must necessarily include whatever is required for the successful prosecution of an administrative claim. The Court cannot, however, make a ruling on the issue of whether Total Gas is entitled to a refund or tax credit certificate in the amount of ₱7,898,433.98. Considering that the judicial claim was denied due course and dismissed by the CTA Division on the ground of premature and/or belated filing, no ruling on the issue of Total Gas entitlement to the refund was made. The Court is not a trier of facts, especially when such facts have not been ruled upon by the lower courts. The case shall, thus, be remanded to the CTA Division for trial *de novo.*

LEONEN, *J., concurring opinion*:

1. TAXATION; NATIONAL INTERNAL REVENUE CODE; TAX CREDITS; REFUNDS OR TAX CREDITS OF INPUT TAX; IT IS THE TAXPAYER THAT HAS THE BURDEN OF PROVING ITS BASIS FOR A CLAIM FOR EXEMPTIONS AND VALUE ADDED TAX (VAT) REFUNDS.— In view of the nature of a judicial action explained in *Commissioner of Internal Revenue v. Aichi Forging Company of Asia, Inc.* and deftly emphasized again in this case, it is the taxpayer that has the greater incentive to present as complete a set of evidence as possible to have the Commissioner rule and, should the ruling be adverse, as basis for an appeal. On the other hand, it is not to the government's interest to allow the Bureau of Internal Revenue to determine whether the documents are complete. Otherwise, we would sanction bias on its part with the corresponding opportunities for illicit rent-seeking that deters honest investors and prudent entrepreneurship. Should the documents, in the opinion of the Commissioner, be incomplete, then the Commissioner should simply proceed to decide on the administrative claim. The sooner it is resolved, the better its effect on our economy. After all,

it is truly the taxpayer that has the burden of proving its basis for a claim for tax exemptions and VAT refunds.

2. ID.; ID.; ID.; ANY ATTEMPT ON THE TAXPAYER TO AMEND OR ADD TO THE DOCUMENTS IT INITIALLY SUBMITTED AFTER AN ADMINISTRATIVE FINDING BY THE COMMISSIONER IS UNACCEPTABLE; THE PREROGATIVE OF THE TAXPAYER AND THE INTEREST OF THE STATE IS NOT TO MAKE THE REGULATORY PERIOD OF 120 DAYS IN SECTION 112(D) FLEXIBLE.— Any attempt on the part of the taxpayer to amend or add to the documents it initially submitted after an administrative finding by the Commissioner would, therefore, be unacceptable. This way, the prerogative of the taxpayer and the interest of the state, in not making the regulatory period of 120 days in Section 112 (D) flexible, could be met. Therefore, I do not agree that the effect of Revenue Memorandum Circular No. 54-2014 and its validity should be decided in this case to arrive at the required result. The ambient facts in *Hedcor v. Commissioner of Internal Revenue* are different from this case. In *Hedcor*, before the filing of a Petition for Review before the Court of Tax Appeals, there was a letter of authority to the officials of the Bureau of Internal Revenue to inspect the documents of the taxpayer. In this case, there was none. It was the taxpayer, on its own initiative, that sought to complete its submissions. Parenthetically, the belated issuance of a letter of authority for administrative claims for VAT refunds in Hedcor seems to me, at best, strange. At worse, it is irregular.

APPEARANCES OF COUNSEL

Aranas Law Office for petitioner.
The Solicitor General for respondent.

D E C I S I O N

MENDOZA, *J.*:

Before the Court is a petition for review on *certiorari*[1] under Rule 45 of the Rules of Court assailing the October 11, 2012

[1] *Rollo,* pp. 11-394.

Decision[2] and the May 8, 2013 Resolution[3] of the Court of Tax Appeals *(CTA) En Banc*, in CTA EB Case No. 776, which affirmed the January 13, 2011 Decision[4] of the CTA Third Division *(CTA Division)* in CTA Case No. 7863.

The Facts

Petitioner Pilipinas Total Gas, Inc. *(Total Gas)* is engaged in the business of selling, transporting and distributing industrial gas. It is also engaged in the sale of gas equipment and other related businesses. For this purpose, Total Gas registered itself with the Bureau of Internal Revenue *(BIR)* as a Value Added Tax *(VAT)* taxpayer.

On April 20, 2007 and July 20, 2007, Total Gas filed its Original Quarterly VAT Returns for the First and Second quarters of 2007, respectively with the BIR.

On May 20, 2008, it filed its Amended Quarterly VAT Returns for the first two quarters of 2007 reflecting its sales subject to VAT, zero-rated sales, and domestic purchases of non-capital goods and services.

For the First and Second quarters of 2007, Total Gas claimed it incurred unutilized input VAT credits from its domestic purchases of non-capital goods and services in the total amount of ₱8,124,400.35. Of this total accumulated input VAT, Total Gas claimed that it had ₱7,898,433.98 excess unutilized input VAT.

On **May 15, 2008**, Total Gas filed an administrative claim for refund of unutilized input VAT for the first two quarters of taxable year 2007, inclusive of supporting documents.

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[2] *Id*. at 39-60; penned by Associate Justice Esperanza R. Fabon-Victorino, with Associate Justice Ernesto D. Acosta, Associate Justice Juanito C. Castaneda, Jr., Associate Justice Caesar A. Casanova, Associate Justice Olga Palanca-Enriquez, and Associate Justice Cielito N. Mindaro-Grulla, concurring; Associate Justice Lovell R. Bautista, dissenting; and Associate Justice Erlinda P. Uy and Associate Justice Amelia R. Cotangco-Manalastas, on leave.

[3] *Id*. at 62-65.

[4] *Id*. at 93-108.

On **August 28, 2008**, Total Gas submitted additional supporting documents to the BIR.

On January 23, 2009, Total Gas elevated the matter to the CTA in view of the inaction of the Commissioner of Internal Revenue (*CIR*).

During the hearing, Total Gas presented, as witnesses, Rosalia T. Yu and Richard Go, who identified documentary evidence marked as Exhibits "A" to "ZZ-1," all of which were admitted. Respondent CIR, on the other hand, did not adduce any evidence and had the case submitted for decision.

Ruling of the CTA Division

In its January 13, 2011 Decision,[5] the CTA Division dismissed the petition for being prematurely filed. It explained that Total Gas failed to complete the necessary documents to substantiate a claim for refund of unutilized input VAT on purchases of goods and services enumerated under Revenue Memorandum Order *(RMO)* No. 53-98. Of note were the lack of Summary List of Local Purchases and the certifications from the Office of the Board of Investment *(BOD),* the Bureau of Customs *(BOC),* and the Philippine Economic Zone Authority *(PEZA)* that the taxpayer had not filed any similar claim for refund covering the same period.[6]

Believing that Total Gas failed to complete the necessary documents to substantiate its claim for refund, the CTA Division was of the view that the 120-day period allowed to the CIR to decide its claim under Section 112 (C) of the National Internal Revenue Code of 1997 *(NIRC)*, had not even started to run. With this, the CTA Division opined that the petition for review was prematurely filed because Total Gas failed to exhauist the appropriate administrative remedies. The CTA Division stressed that tax refunds partake of the nature of an exemption, putting into operation the rule of strict interpretation, with the taxpayer

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[5] *Id*.

[6] *Id*. at 102-105.

being charged with the burden of proving that he had satisfied all the statutory and administrative requirements.[7]

Total Gas sought for reconsideration[8] from the CTA Division, but its motion was denied for lack of merit in a Resolution, dated April 19, 2011.[9] In the same resolution, it reiterated that "that the complete supporting documents should be submitted to the BIR before the 120-day period for the Commissioner to decide the claim for refund shall commence to run. It is only upon the lapse of the 120-day period that the taxpayer can appeal the inaction [to the CTA.]"[10] It noted that RMO No. 53-98, which provides a checklist of documents for the BIR to consider in granting claims for refund, also serves as a guideline for the courts to determine if the taxpayer had submitted complete supporting documents.[11] It also stated that Total Gas could not invoke Revenue Memorandum Circular *(RMC)* No. 29-09 because it was issued after the administrative claim was filed and could not be applied retroactively.[12] Thus, the CTA Division disposed:

> WHEREFORE, premises considered, the present Petition for Review is hereby DENIED DUE COURSE, and, accordingly DISMISSED for having been prematurely filed.
>
> SO ORDERED.[13]

Ruling of the CTA En Banc

In its assailed decision, the CTA *En Banc* likewise denied the petition for review of Total Gas for lack of merit. It condensed its arguments into two core issues, to wit: (1) whether Total Gas seasonably filed its judicial claim for refund; and (2) whether

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[7] *Id*. at 106-107.

[8] *Id*. at 114-126.

[9] *Id*. at 128-133.

[10] *Id*. at 130.

[11] *Id*.

[12] *Id*.

[13] *Id*. at 107.

it was unable to substantiate its administrative claim for refund by failing to submit the required documents that would allow respondent to act on it.[14]

As to the first issue, the CTA *En Banc* ruled that the CTA Division had no jurisdiction over the case because Total Gas failed to seasonably file its petition. Counting from the date it filed its administrative claim on May 15, 2008, the CTA *En Banc* explained that the CIR had 120 days to act on the claim (until September 12, 2008), and Total Gas had 30 days from then, or until October 12, 2008, to question the inaction before the CTA. Considering that Total Gas only filed its petition on January 23, 2009, the CTA *En Banc* concluded that the petition for review was belatedly filed. For the tax court, the 120-day period could not commence on the day Total Gas filed its last supporting document on August 28, 2008, because to allow such would give the taxpayer unlimited discretion to indefinitely extend the 120-day period by simply filing the required documents piecemeal.[15]

As to the second issue, the CTA *En Banc* affirmed the CTA Division that Total Gas failed to submit the complete supporting documents to warrant the grant of its application for refund. Quoting the pertinent portion of the decision of its division, the CTA *En Banc* likewise concurred in its finding that the judicial claim of Total Gas was prematurely filed because the 120-day period for the CIR to decide the claim had yet to commence to run due to the lack of essential documents.[16]

Total Gas filed a motion for reconsideration,[17] but it was denied in the assailed resolution of the CTA *En Banc*.[18]

Hence, the present petition.

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[14] *Id*. at 52.

[15] *Id*. at 56-57.

[16] *Id*. at 57-58.

[17] *Id*. at 157-169.

[18] *Id*. at 62-65.

ISSUES

(a) whether the judicial claim for refund was belatedly filed on 23 January 2009, or way beyond the 30-day period to appeal as provided in Section 112(c) of the Tax Code, as amended; and

(b) whether the submission of incomplete documents at the adminstrative level (BIR) renders the judicial claim premature and dismissible for lack of jurisdiction. [19]

In its petition, Total Gas argues that its judicial claim was filed within the prescriptive period for claiming excess unutilized input VAT refund as provided under Section 112 of the NIRC and expounded in the Court's ruling in *CIR v. Aichi Forging Company of Asia*[20] *(Aichi)* and in compliance with Section 112 of the NIRC. In addition to citing Section 112 (C) of the Tax Code, Total Gas points out that in one of its previous claims for refund of excess unutilized input VAT, the CTA *En Banc* in CTA *En Banc* Case No. 674,[21] faulted the BIR in not considering that the reckoning period for the 120-period should be counted from the date of submission of complete documents.[22] It then adds that the previous ruling of the CTA *En Banc* was in accordance with law because Section 112 (C) of the Tax Code is clear in providing that the 120-day period should be counted from the date of its submission of the complete documents or from August 28, 2008 and not from the date it filed its administrative claim on May 15, 2008.[23] Total Gas argues that, since its claim was filed within the period of exception provided in *CIR v. San Roque Power Corporation*[24] *(San Roque)*, it did not have to strictly comply with 120+30 day period before it could seek judicial relief.[25]

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[19] *Id*. at 18.

[20] 646 Phil. 710 (2010).

[21] Affirmed by the Third Division of this Court in G.R. No. 201920 via Resolutions dated October 14, 2013 and February 10, 2014; see *roll*o, G.R. No. 201920, p. 302 and p. 320.

[22] *Id*. at 20-21.

[23] *Id*. at 21.

[24] G.R. No. 187485, February 12, 2013, 690 SCRA 336.

[25] *Rollo,* pp. 21-22.

Moreover, Total Gas questions the logic of the CTA *En Banc* which stated that the petition was filed both belatedly and prematurely. Total Gas points out that on the one hand, the CTA *En Banc* ruled that it filed the judicial claim belatedly as it was way beyond the 120+30 day period. Yet, it also affirmed the findings of its division that its petition for review was prematurely filed since the 120-day period did not even commence to run for lack of complete supporting documents.[26]

For Total Gas, the CTA *En Banc* violated the doctrine of *stare decisis* because the tax tribunal had, on numerous occassions, held that the submission of incomplete supporting documents should not make the judicial appeal premature and dismissible for lack of jurisdiction. In these decisions, the CTA *En Banc* had previously held that non-compliance with RMO No. 53-98 should not be fatal since the requirements listed therein refer to requirements for refund or tax credit in the administrative level for purposes of establishing the authenticity of a taxpayer's claim; and that in the judicial level, it is the Rules of Court that govern and, thus, whether or not the evidence submitted by the party to the court is sufficient lies within the sound discretion of the court. Total Gas emphasizes that RMO No. 53-98 does not state that non-submission of supporting documents will nullify the judicial claim. It posits that once a judicial claim is filed, what should be examined are the evidence formally offered in the judicial proceedings.[27]

Even assuming that the supporting documents submitted to the BIR were incomplete, Total Gas argues that there was no legal basis to hold that the CIR could not decide or act on the claim for refund without the complete supporting documents. It argues that under RMC No. 29-09, the BIR is tasked with the duty to notify the taxpayer of the incompleteness of its supporting documents and, if the taxpayer fails to complete the supporting supporting documents despite such notice, the same shall be denied. The same regulation provides that for purposes

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[26] *Id*. at 23.

[27] *Id*. at 23-25.

of computing the 120-day period, it should be considered tolled when the taxpayer is notified. Total Gas, however, insists that it was never notified and, therefore, was justified in seeking judicial relief.[28]

Although Total Gas admits that RMC No. 29-09 was not yet issued at the time it filed its administrative claim, the BIR still erred for not notifying them of their lack of supporting documents. According to Total Gas, the power to notify a taxpayer of lacking documents and to deny its claim if the latter would not comply is inherent in the CIR's power to decide refund cases pursuant to Section 4 of the NIRC. It adds "[s]ound policy also dictates that it should be the taxpayer who should determine whether he has already submitted all documents pertinent to his claim. To rule otherwise would result into a never-ending conflict/issue as to the completeness of documents which, in turn, would delay the taxpayer's claim, and would put to naught the protection afforded by Section 112 (C) of the Tax Code."[29]

In her Comment,[30] the CIR echoed the ruling of the CTA *En Banc*, that Total Gas filed its petition out of time. She countered that the 120-day period could not be counted from the time Total Gas submitted its additional documents on August 28, 2008 because such an interpretation of Section 112(D) would indefinitely extend the prescriptive period as provided in favor of the taxpayer.

In its Reply,[31] Total Gas insisted that Section 112(C) stated that the 120-day period should be reckoned from the date of submission of complete documents, and not from the date of the filing of the administrative claim.

Ruling of the Court

The petition has merit.

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[28] *Id*. at 25-26.

[29] *Id*. at 28.

[30] *Id*. at 426-433.

[31] *Id*. at 436-440.

Judicial claim timely filed

Section 112 (C) of the NIRC provides:

SEC. 112. Refunds or Tax Credits of Input Tax. –

x x x x x x x x x

(C) Period within which Refund or Tax Credit of Input Taxes shall be Made. – In proper cases, the Commissioner shall grant a refund or issue the tax credit certificate for creditable input taxes within one hundred twenty (120) days **from the date of submission of complete documents** in support of the application filed in accordance with Subsections (A) and (B) hereof.

In case of full or partial denial of the claim for tax refund or tax credit, or the failure on the part of the Commissioner to act on the application within the period prescribed above, the taxpayer affected may, within thirty (30) days from the receipt of the decision denying the claim or after the expiration of the one hundred twenty day-period, appeal the decision or the unacted claim with the Court of Tax Appeals.-

x x x x x x x x x

[Emphasis and Underscoring Supplied]

From the above, it is apparent that the CIR has 120 days **from the date of submission of complete documents** to decide a claim for tax credit or refund of creditable input taxes. The taxpayer may, within 30 days from receipt of the denial of the claim or after the expiration of the 120-day period, which is considered a "denial due to inaction," appeal the decision or unacted claim to the CTA.

To be clear, Section 112(C) categorically provides that the 120-day period is counted "**from the date of submission of complete documents** in support of the application." Contrary to this mandate, the CTA *En Banc* counted the running of the period from the date the application for refund was filed or May 15, 2008, and, thus, ruled that the judicial claim was belatedly filed.

This should be corrected.

Indeed, the 120-day period granted to the CIR to decide the administrative claim under the Section 112 is primarily intended to benefit the taxpayer, to ensure that his claim is decided judiciously and expeditiously. After all, the sooner the taxpayer successfully processes his refund, the sooner can such resources be further reinvested to the business translating to greater efficiencies and productivities that would ultimately uplift the general welfare. To allow the CIR to determine the completeness of the documents submitted and, thus, dictate the running of the 120-day period, would undermine these objectives, as it would provide the CIR the unbridled power to indefinitely delay the administrative claim, which would ultimately prevent the filing of a judicial claim with the CTA.

A hypothetical situation illustrates the hazards of granting the CIR the authority to decide when complete documents have been submitted – A taxpayer files its administrative claim for VAT refund/credit with supporting documents. After 121 days, the CIR informs the taxpayer that it must submit additional documents. Considering that the CIR had determined that complete documents have not yet been submitted, the 120-day period to decide the administrative claim has not yet begun to run. In the meantime, more than 120 days have already passed since the application with the supporting documents was filed to the detriment of the taxpayer, who has no opportunity to file a judicial claim until the lapse of the 120+30 day period in Section 112(C). With no limitation to the period for the CIR to determine when complete documents have been submitted, the taxpayer may be left in a limbo and at the mercy of the CIR, with no adequate remedy available to hasten the processing of its administrative claim.

Thus, the question must be asked: In an administrative claim for tax credit or refund of creditable input VAT, from what point does the law allow the CIR to determine when it should decide an application for refund? Or stated differently: *Under present law, when should the submission of documents be deemed "completed" for purposes of determining the running of the 120-day period?*

Ideally, upon filing his administrative claim, a taxpayer should complete the necessary documents to support his claim for tax credit or refund or for excess utilized VAT. After all, should the taxpayer decide to submit additional documents and effectively extend the 120-period, it grants the CIR more time to decide the claim. Moreover, it would be prejudicial to the interest of a taxpayer to prolong the period of processing of his application before he may reap the benefits of his claim. Therefore, *ideally*, the CIR has a period of 120 days from the date an administrative claim is filed within which to decide if a claim for tax credit or refund of excess unutilized VAT has merit.

Thus, when the VAT was first introduced through Executive Order No. 273,[32] the pertinent rule was that:

> (e) Period within which refund of input taxes may be made by the Commissioner. The Commissioner shall refund input taxes within 60 days **from the date the application for refund was filed** with him or his duly authorized representative. No refund or input taxes shall be allowed unless the VAT-registered person files an application for refund within the period prescribed in paragraphs (a), (b) and (c), as the case may be.
>
> [Emphasis Supplied]

Here, the CIR was not only given 60 days within which to decide an administrative claim for refund of input taxes, but the beginning of the period was reckoned "from the date the application for refund was filed."

When Republic Act *(R.A.)* No. 7716[33] was, however, enacted on May 5, 1994, the law was **amended** to read:

> (d) Period within which refund or tax credit of input taxes shall be made. – In proper cases, The Commissioner shall grant a refund

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[32] Titled "Adopting A Value-Added Tax, Amending For This Purpose Certain Provisions of the National Internal Revenue Code, and For Other Purposes."

[33] Titled "An Act Restructing the Value Added Tax (Vat) System, Widening its Tax Base and Enhancing its Administration, and for these Purposes Amending and Repealing the Relevant Provisions of the National Internal Revenue Code, as amended, and For Other Purposes."

or issue the tax credit for creditable input taxes within sixty (60) days **from the date of submission of complete documents in support of the application** filed in accordance with sub-paragraphs (a) and (b) hereof. In case of full or partial denial of the claim for tax refund or tax credit, or the failure on the part of the Commissioner to act on the application within the period prescribed above, the taxpayer affected may, within thirty (30) days from the receipt of the decision denying the claim or after the expiration of the sixty-day period, appeal the decision or the unacted claim with the Court of Tax Appeals.

[Emphasis Supplied]

Again, while the CIR was given only 60 days within which to act upon an administrative claim for refund or tax credit, the period came to be reckoned **"from the date of submission of complete documents in support of the application."** With this amendment, the date when a taxpayer made its submission of complete documents became relevant. In order to ensure that such date was at least determinable, RMO No. 4-94 provides:

REVENUE MEMORANDUM ORDER NO. 40-94

SUBJECT : *Prescribing the Modified Procedures on the Processing of Claims for Value-Added Tax Credit/Refund*

III. Procedures
REGIONAL OFFICE
A. Revenue District Office
In General:

1. Ascertain the completeness of the supporting documents prior to the receipt of the application for VAT credit/refund from the taxpayer.

2. Receive application for VAT Credit/Refund (BIR Form No. 2552) in three (3) copies in the following manner:

a. stamp the word "RECEIVED" on the appropriate space provided in all copies of application;

b. indicate the claim number;

c. indicate the date of receipt; and

d. initial by receiving officer.

The application shall be received only if the required attachments prescribed in RAMO 1-91 have been fully complied with. x x x

Then, when the NIRC[34] was enacted on January 1, 1998, the rule was once more amended to read:

(D) *Period within which Refund or Tax Credit of Input Taxes shall be Made*. – In proper cases, the Commissioner shall grant a refund or issue the tax credit certificate for creditable input taxes within **one hundred twenty (120) days from the date of submission of compete documents** in support of the application filed in accordance with Subsections (A) and (B) hereof.

In case of full or partial denial of the claim for tax refund or tax credit, or the failure on the part of the Commissioner to act on the application within the period prescribed above, the taxpayer affected may, within thirty (30) days from the receipt of the decision denying the claim or after the expiration of the one hundred twenty day-period, appeal the decision or the unacted claim with the Court of Tax Appeals.

[Emphasis Supplied]

This time, the period granted to the CIR to act upon an administrative claim for refund was extended to 120 days. The reckoning point however, remained **"from the date of submission of complete documents."**

Aware that not all taxpayers were able to file the complete documents to allow the CIR to properly evaluate an administrative claim for tax credit or refund of creditable input taxes, the CIR issued RMC No. 49-2003, which provided:

Q-18: *For pending claims with incomplete documents, what is the period within which to submit the supporting documents required by the investigating/processing office? When should the investigating/processing office officially receive claims for tax credit/refund and what is the period required to process such claims?*

A-18: **For pending claims** which have not been acted upon by the investigating/processing office due to incomplete documentation, **the taxpayer-claimants are given thirty (30) days within which**

[34] Otherwise known as R.A. No. 8424.

to submit the documentary requirements unless given further extension by the head of the processing unit, but such extension should not exceed thirty (30) days.

For claims to be filed by claimants with the respective investigating/processing office of the administrative agency, the same shall be **officially received** only upon submission of complete documents.

For current and future claims for tax credit/refund, the same shall be processed within one hundred twenty (120) days from receipt of the complete documents. If, in the course of the investigation and processing of the claim, additional documents are required for the proper determination of the legitimate amount of claim, the taxpayer-claimants shall submit such documents **within thirty (30) days from request of the investigating/processing office, which shall be construed as within the one hundred twenty (120) day period.**

[Emphases Supplied]

Consequently, upon filing of his application for tax credit or refund for excess creditable input taxes, the taxpayer-claimant is given thirty (30) days within which to complete the required documents, unless given further extension by the head of the processing unit. If, in the course of the investigation and processing of the claim, additional documents are required for the proper determination of the legitimate amount of claim, the taxpayer-claimants shall submit such documents within thirty (30) days from request of the investigating/processing office. Notice, by way of a request from the tax collection authority to produce the complete documents in these cases, became essential. It is only upon the submission of these documents that the 120-day period would begin to run.

Then, when R.A. No. 9337[35] was passed on July 1, 2005, the same provision under the NIRC was retained. With the amendment to Section 112, particularly the deletion of what was once Section 112(B) of the NIRC, Section 112 (D) was amended and renamed 112(C). Thus:

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[35] Titled "An Act Amending Sections 27, 28, 34, 106, 107, 108, 109, 110, 111, 112, 113, 114, 116, 117, 119, 121, 148, 151, 236, 237 And 288 of the National Internal Revenue Code of 1997, as Amended, and For Other Purposes.

(C) *Period within which Refund or Tax Credit of Input Taxes shall be Made.* – In proper cases, the Commissioner shall grant a refund or issue the tax credit certificate for creditable input taxes within one hundred twenty (120) days **from the date of submission of complete documents** in support of the application filed in accordance with Subsection (A) hereof.

In case of full or partial denial of the claim for tax refund or tax credit, or the failure on the part of the Commissioner to act on the application within the period prescribed above, the taxpayer affected may, within thirty (30) days from the receipt of the decision denying the claim or after the expiration of the one hundred twenty day-period, appeal the decision or the unacted claim with the Court of Tax Appeals.

With the amendments only with respect to its place under Section 112, the Court finds that RMC No. 49-2003 should still be observed. Thus, taking the foregoing changes to the law altogether, it becomes apparent that, for purposes of determining ***when*** the supporting documents have been completed – *it is the taxpayer who ultimately determines when complete documents have been submitted for the purpose of commencing and continuing the running of the 120-day period.* After all, he may have already completed the necessary documents the moment he filed his administrative claim, in which case, the 120-day period is reckoned from the date of filing. The taxpayer may have also filed the complete documents on the 30th day from filing of his application, pursuant to RMC No. 49-2003. He may very well have filed his supporting documents on the first day he was notified by the BIR of the lack of the necessary documents. In such cases, the 120-day period is computed from the date the taxpayer is able to submit the complete documents in support of his application.

Then, except in those instances where the BIR would require additional documents in order to fully appreciate a claim for tax credit or refund, in terms ***what*** additional document must be presented in support of a claim for tax credit or refund – it is the taxpayer who has that right and the burden of providing any and all documents that would support his claim for tax credit or refund. After all, in a claim for tax credit or refund,

it is the taxpayer who has the burden to prove his cause of action. As such, he enjoys relative freedom to submit such evidence to prove his claim.

The foregoing conclusion is but a logical consequence of the due process guarantee under the Constitution. Corollary to the guarantee that one be afforded the opportunity to be heard, it goes without saying that the applicant should be allowed reasonable freedom as to when and how to present his claim within the allowable period.

Thereafter, whether these documents are *actually* complete as required by law – is for the CIR and the courts to determine. Besides, as between a taxpayer-applicant, who seeks the refund of his creditable input tax and the CIR, it cannot be denied that the former has greater interest in ensuring that the complete set of documentary evidence is provided for proper evaluation of the State.

Lest it be misunderstood, the benefit given to the taxpayer to determine when it should complete its submission of documents is not unbridled. Under RMC No. 49-2003, if in the course of the investigation and processing of the claim, additional documents are required for the proper determination of the legitimacy of the claim, the taxpayer-claimants shall submit such documents within thirty (30) days from request of the investigating/processing office. **Again, notice, by way of a request from the tax collection authority to produce the complete documents in these cases, is essential.**

Moreover, under Section 112(A) of the NIRC,[36] as amended by RA 9337, a taxpayer has two (2) years, after the close of

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[36] (A) Zero-Rated or Effectively Zero-Rated Sales. - Any VAT-registered person, whose sales are zero-rated or effectively zero-rated may, within two (2) years after the close of the taxable quarter when the sales were made, apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales, except transitional input tax, to the extent that such input tax has not been applied against output tax: Provided, however, That in the case of zero-rated sales under Section 106(A)(2)(a)(1), (2) and (b) and Section 108 (B)(1) and (2), the acceptable

the taxable quarter when the sales were made, to apply for the issuance of a tax credit certificate or refund of creditable input tax due or paid attributable to such sales. Thus, before the administrative claim is barred by prescription, the taxpayer must be able to submit his complete documents in support of the application filed. This is because, it is upon the complete submission of his documents in support of his application that it can be said that the application was, "officially received" as provided under RMC No. 49-2003.

To summarize, for the just disposition of the subject controversy, the rule is that from the date an administrative claim for excess unutilized VAT is filed, a taxpayer has thirty (30) days within which to submit the documentary requirements sufficient to support his claim, unless given further extension by the CIR. Then, upon filing by the taxpayer of his complete documents to support his application, or expiration of the period given, the CIR has 120 days within which to decide the claim for tax credit or refund. Should the taxpayer, on the date of his filing, manifest that he no longer wishes to submit any other addition documents to complete his administrative claim, the 120 day period allowed to the CIR begins to run from the date of filing.

In all cases, whatever documents a taxpayer intends to file to support his claim must be completed within the two-year period under Section 112(A) of the NIRC. The 30-day period from denial of the claim or from the expiration of the 120-day period within which to appeal the denial or inaction of the CIR to the CTA must also be respected.

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foreign currency exchange proceeds thereof had been duly accounted for in accordance with the rules and regulations of the Bangko Sentral ng Pilipinas (BSP): Provided, further, That where the taxpayer is engaged in zero-rated or effectively zero-rated sale and also in taxable or exempt sale of goods of properties or services, and the amount of creditable input tax due or paid cannot be directly and entirely attributed to any one of the transactions, it shall be allocated proportionately on the basis of the volume of sales: Provided, finally, That for a person making sales that are zero-rated under Section 108 (B)(6), the input taxes shall be allocated ratably between his zero-rated and non-zero-rated sales.

It bears mentioning at this point that the foregoing summation of the rules *should only be made applicable to those claims for tax credit or refund filed prior to June 11, 2014*, such as the claim at bench. As it now stands, RMC 54-2014 dated June 11, 2014 mandates that:

> The application for VAT refund/tax credit **must be accompanied by complete supporting documents** as enumerated in Annex "A" hereof. In addition, the taxpayer shall attach **a statement under oath** attesting to the completeness of the submitted documents (Annex B). The affidavit shall further state that the said documents are the only documents which the taxpayer will present to support the claim. If the taxpayer is a juridical person, there should be a sworn statement that the officer signing the affidavit (i.e., at the very least, the Chief Financial Officer) has been authorized by the Board of Directors of the company.
>
> Upon submission of the administrative claim and its supporting documents, the claim shall be processed and no other documents shall be accepted/required from the taxpayer in the course of its evaluation. A decision shall be rendered by the Commissioner based only on the documents submitted by the taxpayer. The application for tax refund/tax credit shall be denied where the taxpayer/claimant failed to submit the complete supporting documents. For this purpose, the concerned processing/investigating office shall prepare and issue the corresponding Denial Letter to the taxpayer/claimant."

Thus, under the current rule, the reckoning of the 120-day period has been withdrawn from the taxpayer by RMC 54-2014, since it requires him at the time he files his claim to complete his supporting documents and attest that he will no longer submit any other document to prove his claim. Further, the taxpayer is barred from submitting additional documents after he has filed his administrative claim.

On this score, the Court finds that the foregoing issuance **cannot be applied rectroactively to the case at bar** since *it imposes new obligations upon taxpayers in order to perfect their administrative claim*, that is, [1] compliance with the mandate to submit the "supporting documents" enumerated under RMC 54-2014 under its "Annex A"; and [2] the filing of "a statement under oath attesting to the completeness of the submitted

documents," referred to in RMC 54-2014 as "Annex B." This should not prejudice taxpayers who have every right to pursue their claims in the manner provided by existing regulations at the time it was filed.

As provided under Section 246 of the Tax Code:

SEC. 246. ***Non-Retroactivity of Rulings.*** **—** Any revocation, modification or reversal *of any of the rules and regulations* promulgated in accordance with the preceding Sections *or any of the rulings or circulars promulgated by the Commissioner* **shall not be given retroactive application if the revocation, modification or reversal will be prejudicial to the taxpayers**, except in the following cases:

(a) Where the taxpayer deliberately misstates or omits material facts from his return or any document required of him by the Bureau of Internal Revenue;

(b) Where the facts subsequently gathered by the Bureau of Internal Revenue are materially different from the facts on which the ruling is based; or

(c) Where the taxpayer acted in bad faith.

[Emphasis and Italics Supplied]

Applying the foregoing precepts to the case at bench, it is observed that the CIR made no effort to question the inadequacy of the documents submitted by Total Gas. It neither gave notice to Total Gas that its documents were inadequate, nor ruled to deny its claim for failure to adequately substantiate its claim. Thus, for purposes of counting the 120-day period, it should be reckoned from August 28, 2008, the date when Total Gas made its "submission of complete documents to support its application" for refund of excess unutilized input VAT. Consequently, counting from this later date, the BIR had 120 days to decide the claim or until December 26, 2008. With absolutely no action or notice on the part of the BIR for 120 days, Total Gas had 30 days or until January 25, 2009 to file its judicial claim.

Total Gas, thus, timely filed its judicial claim on January 23, 2009.

Anent RMO No. 53-98, the CTA Division found that the said order provided a checklist of documents for the BIR to consider in granting claims for refund, and served as a guide for the courts in determining whether the taxpayer had submitted complete supporting documents.

This should also be corrected.

To quote RMO No. 53-98:

REVENUE MEMORANDUM ORDER NO. 53-98

SUBJECT: Checklist of Documents to be Submitted by a Taxpayer upon Audit of his Tax Liabilities as well as of the Mandatory Reporting Requirements to be Prepared by a Revenue Officer, all of which Comprise a Complete Tax Docket.

TO: All Internal Revenue Officers, Employees and Others Concerned

I. *BACKGROUND*

It has been observed that for the same kind of tax audit case, Revenue Officers differ in their request for requirements from taxpayers as well as in the attachments to the dockets resulting to tremendous complaints from taxpayers and confusion among tax auditors and reviewers.

For equity and uniformity, this Bureau comes up with a prescribed list of requirements from taxpayers, per kind of tax, as well as of the internally prepared reporting requirements, all of which comprise a complete tax docket.

II. *OBJECTIVE*

This order is issued to:
a. Identify the documents to be required from a taxpayer during audit, according to particular kind of tax; and

b. Identify the different audit reporting requirements to be prepared, submitted and attached to a tax audit docket.

III. *LIST OF REQUIREMENTS PER TAX TYPE*

Income Tax/ Withholding Tax
– Annex A (3 pages)

Value Added Tax
– Annex B (2 pages)
– Annex B-1 (5 pages)

x x x x x x x x x

As can be gleaned from the above, RMO No. 53-98 is addressed to internal revenue officers and employees, for purposes of equity and uniformity, to guide them as to what documents they may require taxpayers to present **upon audit of their tax liabilities**. Nothing stated in the issuance would show that it was intended to be a benchmark in determining whether the documents submitted by a taxpayer are *actually* complete to support a claim for tax credit or refund of excess unutilized excess VAT. As expounded in *Commissioner of Internal Revenue v. Team Sual Corporation (formerely Mirant Sual Corporation)*:[37]

The CIR's reliance on RMO 53-98 is misplaced. There is nothing in Section 112 of the NIRC, RR 3-88 or RMO 53-98 itself that requires submission of the complete documents enumerated in RMO 53-98 for a grant of a refund or credit of input VAT. The subject of RMO 53-98 states that it is a "Checklist of Documents to be Submitted by a Taxpayer upon **Audit** of his Tax Liabilities x x x." In this case, TSC was applying for a grant of refund or credit of its input tax. There was no allegation of an audit being conducted by the CIR. Even assuming that RMO 53-98 applies, it specifically states that some documents are required to be submitted by the taxpayer "if applicable."

Moreover, if TSC indeed failed to submit the complete documents in support of its application, the CIR could have informed TSC of its failure, consistent with Revenue Memorandum Circular No. (RMC) 42-03. However, the CIR did not inform TSC of the document it failed to submit, even up to the present petition. The CIR likewise raised the issue of TSC's alleged failure to submit the complete documents only in its motion for reconsideration of the CTA Special First Division's 4 March 2010 Decision. Accordingly, we affirm the CTA EB's finding that TSC filed its administrative claim on 21 December 2005, and submitted the complete documents in support of its application for refund or credit of its input tax at the same time.

[Emphasis included. Underlining Ours.]

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[37] G.R. No. 205055, July 18, 2014, 730 SCRA 242.

As explained earlier and underlined in *Team Sual* above, taxpayers cannot simply be faulted for failing to submit the complete documents enumerated in RMO No. 53-98, absent notice from a revenue officer or employee that other documents are required. Granting that the BIR found that the documents submitted by Total Gas were inadequate, it should have notified the latter of the inadequacy by sending it a request to produce the necessary documents in order to make a just and expeditious resolution of the claim.

Indeed, a taxpayer's failure with the requirements listed under RMO No. 53-98 is not fatal to its claim for tax credit or refund of excess unutilized excess VAT. This holds especially true when the application for tax credit or refund of excess unutilized excess VAT has arrived at the judicial level. After all, in the judicial level or when the case is elevated to the Court, the Rules of Court governs. Simply put, the question of whether the evidence submitted by a party is sufficient to warrant the granting of its prayer lies within the sound discretion and judgment of the Court.

At this point, it is worth emphasizing that the reckoning of the 120-day period from August 28, 2008 cannot be doubted. *First*, a review of the records of the case undubitably show that Total Gas filed its supporting documents on August 28, 2008, together with a transmittal letter bearing the same date. These documents were then *stamped* and *signed* as received by the appropriate officer of the BIR. *Second,* contrary to RMO No. 40-94, which mandates officials of the BIR to indicate the date of receipt of documents received by their office in every claim for refund or credit of VAT, the receiving officer failed to indicate the precise date and time when he received these documents. Clearly, the error is attributable to the BIR officials and should not prejudice Total Gas.

Third, it is observed that whether before the CTA or this Court, the BIR had never questioned the date it received the supporting documents filed by Total Gas, or the propriety of the filing thereof. In contrast to the contiuous efforts of Total Gas to complete the necessary documents needed to support its

application, all that was insisted by the CIR was that the reckoning period should be counted from the date Total Gas filed its application for refund of excess unutilized input VAT. There being no question as to whether these documents were actually received on August 28, 2008, this Court shall not, by way of conjecture, cast doubt on the truthfullness on such submission. *Finally*, in consonance with the presumption that a person acts in accordance with the ordinary course of business, it is presumed that such documents were received on the date stated therein.

Verily, should there be any doubt on whether Total Gas filed its supporting documents on August 28, 2008, it is incumbent upon the CIR to allege and prove such assertion. As the saying goes, *contra preferentum*.

If only to settle any doubt, this Court is by no means setting a precedent by leaving it to the mercy of the taxpayer to determine when the 120-day reckoning period should begin to run by providing absolute discretion as to when he must comply with the mandate submitting complete documents in support of his claim. In addition to the limitations thoroughly discussed above, the peculiar circumstance applicable herein, as to relieve Total Gas from the application of the rule, **is the obvious failure of the BIR to comply with the specific directive, under RMO 40-94, to stamp the date it received the supporting documents** which Total Gas had submitted to the BIR for its consideration in the processing of its claim. The utter failure of the tax administrative agency to comply with this simple mandate to stamp the date it receive the documents submitted by Total Gas – should not in any manner prejudice the taxpayer by casting doubt as to *when* it was able to submit its complete documents for purposes of determing the 120-day period.

While it is still true a taxpayer must prove not only his entitlement to a refund but also his compliance with the procedural due process[38] – it also true that when the law or rule mandates that a party or authority must comply with a specific obligation to perform an act for the benefit of another, the non-compliance

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[38] *CIR v. Aichi Forging Company of Asia, supra* note 17, at 714.

therof by the former should not operate to prejudice the latter, lest it render the nugatory the objective of the rule. Such is the situation in case at bar.

Judicial claim not prematurely filed

The CTA *En Banc* curiously ruled in the assailed decision that the judicial claim of Total Gas was not only belatedly filed, but prematurely filed as well, for failure of Total Gas to prove that it had submitted the complete supporting documents to warrant the grant of the tax refund and to reckon the commencement of the 120-day period. It asserted that Total Gas had failed to submit all the required documents to the CIR and, thus, the 120-day period for the CIR to decide the claim had not yet begun to run, resulting in the premature filing of the judicial claim. It wrote that the taxpayer must first submit the complete supporting documents before the 120-day period could commence, and that the CIR could not decide the claim for refund without the complete supporting documents.

The Court disagrees.

The alleged failure of Total Gas to submit the complete documents at the administrative level did not render its petition for review with the CTA dismissible for lack of jurisdiction. *First*, the 120-day period had commenced to run and the 120+30 day period was, in fact, complied with. As already discussed, it is the taxpayer who determines when complete documents have been submitted for the purpose of the running of the 120-day period. It must again be pointed out that *this in no way precludes the CIR from requiring additional documents necessary to decide the claim, or even denying the claim if the taxpayer fails to submit the additional documents requested.*

Second, the CIR sent no written notice informing Total Gas that the documents were incomplete or required it to submit additional documents. As stated above, such notice by way of a written request is required by the CIR to be sent to Total Gas. Neither was there any decision made denying the administrative claim of Total Gas on the ground that it had failed to submit all the required documents. It was precisely

the inaction of the BIR which prompted Total Gas to file the judicial claim. Thus, by failing to inform Total Gas of the need to submit any additional document, the BIR cannot now argue that the judicial claim should be dismissed because it failed to submit complete documents.

Finally, it should be mentioned that the appeal made by Total Gas to the CTA cannot be said to be premature on the ground that it did not observe the otherwise mandatory and juridictional 120+30 day period. When Total Gas filed its appeal with the CTA on January 23, 2009, it simply relied on BIR Ruling No. DA-489-03, **which, at that time, was not yet struck down** by the Court's ruling in *Aichi.* As explained in *San Roque*, this Court recognized a period in time wherein the 120-day period need not be strictly observed. Thus:

> To repeat, a claim for tax refund or credit, like a claim for tax exemption, is construed strictly against the taxpayer. One of the conditions for a judicial claim of refund or credit under the VAT System is compliance with the 120+30 day mandatory and jurisdictional periods. Thus, strict compliance with the 120+30 day periods is necessary for such a claim to prosper, whether before, during, or after the effectivity of the Atlas doctrine, **except for the period from the issuance of BIR Ruling No. DA-489-03 on 10 December 2003 to 6 October 2010 when the Aichi doctrine was adopted, which again reinstated the 120+30 day periods as mandatory and jurisdictional.**
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> x x x x x x x x x
>
> Clearly, BIR Ruling No. DA-489-03 is a general interpretative rule. **Thus, all taxpayers can rely on BIR Ruling No. DA-489-03 from the time of its issuance on 10 December 2003 up to its reversal by this Court in Aichi on 6 October 2010, where this Court held that the 120+30 day periods are mandatory and jurisdictional.**

At this stage, a review of the nature of a judicial claim before the CTA is in order. In *Atlas Consolidated Mining and Development Corporation v. CIR*, it was ruled —

> x x x First, a judicial claim for refund or tax credit in the CTA is by no means an original action but rather an *appeal* by way of petition for review of a previous, unsuccessful administrative claim. Therefore,

as in every appeal or petition for review, a petitioner has to convince the appellate court that the quasi-judicial agency *a quo* did not have any reason to deny its claims. In this case, it was necessary for petitioner to show the CTA not only that it was entitled under substantive law to the grant of its claims but also that it satisfied all the documentary and evidentiary requirements for an administrative claim for refund or tax credit. Second, cases filed in the CTA are litigated *de novo*. Thus, a petitioner should prove every minute aspect of its case by presenting, formally offering and submitting its evidence to the CTA. Since it is crucial for a petitioner in a judicial claim for refund or tax credit to show that its administrative claim should have been granted in the first place, part of the evidence to be submitted to the CTA must necessarily include whatever is required for the successful prosecution of an administrative claim.[39]

[Underscoring Supplied]

A distinction must, thus, be made between administrative cases appealed due to inaction and those dismissed at the administrative level due to the failure of the taxpayer to submit supporting documents. If an administrative claim was dismissed by the CIR due to the taxpayer's failure to submit complete documents despite notice/request, then the judicial claim before the CTA would be dismissible, not for lack of jurisdiction, but for the taxpayer's failure to substantiate the claim at the administrative level. When a judicial claim for refund or tax credit in the CTA is an appeal of an unsuccessful administrative claim, the taxpayer has to convince the CTA that the CIR had no reason to deny its claim. It, thus, becomes imperative for the taxpayer to show the CTA that not only is he entitled under substantive law to his claim for refund or tax credit, but also that he satisfied all the documentary and evidentiary requirements for an administrative claim. It is, thus, crucial for a taxpayer in a judicial claim for refund or tax credit to show that its administrative claim should have been granted in the first place. Consequently, a taxpayer cannot cure its failure to submit a document requested by the BIR at the administrative level by filing the said document before the CTA.

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[39] *Atlas Consolidated Mining and Development Corporation v. CIR*, 547 Phil. 332, 339 (2007).

In the present case, however, Total Gas filed its judicial claim due to the inaction of the BIR. Considering that the administrative claim was never acted upon; there was no decision for the CTA to review on appeal *per se*. Consequently, the CTA may give credence to all evidence presented by Total Gas, including those that may not have been submitted to the CIR as the case is being essentially decided in the first instance. The Total Gas must prove every minute aspect of its case by presenting and formally offering its evidence to the CTA, which must necessarily include whatever is required for the successful prosecution of an administrative claim.[40]

The Court cannot, however, make a ruling on the issue of whether Total Gas is entitled to a refund or tax credit certificate in the amount of ₱7,898,433.98. Considering that the judicial claim was denied due course and dismissed by the CTA Division on the ground of premature and/ or belated filing, no ruling on the issue of Total Gas entitlement to the refund was made. The Court is not a trier of facts, especially when such facts have not been ruled upon by the lower courts. The case shall, thus, be remanded to the CTA Division for trial *de novo*.

WHEREFORE, the petition is **PARTIALLY GRANTED**. The October 11, 2012 Decision and the May 8, 2013 Resolution of the Court of Tax Appeals *En Banc,* in CTA EB No. 776 are **REVERSED** and **SET ASIDE**.

The case is **REMANDED** to the CTA Third Division for trial *de novo*.

SO ORDERED.

Sereno, C.J., Carpio, Velasco, Jr., Leonardo-de Castro, Peralta, Bersamin, del Castillo, Villarama, Jr., Perez, Reyes, and *Perlas-Bernabe, JJ.,* concur.

Leonen, J., see concurring opinion.

Jardeleza, J., no part.

Brion, J., on leave.

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[40] *Id*.

CONCURRING OPINION

LEONEN, *J.*:

I concur with the ponencia in the result. I agree that it is the taxpayer's burden to determine whether complete documents have been submitted for purposes of computing the 120-day period[1] for the Commissioner to decide administrative claims.

Between the taxpayer and the Commissioner, it is the former that has the greater incentive to (a) have its case decided expeditiously by the Bureau of Internal Revenue, and (b) in cases where it prefers to have the Court of Tax Appeals rule on its case, have the administrative period lapse.

Besides, the sooner the taxpayer is able to get a refund, the sooner its resources can be further reinvested into our economy, thus translating to greater efficiencies, productivities, and an increase in overall welfare.

Furthermore, in view of the nature of a judicial action explained in *Commissioner of Internal Revenue v. Aichi Forging Company of Asia, Inc.*[2] and deftly emphasized again in this case, it is the taxpayer that has the greater incentive to present as complete a set of evidence as possible to have the Commissioner rule and, should the ruling be adverse, as basis for an appeal.

On the other hand, it is not to the government's interest to allow the Bureau of Internal Revenue to determine whether the documents are complete. Otherwise, we would sanction bias on its part with the corresponding opportunities for illicit rent-seeking that deters honest investors and prudent entrepreneurship. Should the documents, in the opinion of the Commissioner, be incomplete, then the Commissioner should simply proceed to

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[1] TAX CODE, SEC. 112(D) provides, in part, that "[i]n proper cases, the Commissioner shall grant a refund or issue the tax credit certificate for creditable input taxes within one hundred twenty (120) days from the date of submission of complete documents in support of the application filed in accordance with Subsection (A) hereof[.]

[2] 646 Phil. 710 (2010) [Per *J.* Del Castillo, First Division].

decide on the administrative claim. The sooner it is resolved, the better its effect on our economy. After all, it is truly the taxpayer that has the burden of proving its basis for a claim for tax exemptions[3] and VAT refunds.[4]

Any attempt on the part of the taxpayer to amend or add to the documents it initially submitted after an administrative finding by the Commissioner would, therefore, be unacceptable. This way, the prerogative of the taxpayer and the interest of the state, in not making the regulatory period of 120 days in Section 112(D) flexible, could be met. Therefore, I do not agree that the effect of Revenue Memorandum Circular No. 54-2014 and its validity should be decided in this case to arrive at the required result.

The ambient facts in *Hedcor v. Commissioner of Internal Revenue*[5] are different from this case. In *Hedcor,* before the filing of a Petition for Review before the Court of Tax Appeals, there was a letter of authority to the officials of the Bureau of Internal Revenue to inspect the documents of the taxpayer. In this case, there was none. It was the taxpayer, on its own initiative, that sought to complete its submissions. Parenthetically, the belated issuance of a letter of authority for administrative claims for VAT refunds in *Hedcor* seems to me, at best, strange. At worse, it is irregular.

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[3] See, for example, *Smart Communications, Inc. v. City of Davao*, 587 Phil. 20, 31 (2008) [Per *J.* Nachura, Third Division]; *Digital Telecom v. City Government of Batangas*, 594 Phil. 269, 299 (2008) [Per *J.* Carpio, *En Banc*].

[4] See, for example, *Republic v. GST Philippines, Inc.,* G.R. No. 190872, October 17, 2013, 707 SCRA 695, 712 [Per *J.* Perlas-Bernabe, *En Banc*]; *Microsoft Phils., Inc. v. Commissioner of Internal Revenue*, 662 Phil. 762, 767 (2011) [Per *J.* Carpio, Second Division]; *Bonifacio Water Corporation v. Commissioner of Internal Revenue,* G.R. No. 175142, July 22, 2013, 701 SCRA 574, 584 [Per *J.* Peralta, Third Division], citing *Western Mindanao Power v. Commissioner of Internal Revenue,* 687 Phil. 328 (2012) [Per *J.* Sereno (now Chief Justice), Second Division]. See also *Commissioner of Internal Revenue v. San Roque,* G.R. No. 187485, February 12, 2013, 690 SCRA 336, 383 [Per *J.* Carpio, *En Banc*].

[5] G.R. No. 207575, July 15, 2015 <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2015/july2015/207575.pdf> [Per *C.J.* Sereno, First Division].

EN BANC

[G.R. No. 209271. December 8, 2015]

INTERNATIONAL SERVICE FOR THE ACQUISITION OF AGRI-BIOTECH APPLICATIONS, INC., *petitioner, vs.* **GREENPEACE SOUTHEAST ASIA (PHILIPPINES), MAGSASAKA AT SIYENTIPIKO SA PAGPAPAUNLAD NG AGRIKULTURA (MASIPAG), REP. TEODORO CASIÑO, DR. BEN MALAYANG III, DR. ANGELINA GALANG, LEONARDO AVILA III, CATHERINE UNTALAN, ATTY. MARIA PAZ LUNA, JUANITO MODINA, DAGOHOY MAGAWAY, DR. ROMEO QUIJANO, DR. WENCESLAO KIAT, JR., ATTY. H. HARRY ROQUE, JR., FORMER SEN. ORLANDO MERCADO, NOEL CABANGON, MAYOR EDWARD S. HAGEDORN and EDWIN MARTHINE LOPEZ,** *respondents,* **CROP LIFE PHILIPPINES, INC.,** *petitioner-in-intervention.*

[G.R. No. 209276. December 8, 2015]

ENVIRONMENTAL MANAGEMENT BUREAU of the Department of Environment and Natural Resources, BUREAU OF PLANT INDUSTRY and FERTILIZER AND PESTICIDE AUTHORITY of the Department of Agriculture, *petitioners, vs.* **COURT OF APPEALS, GREENPEACE SOUTHEAST ASIA (PHILIPPINES), MAGSASAKA AT SIYENTIPIKO SA PAGPAPAUNLAD NG AGRIKULTURA (MASIPAG), REP. TEODORO CASIÑO, DR. BEN MALAYANG III, DR. ANGELINA GALANG, LEONARDO AVILA III, CATHERINE UNTALAN, ATTY. MARIA PAZ LUNA, JUANITO MODINA, DAGOHOY MAGAWAY, DR. ROMEO QUIJANO, DR. WENCESLAO KIAT, JR., ATTY. H. HARRY ROQUE, JR., FORMER SEN. ORLANDO MERCADO, NOEL CABANGON, MAYOR EDWARD S. HAGEDORN and EDWIN MARTHINE LOPEZ,**

respondents, **CROP LIFE PHILIPPINES, INC.,** *petitioner-in-intervention.*

[G.R. No. 209301. December 8, 2015]

UNIVERSITY OF THE PHILIPPINES LOS BAÑOS FOUNDATION, INC., *petitioner, vs.* **GREENPEACE SOUTHEAST ASIA (PHILIPPINES), MAGSASAKA AT SIYENTIPIKO SA PAGPAPAUNLAD NG AGRIKULTURA (MASIPAG), REP. TEODORO CASIÑO, DR. BEN MALAYANG III, DR. ANGELINA GALANG, LEONARDO AVILA III, CATHERINE UNTALAN, ATTY. MARIA PAZ LUNA, JUANITO MODINA, DAGOHOY MAGAWAY, DR. ROMEO QUIJANO, DR. WENCESLAO KIAT, JR., ATTY. HARRY R. ROQUE, JR., FORMER SEN. ORLANDO MERCADO, NOEL CABANGON, MAYOR EDWARD S. HAGEDORN and EDWIN MARTHINE LOPEZ,** *respondents.*

[G.R. No. 209430. December 8, 2015]

UNIVERSITY OF THE PHILIPPINES, *petitioner, vs.* **GREENPEACE SOUTHEAST ASIA (PHILIPPINES), MAGSASAKA AT SIYENTIPIKO SA PAGPAPAUNLAD NG AGRIKULTURA (MASIPAG), REP. TEODORO CASIÑO, DR. BEN MALAYANG III, DR. ANGELINA GALANG, LEONARDO AVILA III, CATHERINE UNTALAN, ATTY. MARIA PAZ LUNA, JUANITO MODINA, DAGOHOY MAGAWAY, DR. ROMEO QUIJANO, DR. WENCESLAO KIAT, ATTY. HARRY R. ROQUE, JR., FORMER SEN. ORLANDO MERCADO, NOEL CABANGON, MAYOR EDWARD S. HAGEDORN and EDWIN MARTHINE LOPEZ,** *respondents.*

SYLLABUS

1. POLITICAL LAW; CONSTITUTIONAL LAW; 1987 CONSTITUTION; JUDICIARY DEPARTMENT; JUDICIAL

REVIEW; *LOCUS STANDI*; A MATTER OF PROCEDURE WHICH CAN BE RELAXED FOR NON-TRADITIONAL PLAINTIFFS LIKE ORDINARY CITIZENS, TAXPAYERS AND LEGISLATORS WHEN PUBLIC INTEREST SO REQUIRES, SUCH AS WHEN THE MATTER IS OF TRANSCENDENTAL IMPORTANCE, OF OVER REACHING SIGNIFICANCE TO SOCIETY, OR OF PARAMOUNT PUBLIC INTEREST. — *Locus standi* is "a right of appearance in a court of justice on a given question." It refers particularly to "a party's personal and substantial interest in a case where he has sustained or will sustain direct injury as a result" of the act being challenged, and "calls for more than just a generalized grievance." However, the rule on standing is a matter of procedure which can be relaxed for non-traditional plaintiffs like ordinary citizens, taxpayers, and legislators when the public interest so requires, such as when the matter is of transcendental importance, of overreaching significance to society, or of paramount public interest. The Court thus had invariably adopted a liberal policy on standing to allow ordinary citizens and civic organizations to prosecute actions before this Court questioning the constitutionality or validity of laws, acts, rulings or orders of various government agencies or instrumentalities.

2. ID.; ID.; ID.; ID.; THERE IS NO DISPUTE ON THE STANDING OF RESPONDENTS TO FILE BEFORE THE COURT THEIR PETITION FOR WRIT OF *KALIKASAN* AND WRIT OF CONTINUING MANDAMUS; THE LIBERALIZED RULE ON STANDING IS NOW ENSHRINED IN THE RULES OF PROCEDURE FOR ENVIRONMENTAL CASES WHICH ALLOW THE FILING OF A CITIZEN SUIT IN ENVIRONMENTAL CASES.— *Oposa v. Factoran, Jr.* signaled an even more liberalized policy on *locus standi* in public suits. In said case, we recognized the "public right" of citizens to "a balanced and healthful ecology which, for the first time in our nation's constitutional history, is solemnly incorporated in the fundamental law." We held that such right need not be written in the Constitution for it is assumed, like other civil and political rights guaranteed in the Bill of Rights, to exist from the inception of mankind and it is an issue of transcendental importance with intergenerational implications. Such right carries with it the correlative duty to refrain from impairing the environment. Since the *Oposa ruling,*

ordinary citizens not only have legal standing to sue for the enforcement of environmental rights, they can do so in representation of their own and future generations. x x x The liberalized rule on standing is now enshrined in the *Rules of Procedure for Environmental Cases* which allows the filing of a citizen suit in environmental cases. The provision on citizen suits in the Rules "collapses the traditional rule on personal and direct interest, on the principle that humans are stewards of nature," and aims to "further encourage the protection of the environment." There is therefore no dispute on the standing of respondents to file before this Court their petition for writ of *kalikasan* and writ of continuing mandamus.

3. **ID.; ID.; ID.; ID.; WHEN IS AN ACTION CONSIDERED MOOT; CASES WHEN COURTS DECIDE CASES OTHERWISE MOOT.—** An action is considered 'moot' when it no longer presents a justiciable controversy because the issues involved have become academic or dead, or when the matter in dispute has already been resolved and hence, one is not entitled to judicial intervention unless the issue is likely to be raised again between the parties. Time and again, courts have refrained from even expressing an opinion in a case where the issues have become moot and academic, there being no more justiciable controversy to speak of, so that a determination thereof would be of no practical use or value. Nonetheless, courts will decide cases, otherwise moot and academic if: *first,* there is a grave violation of the Constitution; *second,* the exceptional character of the situation and the paramount public interest is involved; *third*, when the constitutional issue raised requires formulation of controlling principles to guide the bench, the bar and the public; and *fourth,* the case is capable of repetition yet evading review." We find that the presence of the second and fourth exceptions justified the CA in not dismissing the case despite the termination of *Bt talong* field trials.

4. **ID.; ID.; ID.; ID.; THE PRESENT CASE FALLS UNDER THE "CAPABLE OF REPETITION YET EVADING REVIEW" EXCEPTION TO THE MOOTNESS PRINCIPLE, THE HUMAN AND ENVIRONMENTAL HEALTH HAZARDS POSED BY THE INTRODUCTION OF A GENETICALLY MODIFIED PLANT, A VERY POPULAR STAPLE VEGETABLE AMONG FILIPINOS, IS AN ISSUE OF PARAMOUNT PUBLIC INTEREST.—** While it may be that

the project proponents of *Bt talong* have terminated the subject field trials, it is not certain if they have actually completed the field trial stage for the purpose of data gathering. At any rate, it is on record that the proponents expect to proceed to the next phase of the project, the preparation for commercial propagation of the *Bt* eggplants. Biosafety permits will still be issued by the BPI for *Bt talong* or other GM crops. Hence, not only does this case fall under the "capable of repetition yet evading review" exception to the mootness principle, the human and environmental health hazards posed by the introduction of a genetically modified plant, a very popular staple vegetable among Filipinos, is an issue of paramount public interest.

5. POLITICAL LAW; ADMINISTRATIVE LAW; PRIMARY JURISDICTION AND EXHAUSTION OF ADMINISTRATIVE REMEDIES; THE PROVISIONS OF DEPARTMENT OF AGRICULTURE ADMINISTRATIVE ORDER (DAO) 08-2002 DO NOT PROVIDE A SPEEDY OR ADEQUATE REMEDY FOR THE RESPONDENTS TO DETERMINE QUESTIONS OF UNIQUE NATIONAL IMPORTANCE RAISED THAT PERTAIN TO LAWS AND RULES FOR ENVIRONMENTAL PROTECTION.— Clearly, the provisions of DAO 08-2002 do not provide a speedy, or adequate remedy for the respondents "to determine the questions of unique national and local importance raised here that pertain to laws and rules for environmental protection, thus [they were] justified in coming to this Court." We take judicial notice of the fact that genetically modified food is an intensely debated global issue, and despite the entry of GMO crops (*Bt* corn) into the Philippines in the last decade, it is only now that such controversy involving alleged damage or threat to human health and the environment from GMOs has reached the courts.

6. ID.; ID.; ID.; DAO 08-2002 AND RELATED ORDERS ARE NOT THE ONLY LEGAL BASES FOR REGULATING FIELD TRIALS OF GENETICALLY MODIFIED (GM) PLANTS AND PLANT PRODUCTS; EO 514 ESTABLISHING THE NATIONAL BIOSAFETY FRAMEWORK (NBF) WHOSE MAIN OBJECTIVE IS TO ENHANCE THE DECISION MAKING SYSTEM ON THE APPLICATION OF PRODUCTS OF MODERN BIOTECHNOLOGY TO MAKE IT MORE EFFICIENT, PREDICTABLE, EFFECTIVE, BALANCED, CULTURALLY APPROPRIATE,

ETHICAL, TRANSPARENT AND PARTICIPATORY.— It must be stressed that DAO 08-2002 and related DA orders are not the only legal bases for regulating field trials of GM plants and plant products. EO 514 establishing the National Biosafety Framework (NBF) clearly provides that the NBF shall "apply to the development, adoption and implementation of *all* biosafety policies, measures and guidelines and *in making biosafety decisions* concerning the research, development, handling and use, transboundary movement, *release into the environment* and management of regulated articles. The objective of the NBF is to "[e]nhance the decision-making system on the application of products of modern biotechnology to make it more efficient, predictable, effective, balanced, culturally appropriate, ethical, transparent and participatory." Thus, "the socio-economic, ethical, and cultural benefit and risks of modern biotechnology to the Philippines and its citizens, and in particular on small farmers, indigenous peoples, women, small and medium enterprises and the domestic scientific community, shall be taken into account in implementing the NBF." The NBF also mandates that decisions shall be arrived at in a transparent and participatory manner, recognizing that biosafety issues are best handled with the participation of all relevant stakeholders and organizations who shall have appropriate access to information and the opportunity to participate responsibly and in an accountable manner in biosafety decision-making process.

7. **ID.; ID.; ID.; THE NBF CONTAINS GENERAL PRINCIPLES AND MINIMUM GUIDELINES THAT THE CONCERNED AGENCIES ARE EXPECTED TO FOLLOW AND WHICH THEIR RESPECTIVE RULES AND REGULATIONS MUST CONFORM TO.—** Most important, the NBF requires the use of precaution, as provided in Section 2.6 which reads: 2.6 ***Using Precaution*****.** — In accordance with Principle 15 of the Rio Declaration of 1992 and the relevant provisions of the Cartagena Protocol on Biosafety, in particular Articles 1, 10 (par. 6) and 11 (par. 8), the precautionary approach shall guide biosafety decisions. The principles and elements of this approach are hereby implemented through the decision-making system in the NBF; The NBF contains general principles and minimum guidelines that the concerned agencies are expected to follow and which their respective rules and regulations must conform with. In cases of conflict in applying the principles, the principle

of protecting public interest and welfare shall always prevail, and no provision of the NBF shall be construed as to limit the legal authority and mandate of heads of departments and agencies to consider the national interest and public welfare in making biosafety decisions. As to the conduct of risk assessment to identify and evaluate the risks to human health and the environment, these shall be guided by the following: *5.2.1* ***Principles of Risk Assessment.*** — The following principles shall be followed when performing a RA to determine whether a regulated article poses significant risks to human health and the environment. x x x Considering the above minimum requirements under the most comprehensive national biosafety regulation to date, compliance by the petitioners with DAO 08-2002 is not sufficient. Notably, Section 7 of the NBF mandates a more transparent, meaningful and participatory public consultation on the conduct of field trials beyond the posting and publication of notices and information sheets, consultations with some residents and government officials, and submission of written comments, provided in DAO 08-2002.

8. ID.; ID.; ID.; DAO 08-2002 SHOULD BE DECLARED INVALID FOR ITS FAILURE TO OPERATIONALIZE THE PRINCIPLES OF THE NBF IN THE CONDUCT OF FIELD TRIAL OF THE *BACILLUS THURINGIENSIS* (BT) EGGPLANT OR *BT TALONG*.— We find that petitioners simply adhered to the procedures laid down by DAO 08-2002 and no real effort was made to operationalize the principles of the NBF in the conduct of field testing of *Bt talong*. The failure of DAO 08-2002 to accommodate the NBF means that the Department of Agriculture lacks mechanisms to mandate applicants to comply with international biosafety protocols. Greenpeace's claim that BPI had approved nearly all of the applications for GMO field trials is confirmed by the data posted on their website. For these reasons, the DAO 08-2002 should be declared invalid.

9. ID.; ID.; ID.; PETITIONERS GOVERNMENT EMPLOYEES CLEARLY FAILED TO FULFIL THEIR MANDATES IN THE IMPLEMENTATION OF THE NBF.— All government agencies as well as private corporations, firms and entities who intend to undertake activities or projects which will affect the *quality of the environment* are required to prepare a detailed Environmental Impact Statement (EIS) prior to undertaking

such development activity. An environmentally critical project (ECP) is considered by the EMB as "likely to have significant adverse impact that may be sensitive, irreversible and diverse" and which "include activities that have significant environmental consequences." In this context, and given the overwhelming scientific attention worldwide on the potential hazards of GMOs to human health and the environment, their release into the environment through field testing would definitely fall under the category of ECP. During the hearing at the CA, Atty. Segui of the EMB was evasive in answering questions on whether his office undertook the necessary evaluation on the possible environmental impact of *Bt talong* field trials subject of this case and the release of GMOs into the environment in general. While he initially cited lack of budget and competence as reasons for their inaction, he later said that an amendment of the law should be made since projects involving GMOs are not covered by Proclamation No. 2146. x x x The stance of the EMB's Chief of the Legal Division is an indication of the DENR-EMB's lack of serious attention to their mandate under the law in the implementation of the NBF, as provided in the following sections of EO 514. x x x On the supposed absence of budget mentioned by Atty. Segui, EO 514 itself directed the concerned agencies to ensure that there will be funding for the implementation of the NBF as it was intended to be a multi-disciplinary effort involving the different government departments and agencies. x x x All told, petitioners government agencies clearly failed to fulfil their mandates in the implementation of the NBF.

10. ID.; WRIT OF KALIKASAN; PRECAUTIONARY PRINCIPLE; ORIGIN; PURPOSE.— The precautionary principle originated in Germany in the 1960s, expressing the normative idea that governments are obligated to "foresee and forestall" harm to the environment. In the following decades, the precautionary principle has served as the normative guideline for policymaking by many national governments. The Rio Declaration on Environment and Development, the outcome of the 1992 United Nations Conference on Environment and Development held in Rio de Janeiro, defines the rights of the people to be involved in the development of their economies, and the responsibilities of human beings to safeguard the common environment. It states that the long term economic progress is only ensured if it is linked with the protection of

the environment. For the first time, the precautionary approach was codified under Principle 15, which reads: In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. Principle 15 codified for the first time at the global level the precautionary approach, which indicates that lack of scientific certainty is no reason to postpone action to avoid potentially serious or irreversible harm to the environment. It has been incorporated in various international legal instruments. The Cartagena Protocol on Biosafety to the Convention on Biological Diversity, finalized and adopted in Montreal on January 29, 2000, establishes an international regime primarily aimed at regulating trade in GMOs intended for release into the environment, in accordance with Principle 15 of the Rio Declaration on Environment and Development.

11. ID.; ID.; ID.; THE PRECAUTIONARY PRINCIPLE FINDS DIRECT APPLICATION IN THE EVALUATION OF EVIDENCE IN CASES BEFORE THE COURT; BY APPLYING THE PRECAUTIONARY PRINCIPLE, THE COURT MAY CONSTRUE A SET OF FACTS AS WARRANTING EITHER JUDICIAL ACTION OR INACTION, WITH THE GOAL OF PRESERVING THE ENVIRONMENT.— The Rules likewise incorporated the principle in Part V, Rule 20, which states: PRECAUTIONARY PRINCIPLE SEC.1. *Applicability*. — When there is a lack of full scientific certainty in establishing a causal link between human activity and environmental effect, the court shall apply the precautionary principle in resolving the case before it. The constitutional right of the people to a balanced and healthful ecology shall be given the benefit of the doubt. SEC. 2. *Standards for application*. — In applying the precautionary principle, the following factors, among others, may be considered: (1) threats to human life or health; (2) inequity to present or future generations; or (3) prejudice to the environment without legal consideration of the environmental rights of those affected. Under this Rule, the precautionary principle finds direct application in the evaluation of evidence in cases before the courts. The precautionary principle bridges the gap in cases where scientific certainty in factual findings cannot be achieved.

By applying the precautionary principle, the court may construe a set of facts as warranting either judicial action or inaction, with the goal of preserving and protecting the environment. This may be further evinced from the second paragraph where bias is created in favor of the constitutional right of the people to a balanced and healthful ecology. In effect, the precautionary principle shifts the burden of evidence of harm away from those likely to suffer harm and onto those desiring to change the status quo. An application of the precautionary principle to the rules on evidence will enable courts to tackle future environmental problems before ironclad scientific consensus emerges.

12. ID.; ID.; ID.; FOR PURPOSE OF EVIDENCE, THE PRECAUTIONARY PRINCIPLE SHOULD BE TREATED AS A PRINCIPLE OF LAST RESORT, WHERE APPLICATION OF THE REGULAR RULES OF EVIDENCE WOULD CAUSE AN INEQUITABLE RESULT FOR THE ENVIRONMENTAL PLAINTIFF IN SETTINGS IN WHICH THE RISK OF HARM IS UNCERTAIN, THE POSSIBILITY OF IRREVERSIBLE HARM AND THE POSSIBILITY OF SERIOUS HARM; ALL THE SAID CONDITIONS ARE PRESENT IN CASE AT BAR.— For purposes of evidence, the precautionary principle should be treated as a principle of last resort, where application of the regular Rules of Evidence would cause in an inequitable result for the environmental plaintiff — (a) settings in which the risks of harm are uncertain; (b) settings in which harm might be irreversible and what is lost is irreplaceable; and (c) settings in which the harm that might result would be serious. When these features — **uncertainty,** the **possibility of irreversible harm,** and the **possibility of serious harm** — coincide, the case for the precautionary principle is strongest. When in doubt, cases must be resolved in favor of the constitutional right to a balanced and healthful ecology. Parenthetically, judicial adjudication is one of the strongest fora in which the precautionary principle may find applicability. Assessing the evidence on record, as well as the current state of GMO research worldwide, the Court finds all the three conditions present in this case — uncertainty, the possibility of irreversible harm and the possibility of serious harm. Eggplants (*talong*) are a staple vegetable in the country and grown by small-scale farmers, majority of whom are poor and marginalized. While the goal

of increasing crop yields to raise farm incomes is laudable, independent scientific studies revealed uncertainties due to unfulfilled economic benefits from *Bt* crops and plants, adverse effects on the environment associated with use of GE technology in agriculture, and serious health hazards from consumption of GM foods. For a biodiversity-rich country like the Philippines, the natural and unforeseen consequences of contamination and genetic pollution would be disastrous and irreversible.

13. ID.; ID.; ID.; THERE EXISTS A PREPONDERANCE OF EVIDENCE THAT THE RELEASE OF GENETICALLY MANIPULATED ORGANISMS (GMO) INTO THE ENVIRONMENT THREATENS TO DAMAGE OUR ECOSYSTEMS AND NOT JUST THE TRIAL FIELD SITES AND EVENTUALLY THE HEALTH OF OUR PEOPLE ONCE THE *BT* EGGPLANTS ARE CONSUMED AS FOOD.— Alongside the aforesaid uncertainties, the non-implementation of the NBF in the crucial stages of risk assessment and public consultation, including the determination of the applicability of the EIS requirements to GMO field testing, are compelling reasons for the application of the precautionary principle. There exists a preponderance of evidence that the release of GMOs into the environment *threatens* to damage our ecosystems and not just the field trial sites, and eventually the health of our people once the *Bt* eggplants are consumed as food. Adopting the precautionary approach, the Court rules that the principles of the NBF need to be operationalized first by the coordinated actions of the concerned departments and agencies before allowing the release into the environment of genetically modified eggplant.

14. ID.; ID.; ID.; THE MORE PRUDENT COURSE IS TO ENJOIN THE *BT TALONG* FIELD TRIALS AND APPROVAL FOR ITS PROPAGATION OR COMMERCIALIZATION UNTIL THE GOVERNMENT OFFICES CONCERNED SHALL HAVE PERFORMED THEIR RESPECTIVE MANDATES TO IMPLEMENT THE NBF.— The more prudent course is to immediately enjoin the *Bt talong* field trials and approval for its propagation or commercialization until the said government offices shall have performed their respective mandates to implement the NBF. We have found the experience of India in the *Bt brinjal* field trials — for which an indefinite moratorium was recommended

by a Supreme Court - appointed committee till the government fixes regulatory and safety aspects — as relevant because majority of Filipino farmers are also small-scale farmers. Further, the precautionary approach entailed inputs from all stakeholders, including the marginalized farmers, not just the scientific community. This proceeds from the realization that acceptance of uncertainty is not only a scientific issue, but is related to public policy and involves an ethical dimension. For scientific research alone will not resolve all the problems, but participation of different stakeholders from scientists to industry, NGOs, farmers and the public will provide a needed variety of perspective foci, and knowledge.

VELASCO, JR., *J., concurring opinion*:

1. POLITICAL LAW; WRIT OF KALIKASAN; THE INSTANT PETITION CAN BE RESOLVED AND THE RIGHT TO HEALTHFUL AND BALANCED ECOLOGY SUFFICIENTLY PROTECTED ON A PURELY LEGAL GROUND; IF AN ENVIRONMENTAL CASE CAN BE SETTLED AND THE PEOPLE'S ENVIRONMENTAL RIGHTS SUFFICIENTLY PROTECTED WITHOUT APPLYING THE PRECAUTIONARY PRINCIPLE, THEN THE COURTS SHOULD REFRAIN FROM DOING SO.— Anent the technical aspect of the case, it is clear from the *ponencia's* lengthy discussion that the safety or danger of introduction of GMOs, in general, to the natural environment through field testing has yet to be settled with scientific certainty, if it could indeed be settled. Furthermore, the subject matter of the instant petition—that is, field testing of a GMO—is truly of a highly complex nature and this complexity is strongly demonstrated by the fact that the remains to be hotly debated in the scientific community. However, it is respectfully submitted that the instant petition can be resolved, and the right to a balanced and healthful ecology sufficiently protected, on a purely legal ground. Anent the invocation of the precautionary Principle under A.M. No. 09-6-8-SC or the Court's Rules of Procedure for Environmental Cases, it is submitted that such is not necessary in the instant petition since, as mentioned, it could be sufficiently settled on purely legal grounds and without a heavy, if not complete, reliance on the scientific aspect of the case. As correctly mentioned by the *ponencia*, it is an evidentiary

rule that must be applied only as a last resort. Thus, if an environmental case can be settled and the people's environmental rights sufficiently protected without applying this principle, then the courts should refrain from doing so,

2. ID.; ID.; GENETICALLY MANIPULATED ORGANISMS (GMO) FIELD TRIALS CLEARLY FALL WITHIN THE PURVIEW OF THE PHILIPPINE ENVIRONMENTAL IMPACT STATEMENT SYSTEM (PEISS).— EO 514 clearly requires the DENR to **ensure that environmental assessment are done and impacts identified in biosafety decisions.** This, in itself, is a clear indication that GMO field trials fall within the purview of our PEISS. Under EO 514, "biosafety decision" apply to the development, adoption and implementation of all biosafety policies, measures and guidelines and in **making decisions concerning the research, development, handling and use, transboundary movement, release into the environment** and management of regulated articles. Thus, EO 514 calls for the conduct of environmental assessments and impact identification—which precisely is the purpose of the PEISS—whenever biosafety decisions are to be made with respect to the research, development, handling and use, transboundary movement, and release into the environment of regulated articles, which are, to reiterate, GMOs. To my mind, "making [biosafety] decisions concerning the research, development, handling and use, transboundary movement, release into the environment and management of regulated articles" include determining the coverage or non-coverage of a GMO field trial under the PEISS, as well as the propriety of issuing an ECC or a CNC for a particular project.

3. ID.; ID.; THE ASSESSMENT OF THE DIRECT AND INDIRECT IMPACTS OF A PROJECT ON THE BIOPHYSICAL AND HUMAN ENVIRONMENT AND ENSURING THAT THE IMPACTS ARE ADDRESSED BY THE APPROPRIATE ENVIRONMENTAL PROTECTION AND ENHANCEMENT MEASURES IS THE PRIMARY CONCERN OF THE PHILIPPINE ENVIRONMENTAL IMPACT STATEMENT SYSTEM (PEISS).— The assessment of the direct and indirect impacts of a project on the biophysical and human environment and ensuring that these impacts are addressed by appropriate environmental protection and enhancement measures is the primary concern

of the PEISS as declared in Article 1, Section 1 (Basic Policy and Operating Principles) of the DENR AO No. 30 s. 2003 (DAO 30, s. 2003) or the Implementing Rules and Regulations (IRR) for the Philippine Environmental Impact Statement (EIS) System.

4. ID.; ID.; SECTION 4, PARAGRAPH 4.1, ARTICLE II OF DAO 30, SERIES OF 2003 PROVIDES THAT PROJECTS THAT POSE POTENTIAL SIGNIFICANT IMPACT TO THE ENVIRONMENT SHALL BE REQUIRED TO SECURE AN ENVIRONMENTAL CLEARANCE CERTIFICATE (ECC).— Section 4, paragraph 4.1, Article II of DAO 30, s. 2003, provides that projects that pose **potential significant impact to the environment** shall be required to secure an ECC. Anent this possibility of negatively affecting the environs, it is argued that the introduction of the *Bt talong* to the natural environment in connection with the field trials will not adversely affect the condition of the field trial sites, banking on the absence of documented significant and negative impact of the planting of *Bt corn* in the Philippines, among others. However, it is curious that in blocking the application of the precautionary principle, petitioners contradict this prior assertion when they maintained **that field testing is only a part of a continuing study being done to ensure that the field trials have no significant and negative impact on the environment.** This, to my mind, only goes to show that it is erroneous for them to maintain that the field trials in question will not adversely affect the environment when they themselves admit that such is not yet a scientific certainty, hence the conduct of further research on the matter. And without this certainty that the project will leave no footprint on the natural environment, as well as a certification to that effect, it should be presumed that the field trial poses a potential significant impact to the environment for which an ECC is required.

5. ID.; ID.; THERE IS NO EVIDENCE THAT A CERTIFICATE OF NON-COVERAGE FOR THE *BT TALONG* FIELD TRIALS WAS ISSUED BY THE DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, THROUGH THE ENVIRONMENT MANAGEMENT BUREAU.— To my mind, the above grounds should have prompted the DENR to require from the project proponents an EIA or at the very least evaluated the project's coverage or

non-coverage as pre-condition to the allowance of the field testing. In this regard, **the DENR — as a member of the NCBP with the clear mandate of making certain that environmental assessments are done in the conduct of GMO research, and as the agency tasked to enforce the PEISS — may have been remiss in its duty.** It may be that there is a confusion as to the requirements before field testing a GMO may be allowed considering that the regulation that governs applications therefor, that is, DA AO No. 8, s. 2002, makes no mention of the necessity of an EIA or the applicability of the PEISS. Additionally, per the NCBP's Report, it was pointed out that the applicability of the PEISS to field trials was a hotly discussed issue. While securing an ECC or a CNC was the perceived requirement for EIA in biosafety valuations, there were those who argued that the EIA can take many years to conduct and cost millions of pesos and could, therefore, delay field tests and discourage proponents. It was likewise maintained that under the present practice of the NCBP, the confinement afforded by the screenhouse and/or contained fields already provides a means to prevent or minimize any adverse environmental impact and, thus, an EIA may not be required.

6. ID.; ID.; WHENEVER A PROJECT FALLS WITHIN THE PURVIEW OF THE PHILIPPINE ENVIRONMENTAL IMPACT STATEMENT SYSTEM AND DA AO NO. 8, SERIES OF 2002, AS WELL AS OTHER RELEVANT LAWS, AS PHILIPPINE BIOSAFETY REGULATIONS NOW STAND AND AS REQUIRED BY NATIONAL BIOSAFETY FRAMEWORK (NBF), THE PROJECT PROPONENT IS REQUIRED TO COMPLY WITH ALL APPLICABLE STATUTORY OR REGULATORY REQUIREMENTS NOT JUST DA AO NO. 8, SERIES OF 2002.— In case there was, indeed, doubt as to the applicability or non-applicability of the PEISS to biotechnology research, the DENR-EMB, in accordance with its mandate, should have observed such standard of precaution and applied the PEISS to field trials of GMOs by requiring from project proponents the prior securing of an ECC or a CNC. Additionally, it is but timely to clarify that DA AO No. 8, s. 2002 did not expressly state that projects falling under its coverage are withdrawn from the operation of the PEISS. As a matter of fact, the DENR-EMB itself recognizes that "**the PEISS is supplementary and complementary to other existing environmental laws**." This

is further bolstered by the PEISS' role in relation to the functions of other government agencies. In this regard, it was highlighted that it is inherent upon the EIA Process to undertake a comprehensive and integrated approach in the review and evaluation of environment-related concerns of government agencies (GAs), local government units (LGUs) and the general public. The subsequent EIA findings shall provide guidance and recommendations to these entities as a basis for their decision making process. As such, it must be that whenever a project falls within the purview of the PEISS and DA AO No. 8, s. 2002, as well as other relevant laws, as Philippine biosafety regulations now stand and as required by the NBF, **the project proponent is required to comply with all applicable statutory or regulatory requirements, not just DA AO No. 8, s. 2002.**

LEONEN, *J., separate concurring opinion*:

1. POLITICAL LAW; WRIT OF KALIKASAN; DEPARTMENT OF AGRICULTURE ADMINISTRATIVE ORDER (DAO) 08-2002 IS NULL AND VOID FOR BEING INCONSISTENT WITH THE BASIC GUIDELINES PROVIDED IN OUR CONSTITUTION, VIOLATIVE OF OUR BINDING INTERNATIONAL OBLIGATIONS CONTAINED IN THE CARTAGENA PROTOCOL ON BIOSAFETY TO THE CONVENTION ON BIODIVERSITY, AND EFFECTIVELY DISREGARDS EXECUTIVE ORDERS ISSUED BY THE PRESIDENT IN THE FIELDS OF BIODIVERSITY AND BIOSAFETY.— The Petition for Writ of Kalikasan of Greenpeace Southeast Asia (Philippines), et al. (now respondents), insofar as it assails the field testing permit granted to private petitioners, should have been dismissed and considered moot and academic by the Court of Appeals. The Petition for Writ of Kalikasan was filed only a few months before the two-year permit expired and when the field testing activities were already over. Thus, the pending Petitions which assail the Decision of the Court of Appeals should be granted principally on this ground. There was grave abuse of discretion which amounts to excess of jurisdiction. This does not necessarily mean that petitioners in G.R. No. 209271 can proceed to commercially propagate Bt talong. Under Department of Agriculture Administrative Order No. 8, Series of 2002, the

proponent should submit a new set of requirements that will undergo a stringent process of evaluation by the Bureau of Plant Industry and other agencies. Completion of field testing by itself does not guarantee commercial propagation. To recall, the introduction of genetically modified products, ingredients, and processes requires three (3) mandatory stages of regulatory review. Propagation is not allowed until there is full field testing. Field testing is not allowed unless there are laboratory experiments under contained conditions. Application for each stage has its own set of unique requirements. The standards of review have their own level of rigor. All the applications for each stage should be published. Public participation in each stage must not only be allowed but should be meaningful. Furthermore, commercial propagation will not happen immediately with Bt talong because Administrative Order No. 8 is null and void. In its salient parts, it is inconsistent with the basic guidelines provided in our Constitution, violative of our binding international obligations contained in the Cartagena Protocol on Biosafety to the Convention on Biodiversity (Cartagena Protocol), and effectively disregards the Executive Orders issued by the President in the fields of biodiversity and biosafety. The effect of the invalidity of Administrative Order No. 8 is that petitioners cannot proceed further with any field testing or propagation for lack of administrative guidelines. Any test or propagation of transgenic crops should await valid regulations from the executive or restatements of policy by Congress.

2. ID.; ID.; THE COURT OF APPEALS, IN ADOPTING THE "HOT TUB" METHOD TO ARRIVE AT ITS FACTUAL FINDINGS, GRAVELY ABUSED ITS DISCRETION.— The Petitions in this case should be granted because the Court of Appeals, in adopting the "hot tub" method to arrive at its factual findings, gravely abused its discretion. The transcript of the proceedings presided by the Court of Appeals Division shows how this method obfuscated further an already complicated legal issue. Courts of law have a precise and rigorous method to ferret out the facts of a case, a method which is governed by our published rules of evidence. By disregarding these rules, the Court of Appeals acted whimsically, capriciously, and arbitrarily. This is an important case on a novel issue that affects our food security, which touches on the controversial political, economic, and scientific issues of the introduction

of genetically modified organisms into the consumer mainstream. This court speaks unanimously in narrowing down the issues and exercising restraint and deference. This court must allow the competencies of the administrative regulatory bodies and Congress to fully and meaningfully evolve.

3. ID.; ID.; WITH THE CESSATION OF THE VALIDITY OF THE BIOSAFETY PERMITS AND THE ACTUAL TERMINATION OF ALL FIELD TRIALS, THE VERY SUBJECT MATTER OF THE CONTROVERSY ADVERTED TO BY RESPONDENTS BECAME MOOT; BECAUSE OF THE PETITION'S SPECIFICITY, THE CASE SHOULD NOT BE CONSIDERED CAPABLE OF REPETITION YET EVADING REVIEW, AN EXCEPTION TO THE RULE ON MOOTNESS.— Mere completion of a preceding stage is no guarantee that the subsequent stage shall ensue. While each subsequent stage proceeds from the prior ones, each stage is subject to its unique set of requisites. It is, thus, improper to rely on the expectation that commercial propagation of Bt talong shall ensue after field testing. For the process to proceed to commercial propagation, the concerned applicants are still required to formally seek the permission of the Bureau of Plant Industry by filing an application form. There is no presumption that the Bureau of Plant Industry will favorably rule on any application for commercial propagation. It is also not a valid presumption that the results of field testing are always favorable to the proponent for field testing let alone for those who will continue on to propagation. The alleged actual controversy in the Petition for Writ of Kalikasan arose out of the proposal to do field trials. The reliefs in these remedies did not extend far enough to enjoin the use of the results of the field trials that have been completed. ***Essentially, the findings should be the material to provide more rigorous scientific analysis of the various claims made in relation to Bt talong.*** The original Petition was anchored on the broad proposition that respondents' right to a healthful and balanced ecology was violated on the basis of the grant of the permit. With the cessation of the validity of the biosafety permits and the actual termination of all field trials, the very subject of the controversy adverted to by respondents became moot. Similarly because of the Petition's specificity, the case could not be considered capable of repetition yet evading review and, thus, an exception to the rule on mootness.

4. ID.; ID.; SECTIONS 15 AND 16 OF ARTICLE II OF THE CONSTITUTION ARTICULATE THE DOCTRINE THAT HEALTH AND ECOLOGICAL CONCERNS ARE PROPER PURPOSES OF REGULATION AND, THEREFORE, CAN BE THE BASIS OF THE STATE'S EXERCISE OF POLICE POWER.— Two constitutional provisions bear upon the issues relied upon by private respondents in this case. Both are found in Article II, viz.: Section 15. The State shall protect and promote the right to health of the people and instill health consciousness among them. Section 16. The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature. Traditionally, these provisions articulate the doctrine that health and ecological concerns are proper purposes of regulation and, therefore, can be the basis of the state's exercise of police power. Having constitutionally ordained goals and principles are, per se, compelling state interests. Thus, restricting the rights to property and liberties does not deny their holders their "due process of law" provided there is a discernable rational relationship between the regulatory measure and these legitimate purposes. We have, prior to the 1987 Constitution, adopted a fairly consistent deferential standard of judicial review considering that the Congress has more leeway in examining various submissions of a wider range of experts and has the power to create the forums for democratic deliberation on various approaches.

5. ID.; ID.; WITH RESPECT TO HEALTH AND ECOLOGY, THE STATE IS CONSTITUTIONALLY MANDATED TO PROVIDE AFFIRMATIVE ACTION; THE MANDATE IS IN THE NATURE OF AN ACTIVE DUTY RATHER THAN A PASSIVE PROHIBITION.— Sections 15 and 16 of Article II are, thus, not simply hortatory rights. They are as much a part of the fundamental law as any other provision in the Constitution. They add to the protection of the right to life in Article III, Section 1. To recall, this important provision states: Section 1. No person shall be deprived of life, liberty or property without due process of law. This norm is phrased as a traditional limitation on the powers of the state. That is, that the state's inherent police powers cannot be exercised arbitrarily but must be shown to have been reasonable and fair. The right to life is textually broad to signal the intention that the sphere of autonomy is assumed to encompass life both in terms of its physical integrity and in terms of its quality. Sections 15 and

16, however, impose on the state a positive duty to "promote and protect" the right to health and to "promote and advance" the right of "the people to a balanced and healthful ecology." With respect to health and ecology, therefore, the state is constitutionally mandated to provide affirmative protection. The mandate is in the nature of an active duty rather than a passive prohibition. These provisions represent, in no small measure, a shift in the concept of governance in relation to society's health. It is a recognition that if private actors and entities are left to themselves, they will pursue motivations which may not be too advantageous to nutrition or able to reduce the risks of traditional and modern diseases. At best, the actors may not be aware of their incremental contributions to increasing risks. At worse, there may be conscious efforts not to examine health consequences of products and processes introduced in the market. It is expedient for most to consider such costs as extraneous and affecting their final profit margins. In short, the constitutional provisions embed the idea that there is no invisible hand that guides participants in the economic market to move toward optimal social welfare in its broadest developmental sense.

6. ID.; ID.; SECTIONS 15 AND 16 IMPLY THAT THE STANDARD TO BE USED BY THE STATE IN THE DISCHARGE OF ITS REGULATORY OVERSIGHT SHOULD BE CLEAR; WHILE PROVIDING FOR THE PROCESSES, DAO 08-2002 DOES NOT REFER TO ANY STANDARD OF EVALUATING THE APPLICATIONS TO BE PRESENTED BEFORE THE DEPARTMENT OF AGRICULTURE OR, IN FIELD TESTING, THE SCIENTIFIC REVIEW TECHNICAL BOARD.— The imperative for the state's more active participation in matters that relate to health and ecology is more salient given these perspectives and the pervasive impact of food on our population. At its bare minimum, Sections 15 and 16 imply that the standard to be used by the state in the discharge of its regulatory oversight should be clear. This is where Administrative Order No. 8 fails. While providing for processes, it does not refer to any standard of evaluating the applications to be presented before the Department of Agriculture or, in field testing, the Scientific Review Technical Panel. There are many of such standards available based on best practices. For instance, the regulators may be required to evaluate applications so that there is a

scientific demonstration of a "reasonable certainty of no harm" to both health and environment in all aspects in the creation, testing, and propagation of genetically modified ingredients, processes, or products. Without these standards, Sections 15 and 16 become meaningless. Hence, in this regard, Administrative Order No. 8 is null and void.

7. ID.; ID.; DAO 08-2002 FAILS TO MEET CERTAIN STANDARDS REQUIRED UNDER THE CARTAGENA PROTOCOL.— Like the National Biosafety Framework established by Executive Order No. 514, Administrative Order No. 8 cites the Cartagena Protocol as a source of obligation of the state to regulate transgenic plants. Administrative Order No. 8 fails to meet certain standards required under the Cartagena Protocol. This Order requires an applicant for field testing of a regulated article to create an Institutional Biosafety Committee. It is the applicant who chooses the members of the Institutional Biosafety Committee. The composition of the Institutional Biosafety Committee includes three scientist members and two community representatives who "shall not be affiliated with the applicant apart from being members of its [Institutional Biosafety Committee] and shall be in a position to represent the interests of the communities where the field testing is to be conducted." As an apparent assurance for the lack of bias of these community representatives, the National Committee on Biosafety of the Philippines must approve the composition of the Institutional Biosafety Committee. The manner of choosing the composition of the Institutional Biosafety Committee is problematic. It reduces meaningful compliance in our commitments enunciated in the Cartagena Protocol into mere artifice. It defies the guidelines set by the National Biosafety Framework.

8. ID.; ID.; BOTH THE CARTAGENA PROTOCOL AND THE NATIONAL BIOSAFETY FRAMEWORK (NBF) UNDER E.O. 5I4 REQUIRE PARTICIPATION FROM COMMUNITY MEMBERS.— Both the Cartagena Protocol and National Biosafety Framework require participation from community members. However, in Administrative Order No. 8, the applicant has the initial choice as to the community representatives who will participate as members of the Institutional Biosafety Committee. The approval by the National Committee on Biosafety of the Philippines is not a sufficient mechanism to

check this discretion. This interagency committee can only approve or disapprove community representatives that were already selected by the applicant. The applicant does not have any incentive to choose the critical community representatives. The tendency would be to choose those whose dissenting voices are tolerable. Worse, the National Committee on Biosafety of the Philippines, apart from not being a sufficient oversight for people's participation, is a government body. A government body is not the community that should supposedly be represented in the Institutional Biosafety Committee.

9. ID.; ID.; DAO 08-2002 FAILS IN MEETING THE PUBLIC PARTICIPATION REQUIREMENT OF THE CARTAGENA PROTOCOL AND THE NBF; THERE IS ALSO NO APPEAL PROCESS FOR THIRD PARTIES UNDER DAO 08-2002 WHO MAY WANT TO QUESTION THE EXERCISE OF DISCRETION OF THE DEPARTMENT OF AGRICULTURE OR THE BUREAU OF PLANT INDUSTRY.— The nonchalant attitude of the regulatory framework is best seen in this case. Petitioners alleged that there was some public consultation prior to field testing. These consultations, however, were not documented. The only proof of such consultation was a bare allegation made by Miss Merle Palacpac of the Department of Agriculture in her judicial affidavit. The absence of an effective mechanism for public feedback during the application process for field testing means that Administrative Order No. 8 fails in meeting the public participation requirement of the Cartagena Protocol and the National Biosafety Framework. The current mechanisms have all the badges of a "greenwash": merely an exhibition of symbolic compliance to environmental and biosafety policy. ***The insouciant approach to public participation during the application process is obvious as there is no appeal procedure for third parties under Administrative Order No. 8.*** The regulation does not consider that communities affected may want to question the exercise of discretion by the Department of Agriculture or the Bureau of Plant Industry. Section 18 of Administrative Order No. 8 only covers appeals for "[a]ny person whose permit has been revoked or has been denied a permit or whose petition for delisting has been denied by the Director of [Bureau of Plant Industry]." Procedural due process is taken away from the public. Due to these fundamental deficiencies, Administrative Order No. 8 is null and void. In

its present form, it cannot be used as the guidelines to regulate further field testing or commercial propagation of Bt talong. Until a law or a new regulation is passed consistent with the Constitution, our treaty obligations, and our laws, no genetically modified ingredient process or product can be allowed to be imported, field tested, or commercially propagated.

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D E C I S I O N

VILLARAMA, JR., *J.*:

The consolidated petitions before Us seek the reversal of the Decision[1] dated May 17, 2013 and Resolution[2] dated September 20, 2013 of the Court of Appeals (CA) in CA-G.R. SP No. 00013 which permanently enjoined the conduct of field trials for genetically modified eggplant.

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[1] *Rollo* (G.R. No. 209271), pp. 135-159. Penned by Associate Justice Isaias P. Dicdican with Associate Justices Myra V. Garcia-Fernandez and Nina G. Antonio-Valenzuela concurring.

[2] *Id*. at 161-174.

The Parties

Respondent Greenpeace Southeast Asia (Philippines) is the Philippine branch of Greenpeace Southeast Asia, a regional office of Greenpeace International registered in Thailand.[3] Greenpeace is a non-governmental environmental organization which operates in over 40 countries and with an international coordinating body in Amsterdam, Netherlands. It is well known for independent direct actions in the global campaign to preserve the environment and promote peace.

Petitioner International Service for the Acquisition of Agri-Biotech Applications, Inc. (ISAAA) is an international non-profit organization founded in 1990 "to facilitate the acquisition and transfer of agricultural biotechnology applications from the industrial countries, for the benefit of resource-poor farmers in the developing world" and ultimately "to alleviate hunger and poverty in the developing countries." Partly funded by the United States Agency for International Development (USAID), ISAAA promotes the use of agricultural biotechnology, such as genetically modified organisms (GMOs).[4]

Respondent Magsasaka at Siyentipiko sa Pagpapaunlad ng Agrikultura (MASIPAG) is a coalition of local farmers, scientists and NGOs working towards "the sustainable use and management of biodiversity through farmers' control of genetic and biological resources, agricultural production, and associated knowledge."

The University of the Philippines Los Baños (UPLB) is an autonomous constituent of the University of the Philippines (UP), originally established as the UP College of Agriculture. It is the center of biotechnology education and research in Southeast Asia and home to at least four international research and extension centers. Petitioner UPLB Foundation, Inc. (UPLBFI) is a private corporation organized "to be an instrument for institutionalizing a rational system of utilizing UPLB expertise and other assets

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[3] CA *rollo* (Vol. VI), Annex "O" of Biotech Petition.

[4] <http://www.isaaa.org/inbrief//default.asp> (visited last November 7, 2014).

for generating additional revenues and other resources needed by [UPLB]." Its main purpose is to assist UPLB in "expanding and optimally utilizing its human, financial, and material resources towards a focused thrust in agriculture, biotechnology, engineering and environmental sciences and related academic programs and activities." A memorandum of agreement between UPLBFI and UPLB allows the former to use available facilities for its activities and the latter to designate from among its staff such personnel needed by projects.[5]

Petitioner University of the Philippines (UP) is an institution of higher learning founded in 1908. Under its new charter, Republic Act 9500,[6] approved on April 29, 2008 by President Gloria Macapagal-Arroyo, UP was declared as the national university tasked "to perform its unique and distinctive leadership in higher education and development." Among others, UP was mandated to "serve as a research university in various fields of expertise and specialization by conducting basic and applied research and development, and promoting research in various colleges and universities, and contributing to the dissemination and application of knowledge."[7]

The other individual respondents are Filipino scientists, professors, public officials and ordinary citizens invoking their constitutionally guaranteed right to health and balanced ecology, and suing on their behalf and on behalf of future generations of Filipinos.

Factual Background

Biotechnology is a multi-disciplinary field which may be defined as "any technique that uses living organisms or substances from those organisms to make or modify a product, to improve plants or animals, or to develop microorganisms for specific

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[5] UPLBFI, "History" <http://uplbfi.org/?page_id=231/> (visited last November 7, 2014).

[6] "AN ACT TO STRENGTHEN THE UNIVERSITY OF THE PHILIPPINES AS THE NATIONAL UNIVERSITY."

[7] RA 9500, Sec. 3(c).

uses."[8] Its many applications include agricultural production, livestock, industrial chemicals and pharmaceuticals.

In 1979, President Ferdinand Marcos approved and provided funding for the establishment of the National Institute for Applied Microbiology and Biotechnology (BIOTECH) at UPLB. It is the premier national research and development (R & D) institution applying traditional and modern biotechnologies in innovating products, processes, testing and analytical services for agriculture, health, energy, industry and development.[9]

In 1990, President Corazon C. Aquino signed Executive Order (EO) No. 430 creating the National Committee on Biosafety of the Philippines (NCBP). NCBP was tasked, among others, to "identify and evaluate potential hazards involved in initiating genetic engineering experiments or the introduction of new species and genetically engineered organisms and recommend measures to minimize risks" and to "formulate and review national policies and guidelines on biosafety, such as the safe conduct of work on genetic engineering, pests and their genetic materials for the protection of public health, environment and personnel and supervise the implementation thereof."

In 1991, NCBP formulated the Philippine Biosafety Guidelines, which governs the regulation of the importation or introduction, movement and field release of potentially hazardous biological materials in the Philippines. The guidelines also describe the required physical and biological containment and safety procedures in handling biological materials. This was followed in 1998 by the "*Guidelines on Planned Release of Genetically Manipulated Organisms (GMOs) and Potentially Harmful Exotic Species* (PHES)."[10]

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[8] Susan R. Barnum, Biotechnology: An Introduction by 1 (1998).

[9] University of the Philippines Los Baños National Institute of Molecular Biology and Biotechnology, "About Us" <http://biotech.uplb.edu.ph/index.php/en/about-us> (visited last November 7, 2014).

[10] The Center for Media and Democracy, "GMOs in the Philippines" <http:/www.sourcewatch.org/index.php/GMOs_in_the_Philippines>. (visited last November 7, 2014).

On December 29, 1993, the Convention on Biological Diversity (CBD) came into force. This multilateral treaty recognized that "modern biotechnology has great potential for human well-being if developed and used with adequate safety measures for the environment and human health." Its main objectives, as spelled out in Article 1, are the "conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources."

In January 2000, an agreement was reached on the Cartagena Protocol on Biosafety (Cartagena Protocol), a supplemental to the CBD. The Cartagena Protocol aims "to contribute to ensuring an adequate level of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking into account risks to human health, and specifically focusing on transboundary movements."

On May 24, 2000, the Philippines signed the Cartagena Protocol, which came into force on September 11, 2003. On August 14, 2006, the Philippine Senate adopted Senate Resolution No. 92 or the "Resolution Concurring in the Ratification of the Cartagena Protocol on Biosafety (CPB) to the UN Convention on Biological Diversity."

On July 16, 2001, President Gloria Macapagal-Arroyo issued a policy statement reiterating the government policy of promoting the safe and responsible use of modern biotechnology and its products as one of several means to achieve and sustain food security, equitable access to health services, sustainable and safe environment and industry development.[11]

In April 2002, the Department of Agriculture (DA) issued DA-Administrative Order (AO) No. 08 providing rules and regulations for the importation and release into the environment of plants and plant products derived from the use of modern biotechnology.

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[11] *Id.* (See also CA *rollo*, pp. 882-884).

DAO-08-2002 covers the importation or release into the environment of: (1) any plant which has been altered or produced through the use of modern biotechnology if the donor organism, host organism, or vector or vector agent belongs to the genera or taxa classified by the Bureau of Plant Industry (BPI) as meeting the definition of plant pest or is a medium for the introduction of noxious weeds; or (2) any plant or plant product altered through the use of modern biotechnology which may pose significant risks to human health and the environment based on available scientific and technical information.

The country's biosafety regulatory system was further strengthened with the issuance of EO No. 514 (EO 514) on March 17, 2006, "*Establishing the National Biosafety Framework (NBF), Prescribing Guidelines for its Implementation, and Strengthening the NCBP*." The NBF shall apply to the development, adoption and implementation of all biosafety policies, measures and guidelines and in making decisions concerning the research, development, handling and use, transboundary movement, release into the environment and management of regulated articles.[12]

EO 514 expressly provides that, unless amended by the issuing departments or agencies, DAO 08-2002, the NCBP Guidelines on the Contained Use of Genetically Modified Organisms, except for provisions on potentially harmful exotic species which were repealed, and all issuances of the Bureau of Food and Drugs Authority (FDA) on products of modern biotechnology, shall continue to be in force and effect.[13]

On September 24, 2010, a Memorandum of Undertaking[14] (MOU) was executed between UPLBFI, ISAAA and UP Mindanao Foundation, Inc. (UPMFI), in pursuance of a collaborative research and development project on eggplants that are resistant to the fruit and shoot borer. Other partner

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[12] EO 514, Sec. 2.1.

[13] *Id*., Sec. 8.

[14] CA *rollo* (Vol. I), pp. 82-84.

agencies involved in the project were UPLB through its Institute of Plant Breeding, Maharastra Hybrid Seed Company (MAHYCO) of India, Cornell University and the Agricultural Biotechnology Support Project II (ABSPII) of USAID.

As indicated in the Field Trial Proposal[15] submitted by the implementing institution (UPLB), the pest-resistant crop subject of the field trial was described as a "bioengineered eggplant." The crystal toxin genes from the soil bacterium *Bacillus thuringiensis (Bt)* were incorporated into the eggplant (*talong*) genome to produce the protein *Cry1Ac* which is toxic to the target insect pests. *Cry1Ac* protein is said to be highly specific to *lepidopteran larvae* such as the fruit and shoot borer (FSB), the most destructive insect pest of eggplant.

Under the regulatory supervision of NCBP, a contained experiment was started in 2007 and officially completed on March 3, 2009. The NCBP thus issued a Certificate of Completion of Contained Experiment stating that "During the conduct of the experiment, all the biosafety measures have been complied with and no untoward incident has occurred."[16]

BPI issued Biosafety Permits[17] to UPLB on March 16, 2010 and June 28, 2010. Thereafter, field testing of *Bt talong* commenced on various dates in the following approved trial sites: Kabacan, North Cotabato; Sta. Maria, Pangasinan; Pili, Camarines Sur; Bago Oshiro, Davao City; and Bay, Laguna.

On April 26, 2012, Greenpeace, MASIPAG and individual respondents (Greenpeace, et al.) filed a petition for writ of *kalikasan* and writ of continuing mandamus with prayer for the issuance of a Temporary Environmental Protection Order (TEPO). They alleged that the *Bt talong* field trials violate their constitutional right to health and a balanced ecology considering that (1) the required environmental compliance certificate under Presidential Decree (PD) No. 1151 was not secured prior to

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[15] *Id*. at 85-86.

[16] CA *rollo* (Vol. II), pp. 885-886.

[17] *Id*. at 1058-1064.

the project implementation; (2) as a regulated article under DAO 08-2002, *Bt talong* is presumed harmful to human health and the environment, and there is no independent, peer-reviewed study on the safety of *Bt talong* for human consumption and the environment; (3) a study conducted by Professor Gilles-Eric Seralini showed adverse effects on rats who were fed *Bt* corn, while local scientists also attested to the harmful effects of GMOs to human and animal health; (4) *Bt* crops can be directly toxic to non-target species as highlighted by a research conducted in the US which demonstrated that pollen from *Bt* maize was toxic to the Monarch butterfly; (5) data from the use of *Bt* Cry1Ab maize indicate that beneficial insects have increased mortality when fed on larvae of a maize pest, the corn borer, which had been fed on *Bt*, and hence non-target beneficial species that may feed on eggplant could be similarly affected; (6) data from China show that the use of *Bt* crops (*Bt* cotton) can exacerbate populations of other secondary pests; (7) the built-in pesticides of *Bt* crops will lead to *Bt* resistant pests, thus increasing the use of pesticides contrary to the claims by GMO manufacturers; and (8) the 200 meters perimeter pollen trap area in the field testing area set by BPI is not sufficient to stop contamination of nearby non-*Bt* eggplants because pollinators such as honeybees can fly as far as four kilometers and an eggplant is 48% insect-pollinated. The full acceptance by the project proponents of the findings in the MAHYCO Dossier was strongly assailed on the ground that these do not precisely and adequately assess the numerous hazards posed by *Bt talong* and its field trial.

Greenpeace, et al. further claimed that the *Bt talong* field test project did not comply with the required public consultation under Sections 26 & 27 of the Local Government Code. A random survey by Greenpeace on July 21, 2011 revealed that ten households living in the area immediately around the *Bt talong* experimental farm in Bay, Laguna expressed lack of knowledge about the field testing in their locality. The *Sangguniang Barangay* of Pangasugan in Baybay, Leyte complained about the lack of information on the nature and uncertainties of the *Bt talong* field testing in their barangay. The Davao City Government likewise opposed the project due to lack of

transparency and public consultation. It ordered the uprooting of *Bt* eggplants at the trial site and disposed them strictly in accordance with protocols relayed by the BPI through Ms. Merle Palacpac. Such action highlighted the city government's policy on "sustainable and safe practices." On the other hand, the *Sangguniang Bayan* of Sta. Barbara, Iloilo passed a resolution suspending the field testing due to the following: lack of public consultation; absence of adequate study to determine the effect of *Bt talong* field testing on friendly insects; absence of risk assessment on the potential impacts of genetically modified (GM) crops on human health and the environment; and the possibility of cross-pollination of *Bt* eggplants with native species or variety of eggplants, and serious threat to human health if these products were sold to the market.

Greenpeace, et al. argued that this case calls for the application of the precautionary principle, the *Bt talong* field testing being a classic environmental case where scientific evidence as to the health, environmental and socio-economic safety is insufficient or uncertain and preliminary scientific evaluation indicates reasonable grounds for concern that there are potentially dangerous effects on human health and the environment.

The following reliefs are thus prayed for:

a. Upon the filing [of this petition], a Temporary Environment Protection Order should be issued: (*i*) enjoining public respondents BPI and FPA of the DA from processing for field testing, and registering as herbicidal product, *Bt talong* in the Philippines; (*ii*) stopping all pending field testing of *Bt talong* anywhere in the Philippines; and (*iii*) ordering the uprooting of planted *Bt talong* for field trials as their very presence pose significant and irreparable risks to human health and the environment.

b. Upon the filing [of this petition], issue a writ of continuing mandamus commanding:

(*i*) Respondents to submit to and undergo the process of environmental impact statement system under the Environmental Management Bureau;

(*ii*) Respondents to submit independent, comprehensive, and rigid risk assessment, field tests report, regulatory

compliance reports and supporting documents, and other material particulars of the *Bt talong* field trial;

(*iii*) Respondents to submit all its issued certifications on public information, public consultation, public participation, and consent of the local government units in the barangays, municipalities, and provinces affected by the field testing of *Bt talong*;

(*iv*) Respondent regulator, in coordination with relevant government agencies and in consultation with stakeholders, to submit an acceptable draft of an amendment of the National Bio-Safety Framework of the Philippines, and DA Administrative Order No. 08, defining or incorporating an independent, transparent, and comprehensive scientific and socio-economic risk assessment, public information, consultation, and participation, and providing for their effective implementation, in accord with international safety standards; and,

(*v*) Respondent BPI of the DA, in coordination with relevant government agencies, to conduct balanced nationwide public information on the nature of *Bt talong* and *Bt talong* field trial, and a survey of social acceptability of the same.

c. Upon filing [of this petition], issue a writ of *kalikasan* commanding Respondents to file their respective returns and explain why they should not be judicially sanctioned for violating or threatening to violate or allowing the violation of the above-enumerated laws, principles, and international principle and standards, or committing acts, which would result into an environmental damage of such magnitude as to prejudice the life, health, or property of petitioners in particular and of the Filipino people in general.

d. After hearing and judicial determination, to cancel all *Bt talong* field experiments that are found to be violating the abovementioned laws, principles, and international standards; and recommend to Congress curative legislations to effectuate such order.[18]

On May 2, 2012, the Court issued the writ of *kalikasan* against ISAAA, Environmental Management Bureau (EMB)/BPI/ Fertilizer and Pesticide Authority (FPA) and UPLB,[18-a] ordering

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[18] CA *rollo* (Vol. I), pp. 67-69.

[18-a] *Id*. at 400.

them to make a verified return within a non-extendible period of ten (10) days, as provided in Sec. 8, Rule 7 of the Rules of Procedure for Environmental Cases.[19]

ISAAA, EMB/BPI/FPA, UPLBFI and UPMFI filed their respective verified returns. They all argued that the issuance of writ of *kalikasan* is not proper because in the implementation of the *Bt talong* project, all environmental laws were complied with, including public consultations in the affected communities, to ensure that the people's right to a balanced and healthful ecology was protected and respected. They also asserted that the *Bt talong* project is not covered by the Philippine Environmental Impact Statement (PEIS) Law and that *Bt talong* field trials will not significantly affect the quality of the environment nor pose a hazard to human health. ISAAA contended that the NBF amply safeguards the environment policies and goals promoted by the PEIS Law. On its part, UPLBFI asserted that there is a "plethora of scientific works and literature, peer-reviewed, on the safety of *Bt talong* for human consumption."[20] UPLB, which filed an Answer[21] to the petition before the CA, adopted said position of UPLBFI.

ISAAA argued that the allegations regarding the safety of *Bt talong* as food are irrelevant in the field trial stage as none of the eggplants will be consumed by humans or animals, and all materials that will not be used for analyses will be chopped, boiled and buried following the Biosafety Permit requirements. It cited a 50-year history of safe use and consumption of agricultural products sprayed with commercial *Bt* microbial pesticides and a 14-year history of safe consumption of food and feed derived from *Bt* crops. Also mentioned is the almost

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[19] A.M. No. 09-6-8-SC (2010).

[20] CA *rollo* (Vol. III), p. 2026.

[21] *Id*. at 2120-2123. UPLB was not served with the writ of *kalikasan* issued by this Court nor furnished with copy of the petition of Greenpeace, *et al.* Its Answer, adopting the arguments and allegations in the verified return filed by UPLBFI, was filed in the CA. See CA Resolution dated August 17, 2012, *id.* at 2117-2119.

2 million hectares of land in the Philippines which have been planted with *Bt* corn since 2003, and the absence of documented significant and negative impact to the environment and human health. The statements given by scientists and experts in support of the allegations of Greenpeace, et al. on the safety of *Bt* corn was also addressed by citing the contrary findings in other studies which have been peer-reviewed and published in scientific journals.

On the procedural aspect, ISAAA sought the dismissal of the petition for writ of *kalikasan* for non-observance of the rule on hierarchy of courts and the allegations therein being mere assertions and baseless conclusions of law. EMB, BPI and FPA questioned the legal standing of Greenpeace, et al. in filing the petition for writ of *kalikasan* as they do not stand to suffer any direct injury as a result of the *Bt talong* field tests. They likewise prayed for the denial of the petition for continuing mandamus for failure to state a cause of action and for utter lack of merit.

UPMFI also questioned the legal standing of Greenpeace, *et al.* for failing to allege that they have been prejudiced or damaged, or their constitutional rights to health and a balanced ecology were violated or threatened to be violated by the conduct of *Bt talong* field trials. Insofar as the field trials in Davao City, the actual field trials at Bago Oshiro started on November 25, 2010 but the plants were uprooted by Davao City officials on December 17-18, 2010. There were no further field trials conducted and hence no violation of constitutional rights of persons or damage to the environment, with respect to Davao City, occurred which will justify the issuance of a writ of *kalikasan.* UPMFI emphasized that under the MOU, its responsibility was only to handle the funds for the project in their trial site. It pointed out that in the Field Trial Proposal, Public Information Sheet, Biosafety Permit for Field Testing, and Terminal Report (Davao City Government) by respondent Leonardo R. Avila III, nowhere does UPMFI appear either as project proponent, partner or implementing arm. Since UPMFI, which is separate and distinct from UP, undertook only the fund management of *Bt talong* field test project the duration of which expired on July 1, 2011, it had nothing to do with any field trials conducted in other parts of the country.

Finally, it is argued that the precautionary principle is not applicable considering that the field testing is only a part of a continuing study being done to ensure that the field trials have no significant and negative impact on the environment. There is thus no resulting environmental damage of such magnitude as to prejudice the life, health, property of inhabitants in two or more cities or provinces. Moreover, the issues raised by Greenpeace, et al. largely involve technical matters which pertain to the special competence of BPI whose determination thereon is entitled to great respect and even finality.

By Resolution dated July 10, 2012, the Court referred this case to the CA for acceptance of the return of the writ and for hearing, reception of evidence and rendition of judgment.[22]

CA Proceedings and Judgment

At the preliminary conference held on September 12, 2012, the parties submitted the following procedural issues: (1) whether or not Greenpeace, et al. have legal standing to file the petition for writ of *kalikasan*; (2) whether or not said petition had been rendered moot and academic by the alleged termination of the *Bt talong* field testing; and (3) whether or not the case presented a justiciable controversy.

Under Resolution[23] dated October 12, 2012, the CA resolved that: (1) Greenpeace, et al. possess the requisite legal standing to file the petition for writ of *kalikasan*; (2) assuming *arguendo* that the field trials have already been terminated, the case is not yet moot since it is capable of repetition yet evading review; and (3) the alleged non-compliance with environmental and local government laws present justiciable controversies for resolution by the court.

The CA then proceeded to hear the merits of the case, adopting the "hot-tub" method wherein the expert witnesses of both parties testify at the same time. Greenpeace, et al. presented the following

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[22] *Id*. at 2100.

[23] *Id*. at 2312-2324.

as expert witnesses: Dr. Ben Malayang III (Dr. Malayang), Dr. Charito Medina (Dr. Medina), and Dr. Tushar Chakraborty (Dr. Chakraborty). On the opposing side were the expert witnesses in the persons of Dr. Reynaldo Ebora (Dr. Ebora), Dr. Saturnina Halos (Dr. Halos), Dr. Flerida Cariño (Dr. Cariño), and Dr. Peter Davies (Dr. Davies). Other witnesses who testified were: Atty. Carmelo Segui (Atty. Segui), Ms. Merle Palacpac (Ms. Palacpac), Mr. Mario Navasero (Mr. Navasero) and Dr. Randy Hautea (Dr. Hautea).

On November 20, 2012, Biotechnology Coalition of the Philippines, Inc. (BCPI) filed an Urgent Motion for Leave to Intervene as Respondent."[24] It claimed to have a legal interest in the subject matter of the case as a broad-based coalition of advocates for the advancement of modern biotechnology in the Philippines.

In its Resolution[25] dated January 16, 2013, the CA denied BCPI's motion for intervention stating that the latter had no direct and specific interest in the conduct of *Bt talong* field trials.

On May 17, 2013, the CA rendered a Decision in favor of Greenpeace, et al., as follows:

> **WHEREFORE**, in view of the foregoing premises, judgment is hereby rendered by us **GRANTING** the petition filed in this case. The respondents are **DIRECTED** to:
>
> (a) Permanently cease and desist from further conducting *bt talong* field trials; and
>
> (b) Protect, preserve, rehabilitate and restore the environment in accordance with the foregoing judgment of this Court.
>
> No costs.
>
> **SO ORDERED**.[26]

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[24] CA *rollo* (Vol. IV), pp. 2450-2460.

[25] *Id*. at 2864-2871.

[26] *Rollo* (G.R. No. 209271), Vol. 1, pp. 157-158.

The CA found that existing regulations issued by the DA and the Department of Science and Technology (DOST) are insufficient to guarantee the safety of the environment and health of the people. Concurring with Dr. Malayang's view that the government must exercise precaution "under the realm of public policy" and beyond scientific debate, the appellate court noted the possible irreversible effects of the field trials and the introduction of *Bt talong* to the market.

After scrutinizing the parties' arguments and evidence, the CA concluded that the precautionary principle set forth in Section 1, Rule 20 of the Rules of Procedure for Environmental Cases[27] finds relevance in the present controversy. Stressing the fact that the "over-all safety guarantee of the *bt talong*" remains unknown, the appellate court cited the testimony of Dr. Cariño who admitted that the product is not yet safe for consumption because a safety assessment is still to be done. Again, the Decision quoted from Dr. Malayang who testified that the question of *Bt talong*'s safety demands maximum precaution and utmost prudence, bearing in mind the country's rich biodiversity. Amid the uncertainties surrounding the *Bt talong,* the CA thus upheld the primacy of the people's constitutional right to health and a balanced ecology.

Denying the motions for reconsideration filed by ISAAA, EMB/BPI/FPA, UPLB and UPLBFI, the CA in its Resolution dated September 20, 2013 rejected the argument of UPLB that the appellate court's ruling violated UPLB's constitutional right to academic freedom. The appellate court pointed out that the writ of *kalikasan* originally issued by this Court did not stop research on *Bt talong* but only the particular procedure adopted in doing field trials and only at this time when there is yet no law in the form of a congressional enactment for ensuring its safety and levels of acceptable risks when introduced into the

[27] SECTION 1. Applicability. – When there is lack of full scientific certainty in establishing a causal link between human activity and environmental effect, the court shall apply the precautionary principle in resolving the case before it.

The constitutional right of the people to a balanced and healthful ecology shall be given the benefit of the doubt.

open environment. Since the writ stops the field trials of *Bt talong* as a procedure but does not stop *Bt talong* research, there is no assault on academic freedom.

The CA then justified its ruling by expounding on the theory that introducing a genetically modified plant into our ecosystem is an "ecologically imbalancing act." Thus:

> We suppose that it is of universal and general knowledge that an ecosystem is a universe of biotic (living) and non-biotic things interacting as a living community in a particular space and time. In the ecosystem are found specific and particular biotic and non-biotic entities which depend on each other for the biotic entities to survive and maintain life. A critical element for biotic entities to maintain life would be that their populations are in a proper and natural proportion to others so that, in the given limits of available non-biotic entities in the ecosystem, no one population overwhelms another. In the case of the Philippines, it is considered as one of the richest countries in terms of biodiversity. It has so many plants and animals. It also has many kinds of other living things than many countries in the world. We do not fully know how all these living things or creatures interact among themselves. But, for sure, **there is a perfect and sound balance of our biodiversity as created or brought about by God out of His infinite and absolute wisdom**. In other words, every living creature has been in existence or has come into being for a purpose. So, we humans are not supposed to tamper with any one element in this swirl of interrelationships among living things in our ecosystem. Now, **introducing a genetically modified plant in our intricate world of plants by humans certainly appears to be an ecologically imbalancing act. The damage that it will cause may be irreparable and irreversible.**
>
> At this point, it is significant to note that during the hearing conducted by this Court on November 20, 2012 wherein the testimonies of seven experts were given, Dr. Peter J. Davies (Ph.D in Plant [Physiology]), Dr. Tuskar Chakraborty (Ph.D in Biochemistry and Molecular Biology), Dr. Charito Medina (Ph.D in Environmental Biology), Dr. Reginaldo Ebora (Ph.D in Entomology), Dr. Flerida Cariño (Ph. D in Insecticide Toxicology), Dr. Ben Malayang (Ph.D in Wildland Resource Science) and Dr. Saturnina Halos (Ph.D in Genetics) were in unison in admitting that *bt talong* is an altered plant. x x x
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> x x x x x x x x x

Thus, it is evident and clear that *bt talong* is a technology involving the deliberate alteration of an otherwise natural state of affairs. It is designed and intended to alter natural feed-feeder relationships of the eggplant. It is a deliberate genetic reconstruction of the eggplant to alter its natural order which is meant to eliminate one feeder (the borer) in order to give undue advantage to another feeder (the humans). The genetic transformation is one designed to make *bt talong* toxic to its pests (the targeted organisms). In effect, *bt talong* kills its targeted organisms. Consequently, **the testing or introduction of bt talong into the Philippines, by its nature and intent, is a grave and present danger to (and an assault on) the Filipinos' constitutional right to a balanced ecology** because, in any book and by any yardstick, it is an ecologically imbalancing event or phenomenon. It is a willful and deliberate tampering of a naturally ordained feed-feeder relationship in our environment. It destroys the balance of our biodiversity. Because it violates the conjunct right of our people to a balanced ecology, the whole constitutional right of our people (as legally and logically construed) is violated.

Of course, the *bt talong*'s threat to the human health of the Filipinos as of now remains uncertain. This is because while, on one hand, no Filipinos has ever eaten it yet, and so, there is no factual evidence of it actually causing acute or chronic harm to any or a number of ostensibly identifiable perms, on the other hand, there is correspondingly no factual evidence either of it not causing harm to anyone. However, in a study published on September 20, 2012 in "*Food and Chemical Toxicology*," a team of scientists led by Professor Gilles-Eric Seralini from the University of Caen and backed by the France-based Committee of Independent Research and Information on Genetic Engineering came up with a finding that rats fed with Roundup-tolerant genetically modified corn for two years developed cancers, tumors and multiple organ damage. The seven expert witnesses who testified in this Court in the hearing conducted on November 20, 2012 were duly confronted with this finding and they were not able to convincingly rebut it. That is why we, in deciding this case, applied the precautionary principle in granting the petition filed in the case at bench.

Prescinding from the foregoing premises, therefore, because one conjunct right in the whole Constitutional guarantee is factually and is undoubtedly at risk, and the other still factually uncertain, the entire constitutional right of the Filipino people to a balanced and healthful ecology is at risk. Hence, the issuance of the writ of

kalikasan and the continuing writ of mandamus is justified and warranted.[28] (Additional emphasis supplied.)

Petitioners' Arguments

G.R. No. 209271

ISAAA advances the following arguments in support of its petition:

I

THE COURT OF APPEALS GRAVELY ERRED IN REFUSING TO DISMISS THE *PETITION FOR WRIT OF CONTINUING MANDAMUS AND WRIT OF KALIKASAN* CONSIDERING THAT THE SAME IS ALREADY MOOT AND ACADEMIC.

II

THE COURT OF APPEALS GRAVELY ERRED IN REFUSING TO DISMISS THE *PETITION FOR WRIT OF CONTINUING MANDAMUS AND WRIT OF KALIKASAN* CONSIDERING THAT THE SAME RAISES POLITICAL QUESTIONS.

A. IN SEEKING TO COMPEL THE REGULATORY AGENCIES "TO SUBMIT AN ACCEPTABLE DRAFT OF THE AMENDMENT OF THE NATIONAL BIO-SAFETY FRAMEWORK OF THE PHILIPPINES, AND DA ADMINISTRATIVE ORDER NO. 08," AND IN PRAYING THAT THE COURT OF APPEALS "RECOMMEND TO CONGRESS CURATIVE LEGISLATIONS," RESPONDENTS SEEK TO REVIEW THE WISDOM OF THE PHILIPPINE REGULATORY SYSTEM FOR GMOS, WHICH THE COURT OF APPEALS IS WITHOUT JURISDICTION TO DO SO.

B. WORSE, THE COURT OF APPEALS EVEN HELD THAT THERE ARE NO LAWS GOVERNING THE STUDY, INTRODUCTION AND USE OF GMOS IN THE PHILIPPINES AND COMPLETELY DISREGARDED E.O. NO. 514 AND DA-AO 08-2002.

III

THE COURT OF APPEALS GRAVELY ERRED IN REFUSING TO DISMISS THE *PETITION FOR WRIT OF CONTINUING*

[28] *Rollo* (G.R. No. 209271), Vol. I, pp. 168-170.

MANDAMUS AND WRIT OF KALIKASAN CONSIDERING THAT RESPONDENTS FAILED TO EXHAUST ADMINISTRATIVE REMEDIES.

IV

THE COURT OF APPEALS GRAVELY ERRED IN REFUSING TO DISMISS THE *PETITION FOR WRIT OF CONTINUING MANDAMUS AND WRIT OF KALIKASAN* CONSIDERING THAT PRIMARY JURISDICTION OVER THE SAME LIES WITH THE REGULATORY AGENCIES.

V

THE COURT OF APPEALS EXHIBITED BIAS AND PARTIALITY AND PREJUDGED THE INSTANT CASE WHEN IT RENDERED THE ASSAILED *DECISION* DATED 17 MAY 2013 AND *RESOLUTION* DATED 20 SEPTEMBER 2013.

VI

THE COURT OF APPEALS GRAVELY ERRED IN GRANTING THE WRIT OF KALIKASAN IN FAVOR OF RESPONDENTS.

A. THE EVIDENCE ON RECORD SHOWS THAT THE PROJECT PROPONENTS OF THE *BT TALONG FIELD TRIALS* COMPLIED WITH ALL ENVIRONMENTAL LAWS, RULES AND REGULATIONS IN ORDER TO ENSURE THAT THE PEOPLE'S RIGHT TO A BALANCED AND HEALTHFUL ECOLOGY ARE PROTECTED AND RESPECTED.

B. THE EVIDENCE ON RECORD SHOWS THAT THE *BT TALONG* FIELD TRIALS DO NOT CAUSE ENVIRONMENTAL DAMAGE AND DO NOT PREJUDICE THE LIFE, HEALTH AND PROPERTY OF INHABITANTS OF TWO OR MORE PROVINCES OR CITIES.

C. THE COURT OF APPEALS GRAVELY ERRED IN APPLYING THE PRECAUTIONARY PRINCIPLE IN THIS CASE DESPITE THE FACT THAT RESPONDENTS FAILED TO PRESENT AN IOTA OF EVIDENCE TO PROVE THEIR CLAIM.

VII

THE COURT OF APPEALS GRAVELY ERRED IN GRANTING A WRIT OF CONTINUING MANDAMUS AGAINST PETITIONER ISAAA.

VIII

THE COURT OF APPEALS' *DECISION* DATED 17 MAY 2013 AND *RESOLUTION* DATED 20 SEPTEMBER 2013 IS AN AFFRONT TO ACADEMIC FREEDOM AND SCIENTIFIC PROGRESS.[29]

G.R. No. 209276

Petitioners EMB, BPI and FPA, represented by the Office of the Solicitor General (OSG) assails the CA Decision granting the petition for writ of *kalikasan* and writ of continuing mandamus despite the failure of Greenpeace, et al. (respondents) to prove the requisites for their issuance.

Petitioners contend that while respondents presented purported studies that supposedly show signs of toxicity in genetically engineered eggplant and other crops, these studies are insubstantial as they were not published in peer-reviewed scientific journals. Respondents thus failed to present evidence to prove their claim that the *Bt talong* field trials violated environmental laws and rules.

As to the application of the precautionary principle, petitioners asserted that its application in this case is misplaced. The paper by Prof. Seralini which was relied upon by the CA, was not formally offered in evidence. In volunteering the said article to the parties, petitioners lament that the CA manifested its bias towards respondents' position and did not even consider the testimony of Dr. Davies who stated that "Seralini's work has been refuted by International committees of scientists"[30] as shown by published articles critical of Seralini's work.

Petitioners aver that there was no damage to human health since no *Bt talong* will be ingested by any human being during the field trial stage. Besides, if the results of said testing are adverse, petitioners will not allow the release of *Bt talong* to the environment, in line with the guidelines set by EO 514. The

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[29] *Id*. at 35-37.

[30] *Id*. at 81.

CA thus misappreciated the regulatory process as approval for field testing does not automatically mean approval for propagation of the same product. And even assuming that the field trials may indeed cause adverse environmental or health effects, the requirement of unlawful act or omission on the part of petitioners or any of the proponents, was still absent. Respondents clearly failed to prove there was any unlawful deviation from the provisions of DAO 08-2002. The BPI's factual finding on the basis of risk assessment on the *Bt talong* project should thus be accorded respect, if not finality by the courts.

Petitioners likewise fault the CA in giving such ambiguous and general directive for them to protect, preserve, rehabilitate and restore the environment, lacking in specifics which only indicates that there was really nothing to preserve, rehabilitate or restore as there was nothing damaged or adversely affected in the first place. As to the supposed inadequacy and ineffectiveness of existing regulations, these are all political questions and policy issues best left to the discretion of the policy-makers, the Legislative and Executive branches of government. Petitioners add that the CA treads on judicial legislation when it recommended the re-examination of country's existing laws and regulations governing studies and research on GMOs.

G.R. No. 209301

Petitioner UPLBFI argues that respondents failed to adduce the quantum of evidence necessary to prove actual or imminent injury to them or the environment as to render the controversy ripe for judicial determination. It points out that nowhere in the testimonies during the "hot-tub" presentation of expert witnesses did the witnesses for respondents claim actual or imminent injury to them or to the environment as a result of the *Bt talong* field tests, as they spoke only of injury in the speculative, imagined kind without any factual basis. Further, the petition for writ of *kalikasan* has been mooted by the termination of the field trials as of August 10, 2012.

Finding the CA decision as a judgment *not* based on fact, UPLBFI maintains that by reason of the nature, character, scale, duration, design, processes undertaken, risk assessments and

strategies employed, results heretofore recorded, scientific literature, the safeguards and other precautionary measures undertaken and applied, the *Bt talong* field tests did not or could not have violated the right of respondents to a balanced and healthful ecology. The appellate court apparently misapprehended the nature, character, design of the field trials as one for "consumption" rather than for "field testing" as defined in DAO 08-2002, the sole purpose of which is for the "efficacy" of the eggplant variety's resistance to the FSB.

Against the respondents' bare allegations, UPLBFI submits the following "specific facts borne by competent evidence on record" (admitted exhibits):[31]

> 118. Since the technology's inception 50 years ago, studies have shown that genetically modified crops, including *Bt talong,* significantly reduce the use of pesticides by farmers in growing eggplants, lessening pesticide poisoning to humans.
>
> 119. Pesticide use globally has decreased in the last [14-15] years owing to the use of insect-resistant genetically modified crops. Moreover, that insect-resistant genetically modified crops significantly reduce the use of pesticides in growing plants thus lessening pesticide poisoning in humans, reducing pesticide load in the environment and encouraging more biodiversity in farms.
>
> 120. Global warming is likewise reduced as more crops can be grown.
>
> 121. Transgenic Bacillus thuringensis (Bt) cotton has had a major impact on the Australian cotton industry by largely controlling Lepidopteran pests. To date, it had no significant impact on the invertebrate community studied.
>
> 122. Feeding on Cry1Ac contaminated non-target herbivores does not harm predatory heteropterans and, therefore, cultivation of Bt cotton may provide an opportunity for conservation of these predators in cotton ecosystems by reducing insecticide use.

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[31] *Rollo* (G.R. No. 209301), pp. 48-50, 53-55.

123. The Bt protein in Bt corn only affects target insects and that Bt corn pollens do not negatively affect monarch butterflies.

124. The field trials will not cause "contamination" as feared by the petitioners because flight distance of the pollinators is a deterrent to cross pollination. Studies reveal that there can be no cross pollination more than a fifty (50) meter distance.

x x x x x x x x x

135. There is a 50 year history of safe use and consumption of agricultural products sprayed with commercial Bt microbial pesticides and a 14 year history of safe consumption of food and feed derived from Bt crops.

x x x x x x x x x

140. In separate reviews by the European Food Safety Agency (EFSA) and the Food Standards Australia and New Zealand (FSANZ), the "work" of one Prof. Seralini relied upon by [respondents] was dismissed as "scientifically flawed," thus providing no plausible basis to the proposition that Bt talong is dangerous to public health.

141. In a learned treatise by James Clive entitled "Global Status of Commercialized Biotech/GM Crops: 2011," the Philippines was cited to be the first country in the ASEAN region to implement a regulatory system for transgenic crops (which includes DAO 08-[2]002). Accordingly, the said regulatory system has also served as a model for other countries in the region and other developing countries outside of Asia.

On the precautionary principle, UPLBFI contends that the CA misapplied it in this case. The testimonial and documentary evidence of respondents, taken together, do not amount to "scientifically plausible" evidence of threats of serious and irreversible damage to the environment. In fact, since BPI started regulating GM crops in 2002, they have monitored 171 field trials all over the Philippines and said agency has not observed any adverse environmental effect caused by said field trials. Plainly, respondents failed to show proof of "specific facts" of

environmental damage of the magnitude contemplated under the Rules of Procedure for Environmental Cases as to warrant sanctions over the *Bt talong* field trials.

Lastly, UPLBFI avers that the *Bt talong* field trial was an exercise of the constitutional liberty of scientists and other academicians of UP, of which they have been deprived without due process of law. Stressing that a possibility is not a fact, UPLBFI deplores the CA decision's pronouncement of their guilt despite the preponderance of evidence on the environmental safety of the field trials, as evident from its declaration that "the over-all safety guarantee of *Bt talong* remains to be still unknown." It thus asks if in the meantime, petitioners must bear the judicial stigma of being cast as violators of the right of the people to a balanced and healthful ecology for an injury or damage *unsubstantiated* by evidence of scientific plausibility.

G.R. No. 209430

Petitioner UP reiterates UPLBFI's argument that the *Bt talong* field testing was conducted in the exercise of UPLB's academic freedom, which is a *constitutional right.* In this case, there is nothing based on evidence on record or overwhelming public welfare concern, such as the right of the people to a balanced and healthful ecology, which would warrant restraint on UPLB's exercise of academic freedom. Considering that UPLB complied with all laws, rules and regulations regarding the application and conduct of field testing of GM eggplant, and was performing such field tests within the prescribed limits of DAO 08-2002, and there being no harm to the environment or prejudice that will be caused to the life, health or property of inhabitants in two or more cities or provinces, to restrain it from performing the said field testing is unjustified.

Petitioner likewise objects to the CA's application of the precautionary principle in this case, in violation of the standards set by the Rules of Procedure for Environmental Cases. It points out that the *Bt* eggplants are not yet intended to be introduced into the Philippine ecosystem nor to the local market for human consumption.

Cited were the testimonies of two expert witnesses presented before the CA: Dr. Navasero who is an entomologist and expert in integrated pest management and insect taxonomy, and Dr. Davies, a member of the faculty of the Department of Plant Biology and Horticulture at Cornell University for 43 years and served as a senior science advisor in agricultural technology to the United States Department of State. Both had testified that based on generally accepted and scientific methodology, the field trial of *Bt* crops do not cause damage to the environment or human health.

Petitioner assails the CA in relying instead on the conjectural statements of Dr. Malayang. It asserts that the CA could not support its Decision and Resolution on the pure conjectures and imagination of one witness. Basic is the rule that a decision must be supported by evidence on record.

Respondents' Consolidated Comment

Respondents aver that *Bt talong* became the subject of public protest in our country precisely because of the serious safety concerns on the impact of *Bt talong* toxin on human and animal health and the environment through *field trial contamination.* They point out that the inherent and potential risks and adverse effects of GM crops are recognized in the Cartagena Protocol and our biosafety regulations (EO 514 and DAO 08-2002). Contamination may occur through pollination, ingestion by insects and other animals, water and soil run off, human error, mechanical accident and even by stealing was inevitable in growing *Bt talong* in an open environment for field trial. Such contamination may manifest even after many years and in places very far away from the trial sites.

Contrary to petitioners' claim that they did not violate any law or regulation, or unlawful omission, respondents assert that, in the face of scientific uncertainties on the safety and effects of *Bt talong,* petitioners omitted their crucial duties to conduct environmental impact assessment (EIA); evaluate health impacts; get the free, prior and informed consent of the people in the host communities; and provide remedial and liability processes in the approval of the biosafety permit and conduct of the field

trials in its five sites located in five provinces. These omissions have put the people and the environment at serious and irreversible risks.

Respondents cite the numerous studies contained in "*Adverse Impacts of Transgenic Crops/Foods: A Compilation of Scientific References with Abstracts*" printed by Coalition for a GMO-Free India; a study on *Bt* corn in the Philippines, "*Socio-economic Impacts of Genetically Modified Corn in the Philippines*" published by MASIPAG in 2013; and the published report of the investigation conducted by Greenpeace, "*White Corn in the Philippines: Contaminated with Genetically Modified Corn Varieties*" which revealed positive results for samples purchased from different stores in Sultan Kudarat, Mindanao, indicating that they were contaminated with GM corn varieties, specifically the herbicide tolerant and *Bt* insect resistant genes from Monsanto, the world's largest biotech company based in the US.

To demonstrate the health hazards posed by *Bt* crops, respondents cite the following sources: the studies of Drs. L. Moreno-Fierros, N. Garcia, R. Gutierrez, R. Lopez-Revilla, and RI Vazquez-Padron, all from the Universidad Nacional Autonoma de Mexico; the conclusion made by Prof. Eric-Gilles Seralini of the University of Caen, France, who is also the president of the Scientific Council of the Committee for Independent Research and Information on Genetic Engineering (CRIIGEN), in his review, commissioned by Greenpeace, of Mahyco's data submitted in support of the application to grow and market *Bt* eggplant in India; and the medical interpretations of Prof. Seralini's findings by Filipino doctors Dr. Romeo Quijano of the University of the Philippines-Philippine General Hospital and Dr. Wency Kiat, Jr. of St. Luke's Medical Center (Joint Affidavit).

According to respondents, the above findings and interpretations on serious health risks are strengthened by the findings of a review of the safety claims in the MAHYCO Dossier authored by Prof. David A. Andow of the University of Minnesota, an expert in environmental assessment in crop science. The review was made upon the request in 2010 of His Honorable Shri Jairam

Ramesh of the Ministry of Environment and Forests of India, where MAHYCO is based. MAHYCO is the corporate creator and patent owner of the *Bt* gene inserted in *Bt talong*.

The conclusions of health hazards from the above studies were summarized[32] by respondents, as follows:

Studies/interpretation by	**Conclusion/interpretation**
Drs. L. Moreno-Fierros, N. Garcia, R. Gutierrez, R. Lopez-Revilla, and RI Vazquez-Padron	For *Bt* modified crops (like *Bt* talong), there is concern over its potential allergenicity. Cry1Ac (the gene inserted in *Bt* talong) protoxin is a potent immunogen (triggers immune response); the protoxin is immunogenic by both the intraperitoneal (injected) and intragastric (ingested) route; the immune response to the protoxin is both systemic and mucosal; and Cry1Ac protoxin binds to surface proteins in the mouse small intestine. These suggest that **extreme caution is required** in the use of Cry1Ac in food crops.
Prof. Eric-Gilles Seralini	His key findings showed statistical significant differences between group of animals fed GM and non-GM eggplant that raise **food safety concerns and warrant further investigation**.
Dr. Romeo Quijano & Dr. Wency Kiat, Jr.	Interpreting Prof. Seralini's findings, the altered condition of rats **symptomatically indicate hazards for human health**
	The MAHYCO dossier is inadequate to support the needed environmental risk assessment; MAHYCO's food safety

[32] *Rollo* (G.R. No. 209271), Vol. IX, pp. 4111-4112. Citations omitted.

Prof. David A. Andow	assessment does not comply with international standards; and that MAHYCO relied on dubious scientific assumptions and disregarded real environmental threats.

As to environmental effects, respondents said these include the potential for living modified organisms, such as *Bt talong* tested in the field or released into the environment, to contaminate non-GM traditional varieties and other wild eggplant relatives and turn them into novel pests, outcompete and replace their wild relatives, increase dependence on pesticides, or spread their introduced genes to weedy relatives, potentially creating superweeds, and kill beneficial insects.

Respondents then gave the following tabulated summary[33] of *field trial contamination cases* drawn from various news reports and some scientific literature submitted to the court:

What happened	**Impact**	**How did it occur**
During 2006 and 2007, traces of three varieties of unapproved genetically modified rice owned by Bayer Crop Science were found in US rice exports in over 30 countries worldwide.	In July 2011, Bayer eventually agreed to a $750m US dollar settlement resolving claims with about 11,000 US farmers for market losses and clean-up costs. The total costs to the rice industry are likely to have been over $1bn worldwide.	Field trials were conducted between the mid-1990s and early 2000s. The US Department of Agriculture (USDA) reported these field trials were the likely sources of the contamination between the modified rice and conventional varieties. However, it was unable to conclude [if it] was caused by gene flow (cross pollination) or mechanical mixing.

[33] *Id.* at 4112-4115. Citations omitted.

In 2009, unauthorised GE linseed (also known as 'flax') produced by a public research institution was discovered in food in several EU countries, having been imported from Canada.	Canada lost exports to its main European market worth hundreds of millions of dollars and non-GElinseed farmers have faced huge costs and market losses.	In the late 1980s a public research institution, the Crop Development Centre in Saskatoon, Saskatchewan, developed a GElinseed variety FP96—believed to be the origin of the contamination.
During 2004, the Thai government found that papaya samples from 85 farms were genetically modified. The contamination continued into 2006 and it is likely that the GE contamination reached the food chain.	Exports of papaya to Europe have been hit because of fears that contamination could have spread. The Thai government said it was taking action to destroy the contaminated trees.	GE papaya is not grown commercially in Thailand, so it was clear that the contamination originated from the government station experimentally breeding GE papaya trees. Tests that showed that one third of papaya orchards tested in the eastern province of Rayong and the north-eastern provinces of Mahasarakham, Chaiyaphum and Kalasinhad GE-contaminated papaya seeds in July 2005. The owners said that a research station gave them the seeds.
In the US in 2002, seeds from a GE maize pharma-crop containing a pig vaccine grew independently among normal soybean crops.	Prodigene, the company responsible, was fined $3m for tainting half a million bushels of soya bean with a trial vaccine	Seeds from the GE maize crop sprouted voluntarily in the following season.

	used to prevent stomach upsets in piglets. Prodigene agreed to pay a fine of $250,000 and to repay the government for the cost of incinerating the soya bean that had been contaminated with genetically altered corn.	
In 2005, Greenpeace discovered that GE rice seeds had been illegally sold in Hubei, China. Then, in 2006, GE rice event Bt63 was found in baby food sold in Beijing, Guangzhou and Hong Kong. In late 2006, GE rice Bt63 was found to be contaminating exports in Austria, France, the UK and Germany. In 2007 it was again found in EU imports to Cyprus, Germany, Greece, Italy and Sweden.	The European Commission adopted emergency measures (on 15 August 2008) to require compulsory certification for the imports of Chinese rice products that could contain the unauthorised GE rice Bt63. The Chinese government took several measures to try to stop the contamination, which included punishing seed companies, confiscating GEseed, destroying GErice grown in the field and tightening control over the food chain.	The source of the contamination appears to have been the result of illegal planting of GE seeds. Seed companies in China found to have sold GE rice hybrid seed to farmers operated directly under the university developing GM rice. It has been reported that the key scientist sat on the board of one GEseed company.
In 2005, the European Commission announced that illegal Bt10 GE maize produced by G Eseed	The European Commission blocked US grain import unless they could be guaranteed free of	The contamination arose because Syngenta's quality control procedures did not differentiate

company Syngenta had entered the European food chain. The GEmaize Bt10 contains a marker gene that codes for the widely-used antibiotic ampicillin, while the Bt11 does not. According to the international Codex Alimentarius Guideline for Conduct of Food Safety Assessment of Foods Derived from Recombinant-DNA: Plants: 'Antibiotic resistance genes used in food production that encode resistance to clinically used antibiotics should not be present in foods' because it increases the risk of antibiotic resistance in the population.	Bt10. The USDA fined Syngenta $375,000. There are no figures for the wider costs.	between Bt10 and its sister commercial line, Bt11. As a result, the experimental and substantially different Bt10 line was mistakenly used in breeding. The error was detected four years later when one of the seed companies developing Bt11 varieties adopted more sophisticated analytical techniques.

Refuting the claim of petitioners that contamination is nil or minimal because the scale of *Bt talong* field trial is isolated, restricted and that "each experiment per site per season consists of a maximum net area planted to *Bt* eggplant of between 480 sq. meters to 1,080 sq. meters,"[34] respondents emphasize that as shown by the above, contamination knows no size and boundaries in an open environment.

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[34] *Rollo* (G.R. No. 209271), Vol. IX, p. 4115.

With regard to the required geographical coverage of environmental damage for the issuance of writ of *kalikasan,* respondents assert that while the *Bt talong* field trials were conducted in only five provinces, the environmental damage prejudicial to health extends beyond the health of the present generation of inhabitants in those provinces.

On petitioners' insistence in demanding that those who allege injury must prove injury, respondents said that biosafety evidence could not be readily contained in a *corpus delicti* to be presented in court. Indeed, the inherent and potential risks and adverse effects brought by GMOs are not like dead bodies or wounds that are immediately and physically identifiable to an eyewitness and which are resulting from a common crime. Precisely, this is why the Cartagena Protocol's foundation is on the precautionary principle and development of sound science and its links, to social and human rights law through its elements of public awareness, public participation and public right to know. This is also why the case was brought under the Rules of Procedure for Environmental Cases and not under ordinary or other rules, on the grounds of violation of the rights of the Filipino people to health, to a balanced and healthful ecology, to information on matters of national concern, and to participation. The said Rules specifically provides that the appreciation of evidence in a case like this must be guided by the precautionary principle.

As to the non-exhaustion of administrative remedies being raised by petitioners as ground to dismiss the present petition, respondents said that nowhere in the 22 sections of DAO 08-2002 that one can find a remedy to appeal the decision of the DA issuing the field testing permit. What is only provided for is a mechanism for applicants of a permit, not stakeholders like farmers, traders and consumers to appeal a decision by the BPI-DA in case of denial of their application for field testing. Moreover, DAO 08-2002 is silent on appeal after the issuance of the biosafety permit.

Finally, on the propriety of the writ of continuing mandamus, respondents argue that EO 514 explicitly states that the application of biosafety regulations shall be made in accordance with *existing*

laws and the guidelines therein provided. Hence, aside from risk assessment requirement of the biosafety regulations, pursuant to the PEISS law and Sections 12 and 13 of the Philippine Fisheries Code of 1998, an environmental impact statement (EIS) is required and an environmental compliance certificate (ECC) is necessary before such *Bt* crop field trials can be conducted.

Petitioners' Replies

G.R. No. 209271

ISAAA contends that the Precautionary Principle and the Rules of Procedure for Environmental Cases do not empower courts to adjudicate a controversy that is moot and academic. It points out that respondents failed to satisfy all the requirements of the exception to the rule on actual controversies. The Biosafety Permit is valid for only two years, while the purported stages in the commercialization, propagation and registration of *Bt talong* still cannot confer jurisdiction on the CA to decide a moot and academic case.

As to the propriety of the writ of continuing mandamus, ISAAA maintains that public petitioners do not have "mandatory" and "ministerial" duty to re-examine and reform the biosafety regulatory system, and to propose curative legislation. The law (EO 514) cited by respondents does not impose such duty on public petitioners. As for the Cartagena Protocol, it laid down a procedure for the evaluation of the Protocol itself, not of the Philippine biosafety regulatory system. ISAAA stresses that the CA is without jurisdiction to review the soundness and wisdom of existing laws, policy and regulations. Indeed, the questions posed by the respondents are political questions, which must be resolved by the executive and legislative departments in deference to separation of powers.

On the availability of administrative remedies, ISAAA asserts that respondents are mistaken in saying that these are limited to appeals. The concerned public may invoke Section 8 (G) of DAO 08-2002 which grants them the right to submit their written comments on the BPI regarding the field testing permits, or Section 8 (P) for the revocation and cancellation of a field testing

permit. Respondents' failure to resort to the internal mechanisms provided in DAO 08-2002 violates the rule on exhaustion of administrative remedies, which warrants the dismissal of respondents' petition.

ISAAA points out that under Section 7 of DAO 08-2002, the BPI is the approving authority for field testing permits, while under Title IV, Chapter 4, Section 19 of the Administrative Code of 1987, the DA through the BPI, is responsible for the production of improved planting materials and protection of agricultural crops from pests and diseases. In bypassing the administrative remedies available, respondents not only failed to exhaust a less costly and speedier remedy, it also deprived the parties of an opportunity to be heard by the BPI which has primary jurisdiction and knowledgeable on the issues they sought to raise.

Rejecting the scientific data presented by the respondents, petitioners found Annex "A" of the Consolidated Comment as irrelevant because it was not formally offered in evidence and are hearsay. Majority of those records contain incomplete information and none of them pertain to the *Bt talong*. Respondents likewise presented two misleading scientific studies which have already been discredited: the 2013 study by B.P. Mezzomo, et al. and the study by Prof. Seralini in 2012. Petitioner notes that both articles have been withdrawn from publication.

ISAAA further describes Annex "A" as a mere compilation of records of flawed studies with only 126 usable records out of the 338 records. In contrast, petitioner cites the work of Nicolia, A., A. Manzo, F. Veronesi, and D. Rosellini, entitled "*An overview of the last 10 years of genetically engineered crop safety research*." The authors evaluated 1,783 scientific records of GE crop safety research papers, reviews, relevant opinions and scientific reports from 2002-2012. Their findings concluded that "the scientific research conducted so far has not detected any significant hazards directly connected with the use of GE crops." In the article "*Impacts of GM crops on biodiversity*," in which scientific findings concluded that "[o]verall, x x x

currently commercialized GM crops have reduced the impacts of agriculture on biodiversity, through enhanced adoption of conservation tillage practices, reduction of insecticide use and use of more environmentally benign herbicides and increasing yields to alleviate pressure to convert additional land into agricultural use."

Debunking the supposed inherent risks and potential dangers of GMOs, petitioner cites *EUR 24473 – A decade of EU-funded GMO research (2001-2010)*, concluded from more than 130 research projects, covering a period of 25 years of research, and involving more than 500 independent research groups, that "biotechnology, and in particular GMOs, are not per se more risky than e.g. conventional plant breeding technologies." Another article cited is *"Assessment of the health impact of GM plant diets in long-term and multigenerational animal feeding trials: A literature review"* which states that scientific findings show that GM crops do not suggest any health hazard, and are nutritionally equivalent to their non-GM counterparts and can be safely used in food and feed.

Addressing the studies relied upon by respondents on the alleged adverse environmental effects of GM crops, petitioner cites the article *"Ecological Impacts of Genetically Modified Crops: Ten Years of Field Research and Commercial Cultivation"* which concluded that "[T]he data available so far provide no scientific evidence that the cultivation of the presently commercialized GM crops has caused environmental harm." A related article, "*A Meta-Analysis of Effects of Bt Cotton and Maize on Non-target Invertebrates*," states that scientific findings show that non-target insects are more abundant in GM crop fields like *Bt* cotton and *Bt maize* fields than in non-GM crops that are sprayed with insecticides.

The two tables/summaries of studies submitted by respondents are likewise rejected by ISAAA, which presented the following comments and criticisms on each of the paper/article cited, thus:

With respect to the study made by L. Moreno-Fierros, *et al.*, the same should be rejected considering that this was not formally offered as evidence by respondents. Hence, the same may not be considered

by the Honorable Court. (Section 34, Rule 132 of the Rules of Court; ***Heirs of Pedro Pasag v. Spouses Parocha****, supra*)

Further, the study is irrelevant and immaterial. The Cry1Ac protein used in the study was from engineered *E.coli* and may have been contaminated by endotoxin. The Cry1Ac used in the study was **not** from *Bt talong*. Hence, respondents' attempt to extrapolate the interpretation and conclusion of this study to *Bt talong* is grossly erroneous and calculated to mislead and deceive the Honorable Court.

Moreover, in a review by Bruce D. Hammond and Michael S. Koch of the said study by L. Moreno-Fierros, *et al.*, which was published in an article entitled *A Review of the Food Safety of Bt Crops*, the authors reported that Adel-Patient, *et al*. tried and failed to reproduce the results obtained by the study made by L. Moreno-Fierros, *et al*. The reason is because of endotoxin contamination in the preparation of the Cry1Ac protein. Further, when purified Cry protein was injected to mice through intra-gastric administration, there was no impact on the immune response of the mice.

In addition, the biological relevance of the study made by L. Moreno-Fierros, *et al*. to assessing potential health risks from human consumption of foods derived from *Bt* crops can be questioned because the doses tested in mice is irrelevant to human dietary exposure, i.e., the doses given were "far in excess of potential human intakes."

With respect to the interpretation made by Prof. Eric-Gilles Seralini, the same is not entitled to any weight and consideration because his sworn statement was not admitted in evidence by the Court of Appeals.

Further, Seralini's findings are seriously flawed. Food safety experts explained the differences observed by Seralini's statistical analysis as examples of random biological variation that occurs when many measurements are made on test animals, and which have no biological significance. Hence, there are no food safety concerns. Further, petitioner ISAAA presented in evidence the findings of regulatory bodies, particularly the EFSA and the FSANZ, to controvert Seralini's findings. The EFSA and the FSANZ rejected Seralini's findings because the same were based on **questionable statistical procedure** employed in maize in 2007.

In addition, it must be pointed out that the Indian regulatory authority, GEAC, has not revised its earlier decision approving the safety of *Bt* eggplant notwithstanding the findings of Seralini's

assessment. In effect, Seralini's findings and interpretation were rejected by the Indian regulatory agency.

With respect to the interpretation made by Drs. Romeo Quijano and Wency Kiat, the same is not entitled to any weight and consideration because the Court of Appeals did not admit their sworn statement. Further, Drs. Romeo Quijano and Wency Kiat sought to interpret a seriously flawed study, making their sworn statements equally flawed.

In an attempt to mislead the Honorable Court, respondents tried to pass off the review of Prof. David A. Andow as the work of the National Academy of Sciences of the USA. Such claim is grossly misleading. In truth, as Prof. David A. Andow indicated in the preface, the report was produced upon the request of Aruna Rodriguez, a known anti-GM campaigner.

Further, Prof. David A. Andow's review did not point to any negative impact to the environment of Mahyco's *Bt brinjal* (Indian name for *Bt talong*) during the entire period of conduct of field trials all over the country. He concluded, however, that the dossier is inadequate for ERA. This is perplexing considering this is the same gene that has been used in *Bt* cotton since 1996. Scores of environmental and food safety risk assessment studies have been conducted and there is wealth of information and experience on its safety. Various meta-analyses indicate that delaying the use of this already effective *Bt brinjal* for managing this devastating pest only ensures the continued use of frequent insecticide sprays with proven harm to human and animal health and the environment and loss of potential income of resource-poor small farmers.

Notwithstanding the conclusions of Prof. David A. Andow, to date, it is worth repeating that the Indian regulatory body, GEAC, has not revised its earlier decision approving the safety of *Bt* eggplant based on the recommendation of two expert committees which found the Mahyco regulatory dossier compliant to the ERA stipulated by the Indian regulatory body. In effect, like Seralini, Andow's findings and interpretation were also rejected by the Indian regulatory agency.[35]

Petitioner reiterates that the PEIS law does not apply to field testing of *Bt talong* and the rigid requirements under Section 8

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[35] *Id.*, Vol. XI, pp. 5715-5717.

of DAO 08-2002 already takes into consideration any and all significant risks not only to the environment but also to human health. The requirements under Sections 26 and 27 of the Local Government Code are also inapplicable because the field testing is not among the six environmentally sensitive activities mentioned therein; the public consultations and prior local government unit (LGU) approval, were nevertheless complied with. Moreover, the field testing is an exercise of academic freedom protected by the Constitution, the possibility of *Bt talong*'s commercialization in the future is but incidental to, and fruit of the experiment.

As to the "commissioned studies" on *Bt* corn in the Philippines, petitioner asserts that these are inadmissible, hearsay and unreliable. These were not formally offered in evidence; self-serving as it was conducted by respondents Greenpeace and MASIPAG themselves; the persons who prepared the same were not presented in court to identify and testify on its findings; and the methods used in the investigation and research were not scientific. Said studies failed to establish any correlation between *Bt* corn and the purported environmental and health problems.

G.R. No. 209276

EMB, BPI and FPA joined in objecting to Annex "A" of respondents' consolidated comment, for the same reasons given by ISAAA. They noted that the affidavit of Prof. Seralini, and the joint affidavit of Dr. Kiat and Dr. Quijano were denied admission by the CA. Given the failure of the respondents to present scientific evidence to prove the claim of environmental and health damages, respondents are not entitled to the writ of *kalikasan*.

Public petitioners reiterate that in issuing the Biosafety Permits to UPLB, they made sure that the latter complied with all the requirements under DAO 08-2002, including the conduct of risk assessment. The applications for field testing of *Bt talong* thus underwent the following procedures:

Having completed the contained experiment on the *Bt talong*, UPLB filed with BPI several applications for issuance of Biosafety

Permits to conduct multi-locational field testing of *Bt talong*. Even before the proponent submitted its application, petitioner BPI conducted a consultative meeting with the proponent to enlighten the latter about the requirements set out by DA AO No. 8.

Thereafter, petitioner BPI evaluated UPLB's applications *vis-à-vis* the requirements of Section 8 of DA AO No. 8 and found them to be sufficient in form and substance, *to wit*:

> *First*. The applications were in the proper format and contained all of the relevant information as required in Section 8 (A) (1) of DA AO No. 08.
>
> *Second*. The applications were accompanied by a (i) Certification from the NCBP that the regulated article has undergone satisfactory testing under contained conditions in the Philippines, (ii) technical dossier consisting of scientific literature and other scientific materials relied upon by the applicant showing that *Bt talong* will not pose any significant risks to human health and the environment, and (iii) copy of the proposed PIS for Field Testing as prescribed by Section 8 (A) (2) of DA AO No. 08; and
>
> *Third*. The applications contained the Endorsement of proposal for field testing, duly approved by the majority of all the members of the respective Institutional Biosafety Committees (**IBC**), including at least one community representative, as required by Section 8 (E) of DA AO No. 08.
>
> a. Under Sections 1 (L) and 8 (D) of DA AO No. 08, the IBC is responsible for the initial evaluation of the risk assessment and risk management strategies of the applicant for field testing using the NCBP guidelines. **The IBC shall determine if the data obtained under contained conditions provide sufficient basis to authorize the field testing of the regulated article**. In making the determination, the **IBC shall ensure that field testing does not pose any significant risks to human health and the environment**. The IBC may, in its discretion, require the proponent to perform additional experiments under contained conditions before acting on the field testing proposal. The IBC shall either endorse the field testing proposal to the BPI or reject it for failing the scientific risk assessment.
>
> b. Relatedly, UPLB had previously complied with Section 1 (L) of DA AO No. 08 which requires an applicant for field

> testing to establish an IBC in preparation for the field testing of a regulated article and whose membership has been approved by the BPI. Section 1 (L) of DA AO No. 08, requires that the IBC shall be composed of at least five (5) members, three (3) of whom shall be designated as "scientist-members" who shall possess scientific and technological knowledge and expertise sufficient to enable them to evaluate and monitor properly any work of the applicant relating to the field testing of a regulated article, and the other members are designated as "community representatives" who are in a position to represent the interest of the communities where the field testing is to be conducted.

Before approving the intended multi-locations [field] trials, petitioner BPI, pursuant to Section 8 (F) of DA AO No. 08, forwarded the complete documents to three (3) independent Scientific Technical Review Panel (**STRP**) members. Pending receipt of the risk assessment reports of the three STRP members, petitioner BPI conducted its own risk assessment.

Thereafter, on separate occasions, petitioner BPI received the final risk assessment reports of the three STRP members recommending the grant of Biosafety Permits to UPLB after a thorough risk assessment and evaluation of UPLB's application for field trial of *Bt talong*.

Meanwhile, petitioner BPI received from UPLB proofs of posting of the **PISs** for Field Testing in each concerned barangays and city/municipal halls of the localities having jurisdiction over its proposed field trial sites.

In addition to the posting of the **PISs** for Field Testing, petitioner BPI conducted consultative meetings and public seminars in order to provide public information and in order to give an opportunity to the public to raise their questions and/or concerns regarding the *Bt talong* field trials.[36]

Petitioners maintain that Sections 26 and 27 of the Local Government Code are inapplicable to the *Bt talong* field testing considering that its subject matter is not mass production for human consumption. The project entails only the planting of *Bt* eggplants and cultivation in a controlled environment; indeed,

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[36] *Id*. at 5835-5837.

the conduct of a field trial is not a guarantee that the *Bt talong* will be commercialized and allowed for cultivation in the Philippines.

On the non-exhaustion of administrative remedies by the respondents, petitioners note that during the period of public consultation under DAO 08-2002, it is BPI which processes written comments on the application for field testing of a regulated article, and has the authority to approve or disapprove the application. Also, under Section 8 (P), BPI may revoke a biosafety permit issued on the ground of, among others, receipt of new information that the field testing poses significant risks to human health and the environment. Petitioners assert they were never remiss in the performance of their mandated functions, as shown by their immediate action with respect to the defective certification of posting of PIS in Kabacan, North Cotabato. Upon receiving the letter-complaint on January 24, 2012, BPI readily ordered their re-posting. The same incident occurred in Davao City, where BPI refused to lift the suspension of biosafety permits until "rectification of the conditions for public consultation is carried out."

To underscore respondents' blatant disregard of the administrative process, petitioners refer to documented instances when respondents took the law in their own hands. Greenpeace barged into one of the *Bt talong* field trial sites at Bgy. Paciano Rizal, Bay, Laguna, forcibly entered the entrance gate through the use of a bolt cutter, and then proceeded to uproot the experimental crops without permission from BPI or the project proponents. Petitioners submit that the non-observance of the doctrine of exhaustion of administrative remedies results in lack of cause of action, one of the grounds under the Rules of Court justifying the dismissal of a complaint.

Petitions-in-Intervention

***Crop Life Philippines, Inc.* (Crop Life)**

Crop Life is an association of companies which belongs to a global (Crop Life International) as well as regional (Crop Life Asia) networks of member-companies representing the plant

science industry. It aims to "help improve the productivity of Filipino farmers and contribute to Philippine food security in a sustainable way." It supports "innovation, research and development in agriculture through the use of biology, chemistry, biotechnology, plant breeding, other techniques and disciplines."

On procedural grounds, Crop Life assails the CA in rendering judgment in violation of petitioners' right to due process because it was prevented from cross-examining the respondents' expert witnesses and conducting re-direct examination of petitioners' own witnesses, and being an evidently partial and prejudiced court. It said the petition for writ of *kalikasan* should have been dismissed outright as it effectively asks the Court to engage in "judicial legislation" to "cure" what respondents feel is an inadequate regulatory framework for field testing of GMOs in the Philippines. Respondents also violated the doctrine of exhaustion of administrative remedies, and their petition is barred by estoppel and laches.

Crop Life concurs with the petitioners in arguing that respondents failed to specifically allege and prove the particular environmental damage resulting from the *Bt talong* field testing. It cites the scientific evidence on record and the internationally accepted scientific standards on GMOs and GMO field testing, and considering the experience of various countries engaged in testing GMOs, telling us that GMO field testing will not damage the environment nor harm human health and more likely bring about beneficial improvements.

Crop Life likewise assails the application of the Precautionary Principle by the CA which erroneously equated field testing of *Bt talong* with *Bt talong* itself; failed to recognize that in this case, there was no particular environmental damage identified, much less proven; relied upon the article of Prof. Seralini that was retracted by the scientific journal which published it; there is no scientific uncertainty on the adverse effects of GMOs to environment and human health; and did not consider respondents' failure to prove the insufficiency of the regulatory framework under DAO 08-2002.

On policy grounds, Crop Life argues that requiring all organisms/plants to be considered absolutely safe before any field testing may be allowed, would result in permanently placing the Philippines in the shadows of more developed nations (whose economies rest on emerging markets importing products from them). It points out that the testing of *Bt talong* specifically addresses defined problems such as the need to curb the misuse of chemical pesticides.

Biotechnology Coalition of the Philippines (BCP)

BCP is a non-stock, non-profit membership association, a broad-based multi-sectoral coalition of advocates of modern biotechnology in the Philippines.

Reversal of the CA ruling is sought on the following grounds:

I.

THE COURT OF APPEALS ERRED IN TAKING COGNIZANCE OF THE *KALIKASAN* PETITION IN THE ABSENCE OF ANY JUSTICIABLE CONTROVERSY.

II.

EXISTING LEGISLATION AND ADMINISTRATIVE REGULATIONS ALREADY INCORPORATE THE PRECAUTIONARY PRINCIPLE AS A GUIDING PRINCIPLE IN RELATION TO GMOs.

III.

THE CA DECISION AND THE CA RESOLUTION IMPROPERLY APPLIED THE PRECAUTIONARY PRINCIPLE.

IV.

THE COURT OF APPEALS' ERRONEOUS APPLICATION OF THE PRECAUTIONARY PRINCIPLE, IF SUSTAINED, WOULD PRODUCE A DANGEROUS PRECEDENT THAT IS ANTI-PROGRESS, ANTI-TECHNOLOGY AND, ULTIMATELY, DETRIMENTAL TO THE FILIPINO PEOPLE.[37]

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[37] *Rollo* (G.R. No. 209271), Vol. V, pp. 2386-2387.

BCP argued that in the guise of taking on a supposed justiciable controversy, despite the *Bt talong* field trials having been terminated, the CA entertained a prohibited collateral attack on the sufficiency of DAO 08-2002. Though not invalidating the issuance, which the CA knew was highly improper, it nonetheless granted the petition for writ of *kalikasan* on the theory that "mere biosafety regulations" were insufficient to guarantee the safety of the environment and the health of the people.

Also reiterated were those grounds for dismissal already raised by the petitioners: failure to exhaust administrative remedies and finality of findings of administrative agencies.

BCP further asserts that the application of a *stringent* "risk assessment" process to regulated articles prior to any release in the environment for field testing mandated by AO No. 8 sufficiently complies with the rationale behind the development of the precautionary principle. By implementing the stringent provisions of DAO 08-2002, in conjunction with the standards set by EO 514 and the NBF, the government preemptively intervenes and takes precautionary measures prior to the release of any potentially harmful substance or article into the environment. Thus, any potential damage to the environment is prevented or negated. Moreover, international instruments ratified and formally adopted by the Philippines (CBD and the Cartagena Protocol) provide additional support in the proper application of the precautionary principle in relation to GMOs and the environment.

On the "misapplication" by the CA of the precautionary principle, BCP explains that the basic premise for its application is the existence of threat of harm or damage to the environment, which must be backed by a reasonable scientific basis and not based on mere hypothetical allegation, before the burden of proof is shifted to the public respondents in a petition for writ of *kalikasan*. Here, the CA relied heavily on its observation that "… field trials of *bt* talong could not be declared…as safe to human health and to ecology, with full scientific certainty, being an alteration of an otherwise natural state of affairs in our ecology"

and "introducing a genetically modified plant in our intricate world of plants by humans certainly appears to be an ecologically imbalancing act," among others. BCP finds that this pronouncement of the CA constitutes an indictment not only against *Bt talong* but against all GMOs as well. The appellate court's opinion is thus highly speculative, sweeping and laced with obvious bias.

There being no credible showing in the record that the conduct of *Bt talong* field trials entails real threats and that these threats pertain to serious and irreversible damage to the environment, BCP maintains that the precautionary principle finds no application in this case. While Rule 20 of the Rules of Procedure for Environmental Cases states that "[w]hen there is a lack of full scientific certainty in establishing a causal link *between human activity and environmental effect*, the court shall apply the precautionary principle in resolving the case before it," the CA failed to note that the element of lack of full scientific certainty pertains merely to the *causal link* between human activity and environmental effect, and not the existence or risk of environmental effect.

BCP laments that sustaining the CA's line of reasoning would produce a chilling effect against technological advancements, especially those in agriculture. Affirming the CA decision thus sets a dangerous precedent where any and all human activity may be enjoined based on unfounded fears of possible damage to health or the environment.

Issues

From the foregoing submissions, the Court is presented with the following issues for resolution:

1. Legal standing of respondents;
2. Mootness;
3. Violation of the doctrines of primary jurisdiction and exhaustion of administrative remedies;
4. Application of the law on environmental impact statement/ assessment on projects involving the introduction and propagation of GMOs in the country;

5. Evidence of damage or threat of damage to human health and the environment in two or more provinces, as a result of the *Bt talong* field trials;

6. Neglect or unlawful omission committed by the public respondents in connection with the processing and evaluation of the applications for *Bt talong* field testing; and

7. Application of the Precautionary Principle.

The Court's Ruling

Legal Standing

Locus standi is "a right of appearance in a court of justice on a given question."[38] It refers particularly to "a party's personal and substantial interest in a case where he has sustained or will sustain direct injury as a result" of the act being challenged, and "calls for more than just a generalized grievance."[39]

However, the rule on standing is a matter of procedure which can be relaxed for non-traditional plaintiffs like ordinary citizens, taxpayers, and legislators when the public interest so requires, such as when the matter is of transcendental importance, of overreaching significance to society, or of paramount public interest.[40] The Court thus had invariably adopted a liberal policy on standing to allow ordinary citizens and civic organizations to prosecute actions before this Court questioning the constitutionality or validity of laws, acts, rulings or orders of various government agencies or instrumentalities.[41]

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[38] *Bayan Muna v. Romulo*, G.R. No. 159618, February 1, 2011, 641 SCRA 244, 254, citing *David v. Macapagal-Arroyo,* 522 Phil. 705, 755 (2006).

[39] *Id.*, citing *Jumamil v. Cafe,* 507 Phil. 455, 465 (2005).

[40] *Social Justice Society (SJS) v. Dangerous Drugs Board, et al.,* 591 Phil. 393, 404 (2008); *Tatad v. Secretary of the Department of Energy,* 346 Phil. 321 (1997); and *De Guia v. COMELEC,* G.R. No. 104712, May 6, 1992, 208 SCRA 420, 422.

[41] *Kilosbayan Incorporated v. Guingona, Jr.,* G.R. No. 113375, May 5, 1994, 232 SCRA 110, 137.

Oposa v. Factoran, Jr.[42] signaled an even more liberalized policy on *locus standi* in public suits. In said case, we recognized the "public right" of citizens to "a balanced and healthful ecology which, for the first time in our nation's constitutional history, is solemnly incorporated in the fundamental law." We held that such right need not be written in the Constitution for it is assumed, like other civil and political rights guaranteed in the Bill of Rights, to exist from the inception of mankind and it is an issue of transcendental importance with intergenerational implications. Such right carries with it the correlative duty to refrain from impairing the environment.

Since the *Oposa ruling*, ordinary citizens not only have legal standing to sue for the enforcement of environmental rights, they can do so in representation of their own and future generations. Thus:

> Petitioners minors assert that they represent their generation as well as generations yet unborn. We find no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generations, file a class suit. **Their personality to sue in behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned.** Such a right, as hereinafter expounded, considers the "rhythm and harmony of nature." Nature means the created world in its entirety. Such rhythm and harmony indispensably include, *inter alia*, the judicious disposition, utilization, management, renewal and conservation of the country's forest, mineral, land, waters, fisheries, wildlife, off-shore areas and other natural resources to the end that their exploration, development and utilization be equitably accessible to the present as well as future generations. Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. Put a little differently, the minors' assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come.[43] (Emphasis supplied.)

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[42] G.R. No. 101083, July 30, 1993, 224 SCRA 792, 804-805.

[43] *Id*. at 802-803.

The liberalized rule on standing is now enshrined in the Rules of Procedure for Environmental Cases which allows the filing of a citizen suit in environmental cases.[44] The provision on citizen suits in the Rules "collapses the traditional rule on personal and direct interest, on the principle that humans are stewards of nature," and aims to "further encourage the protection of the environment."[45]

There is therefore no dispute on the standing of respondents to file before this Court their petition for writ of *kalikasan* and writ of continuing mandamus.

Mootness

It is argued that this case has been mooted by the termination of all field trials on August 10, 2012. In fact, the validity of all Biosafety permits issued to UPLB expired in June 2012.

An action is considered 'moot' when it no longer presents a justiciable controversy because the issues involved have become academic or dead, or when the matter in dispute has already been resolved and hence, one is not entitled to judicial intervention unless the issue is likely to be raised again between the parties.[46] Time and again, courts have refrained from even expressing an opinion in a case where the issues have become moot and academic, there being no more justiciable controversy to speak of, so that a determination thereof would be of no practical use or value.[47]

Nonetheless, courts will decide cases, otherwise moot and academic if: *first*, there is a grave violation of the Constitution; *second,* the exceptional character of the situation and the

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[44] Rule 2, Sec. 5 reads in part:

SEC. 5. *Citizen suit.* – Any Filipino citizen in representation of others, including minors or generations yet unborn, may file an action to enforce rights or obligations under environmental laws. x x x

[45] See *Annotation* on A.M. 09-6-8-SC.

[46] *Santiago v. Court of Appeals,* 348 Phil. 792, 800 (1998).

[47] *Barbieto v. Court of Appeals,* G.R. No. 184645, October 30, 2009, 604 SCRA 825, 840.

paramount public interest is involved; *third*, when the constitutional issue raised requires formulation of controlling principles to guide the bench, the bar and the public; and *fourth*, the case is capable of repetition yet evading review."[48] We find that the presence of the second and fourth exceptions justified the CA in not dismissing the case despite the termination of *Bt talong* field trials.

While it may be that the project proponents of *Bt talong* have terminated the subject field trials, it is not certain if they have actually completed the field trial stage for the purpose of data gathering. At any rate, it is on record that the proponents expect to proceed to the next phase of the project, the preparation for commercial propagation of the *Bt* eggplants. Biosafety permits will still be issued by the BPI for *Bt talong* or other GM crops. Hence, not only does this case fall under the "capable of repetition yet evading review" exception to the mootness principle, the human and environmental health hazards posed by the introduction of a genetically modified plant, a very popular staple vegetable among Filipinos, is an issue of paramount public interest.

Primary Jurisdiction and Exhaustion of Administrative Remedies

In *Republic v. Lacap*,[49] the Court explained the related doctrines of primary jurisdiction and exhaustion of administrative remedies, as follows:

The general rule is that before a party may seek the intervention of the court, he should first avail of all the means afforded him by administrative processes. The issues which administrative agencies are authorized to decide should not be summarily taken from them and submitted to a court without first giving such administrative agency the opportunity to dispose of the same after due deliberation.

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[48] *Office of the Deputy Ombudsman for Luzon v. Francisco, Sr.,* G.R. No. 172553, December 14, 2011, 662 SCRA 439, 449, citing *David v. Macapagal-Arroyo, supra* note 38, at 754.

[49] 546 Phil. 87, 96-98 (2007).

Corollary to the doctrine of exhaustion of administrative remedies is the doctrine of primary jurisdiction; that is, courts cannot or will not determine a controversy involving a question which is within the jurisdiction of the administrative tribunal prior to the resolution of that question by the administrative tribunal, where the question demands the exercise of sound administrative discretion requiring the special knowledge, experience and services of the administrative tribunal to determine technical and intricate matters of fact.

Nonetheless, the doctrine of exhaustion of administrative remedies and the corollary doctrine of primary jurisdiction, which are based on sound public policy and practical considerations, are not inflexible rules. **There are many accepted exceptions,** such as: (a) where there is estoppel on the part of the party invoking the doctrine; (b) where the challenged administrative act is patently illegal, amounting to lack of jurisdiction; (c) where there is unreasonable delay or official inaction that will irretrievably prejudice the complainant; (d) where the amount involved is relatively small so as to make the rule impractical and oppressive; (e) where the question involved is purely legal and will ultimately have to be decided by the courts of justice; (f) where judicial intervention is urgent; (g) when its application may cause great and irreparable damage; (h) where the controverted acts violate due process; (i) when the issue of non-exhaustion of administrative remedies has been rendered moot; (j) **when there is no other plain, speedy and adequate remedy**; (k) **when strong public interest is involved;** and, (l) in *quo warranto* proceedings. x x x (Emphasis supplied)

Under DAO 08-2002, the public is invited to submit written comments for evaluation by BPI after public information sheets have been posted (Section 7[G]). Section 7(P) also provides for revocation of field testing permit on certain grounds, to wit:

P. Revocation of Permit to Field Test. – A *Permit to Field Test* may be revoked for any of the following grounds:

1. Provision of false information in the *Application to Field Test*;

2. Violation of SPS or biosafety rules and regulations or of any conditions specified in the permit;

3. Failure to allow the inspection of the field testing site;

4. Receipt by BPI of new information that the field testing of the regulated article poses significant risks to human health and the environment;

5. Whether the regulated article was imported, misdeclaration of shipment; or

6. Such other grounds as BPI may deem reasonable to prevent significant risks to human health and the environment.

Respondents sought relief under the Rules of Procedure for Environmental Cases, claiming serious health and environmental adverse effects of the *Bt talong* field trials due to "inherent risks" associated with genetically modified crops and herbicides. They sought the immediate issuance of a TEPO to enjoin the processing for field testing and registering *Bt talong* as herbicidal product in the Philippines, stopping all pending field trials of *Bt talong* anywhere in the country, and ordering the uprooting of planted *Bt talong* in the field trial sites.

In addition to the TEPO and writ of *kalikasan,* respondents also sought the issuance of a writ of continuing mandamus commanding the respondents to: (1) comply with the requirement of environmental impact statement; (2) submit comprehensive risk assessments, field test reports, regulatory compliance reports and other material documents on *Bt talong* including issued certifications on public consultation with LGUs; (3) work with other agencies to submit a draft amendment to biosafety regulations; and (4) BPI, in coordination with relevant government agencies, conduct balanced nationwide public information on the nature of *Bt talong* field trial, and a survey of its social acceptability.

Clearly, the provisions of DAO 08-2002 do not provide a speedy, or adequate remedy for the respondents "to determine the questions of unique national and local importance raised here that pertain to laws and rules for environmental protection, thus [they were] justified in coming to this Court."[50] We take

[50] See *Boracay Foundation, Inc. v. Province of Aklan,* G.R. No. 196870, June 26, 2012, 674 SCRA 555, 608.

judicial notice of the fact that genetically modified food is an intensely debated global issue, and despite the entry of GMO crops (*Bt* corn*)* into the Philippines in the last decade, it is only now that such controversy involving alleged damage or threat to human health and the environment from GMOs has reached the courts.

Genetic Engineering

Genetic manipulation has long been practiced by conventional breeders of plant or animal to fulfill specific purposes. The basic strategy employed is to use the sexual mechanism to reorganize the genomes of two individuals in a new genetic matrix, and select for individuals in the progeny with the desirable combination of the parental characteristics. Hybridization is the conventional way of creating variation. In animals, mating is effected by introducing the desired sperm donor to the female at the right time. In plants, pollen grains from the desired source are deposited on the stigma of a receptive female plant. Pollination or mating is followed by fertilization and subsequently development into an embryo. The effect of this action is the reorganization of the genomes of two parents into a new genetic matrix to create new individuals expressing traits from both parents. The ease of crossing of mating varies from one species to another. However, conventional breeding technologies are limited by their long duration, need for sexual compatibility, low selection efficiency, and restricted gene pool.[51]

Recombinant DNA (*rDNA*) technology, often referred to as *genetic engineering*, allows scientists to transfer genes from one organism to any other, circumventing the sexual process. For example, a gene from a bacterium can be transferred to corn. Consequently, DNA technology allowed scientists to treat all living things as belonging to one giant breeding pool. Unlike other natural genome rearrangements phenomena, *rDNA* introduces alien DNA sequences into the genome. Even though crossing of two sexually compatible individuals produces

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[51] George Acquaah, *Understanding Biotechnology: an integrated and cyber-based approach*, (Pearson Education, Inc., 2004) at 62, 64, 69 and 70.

recombinant progeny, the term recombinant DNA is restricted to the product of the union of DNA segments of different biological origins. The product of recombinant DNA manipulation is called a *transgenic organism*. *rDNA* is the core technology of biotechnology.[52]

The organism that is created through genetic engineering is called a genetically modified organism (GMO). Since the production of the first GMOs in the 1970s, genes have been transferred between animal species, between plant species, and from animal species to plant species. Some genes can make an animal or plant grow faster or larger, or both. A gene produced by flounder (anti-freeze) was transplanted into salmon so that salmon can be farmed in colder climates. Many species of fish are genetically engineered to speed growth, to alter flesh quality, and to increase cold and disease resistance. In farm animals such as cattle, genes can be inserted to reduce the amount of fat in meat, to increase milk production, and to increase superior cheese-making proteins in milk. Biotechnology has also modified plants to produce its own pesticide, resist common diseases or to tolerate weed-killing herbicide sprays.[53]

Despite these promising innovations, there has been a great deal of controversy over bioengineered foods. Some scientists believe genetic engineering dangerously tampers with the most fundamental natural components of life; that genetic engineering is scientifically unsound; and that when scientists transfer genes into a new organism, the results could be unexpected and dangerous. But no long-term studies have been done to determine what effects GMO foods might have on human health.[54]

Genetically Modified Foods

The term GM food refers to crop plants created for human or animal consumption using the latest molecular biology

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[52] *Id*. at 72.

[53] Nancy Harris, *Genetically Engineered Foods*, (Greenhaven Press, 2004) at 5-6.

[54] *Id*. at 7.

techniques. These plants are modified in the laboratory to enhance desired traits such as increased resistance to herbicides or improved nutritional content.[55] Genetic modification of plants occurs in several stages:

1. An organism that has the desired characteristic is identified and the specific gene producing this characteristic is located and the DNA is cut off.
2. The gene is then attached to a carrier in order to introduce the gene into the cells of the plant to be modified. Mostly plasmid (piece of bacterial DNA) acts as a carrier.
3. Along with the gene and carrier a 'promoter' is also added to ensure that the gene works adequately when it is introduced into the plant.
4. The gene of interest together with carrier and promoter is then inserted into bacterium, and is allowed to reproduce to create many copies of the gene which are then transferred into the plant being modified.
5. The plants are examined to ensure that they have the desired physical characteristic conferred by the new gene.
6. The genetically modified plants are bred with conventional plants of the same variety to produce seed for further testing and possibly for future commercial use. The entire process from the initial gene selection to commercial production can take up to ten years or more.[56]

Benefits of GM Foods

The application of biotechnology in agricultural production promises to overcome the major constraints being faced in farming such as insect pest infestation and diseases which lead to substantial yield losses. Pest-resistant crops could substantially improve yields in developing countries where pest damage is

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[55] Sheweta Barak, Deepak Mudgil and B.S. Khatkar, "Genetically modified food: benefits, safety aspects and concerns" *Asian Journal of Food and Agro-Industry* <www.ajofai.info/Abstact/Genetically%2food%20benefits,%20safety %20aspects%2concerns.pdf> (visited last November 7, 2014).

[56] *Id*. at 550.

rampant and reduce the use of chemical pesticides. Crop plants which have been genetically engineered to withstand the application of powerful herbicides[57] using genes from soil bacteria eliminates the time-consuming and not cost-effective physical removal of weeds by tilling. The herbicides to which the GM crops are tolerant are "broad spectrum" weed-killers, which means they can be sprayed over the entire field, killing all plants apart from the GM crop. Herbicide-tolerant crops include transgenes providing tolerance to the herbicides (*glyphosate* or *glufosinate ammonium*). These herbicides kill nearly all kinds of plants except those that have the tolerance gene. Another important benefit is that this class of herbicides breaks down quickly in the soil, eliminating residue carryover problems and reducing adverse environmental impacts.[58]

Some plants are genetically engineered to withstand cold climates such as GM strawberries or soybeans, expressing the anti-freeze gene of arctic flounder, to protect themselves against the damaging effects of the frost; and GM tobacco and potato with anti-freeze gene from cold water fish. Crops could also be genetically modified to produce micronutrients vital to the human diet such as the "golden rice" genetically modified to produce beta-carotene, which can solve Vitamin A deficiency and prevent night blindness in pre-school children. Other efforts to enhance nutritional content of plants include the genetic modification of canola to enhance Vitamin E content or better balance fatty acids, cereals for specific starch or protein, rice for increased iron to reduce anemia, and plant oils to adjust cholesterol levels. There are also food crops engineered to produce edible vaccines against infectious diseases that would make vaccination more readily available to children around the world. For example, transgenic bananas containing inactivated viruses protecting against common developing world diseases such as cholera, hepatitis B and diarrhea, have been produced. These vaccines

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[57] Herbicide is defined as "a poisonous substance used to destroy unwanted plants." (Compact Oxford English Dictionary 473 [3rd ed. 2005]).

[58] *Supra* note 55, at 551-552.

will be much easier to ship, store and administer than traditional injectable vaccines.[59]

Overall, biotechnology is perceived as having the potential to either help or hinder reconciling of the often opposing goals of meeting the human demand for food, nutrition, fiber, timber, and other natural resources. Biotech crops could put more food on the table per unit of land and water used in agriculture, thus resulting in decreased land and water diverted to human uses. Increasing crop yields and reducing the amount of cultivated land necessary would also reduce the area subject to soil erosion from agricultural practices, which in turn would limit associated environmental effects on water bodies and aquatic species and would reduce loss of carbon sinks and stores into the atmosphere.[60]

Adverse Health Effects of GMOs

Along with the much heralded benefits of GM crops to human health and environment, there emerged controversial issues concerning GM foods. In 1999, it was found that genetically engineered foods can have negative health effects. Based on scientific studies, these foods can unleash new pathogens, contain allergens and toxins, and increase the risk of cancer, herbicide exposure, and harm to fetuses and infants.[61] Independent studies conducted went as far to conclude that GM food and feed are "inherently hazardous to health."[62]

A widely reported case is that of the Brazil nut gene expressed in soybean in order to increase the methionine content for animal feed. The protein was subsequently shown to be an allergen

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[59] *Id*. at 552-553.

[60] Indur M. Goklany, "Applying the Precautionary Principle to Genetically Modified Crops" *Policy Study Number 157* (2000): 4-5, 8 and 10. Print.

[61] Roberto Verzola, "Genetically Engineered Foods Have Health Risks" *supra* note 53, at 38-42.

[62] Mae-Wan Ho, "Ban GMOs Now," Lecture by at conference on Traditional Seeds Our National Treasure and Heritage – Traditional and Organic Agriculture. Bewelder, Warsaw, Poland, April 6, 2008. <http://www.i-sis.org.uk/Ban_GMOs_Now.php.> (visited last December 4, 2014)

and the product was never marketed. Genetically modified foods can introduce novel proteins into the food supply from organisms that are never consumed as foods, which may pose a health risk. This may elicit potentially harmful immunological responses, including allergic hypersensitivity.[63]

A feeding experiment conducted by Dr. Arpad Pusztai also demonstrated that potatoes genetically altered to produce lectins, natural insecticides, to protect them against aphids, damaged the animals' gut, other organs, and immune system. Dr. Pusztai found that "the damage originated not from the transgene and its expressed product but from the damage caused by the insertion of the transgene, probably due to insertional mutagenesis."[64] If confirmed, Pusztai's conclusions will reinforce concerns that gene insertion itself may create new toxins; it will also implicate the toxin commonly used in other genetically engineered crops — the *Bt* toxin which, Pusztai says, is also a lectin.[65]

The use of antibiotic resistance marker *(arm)* gene, inserted into a plant or microbe, that helps determine if the foreign gene has successfully spliced into the host organism, is another cause of grave concern among scientists. These *arm* genes might unexpectedly recombine with disease-causing bacteria or microbes in the environment or in the guts of animals or humans who eat GM food, thus contributing to the growing public health danger of antibiotic-resistance of infections that cannot be cured with traditional antibiotics (*e.g.*, new strains of salmonella, e-coli, campylobacter and enterococci).[66] However, recent advances in genetic engineering indicate that use of such selection markers

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[63] Anita Bakshi, "Potential Adverse Health Effects of Genetically Modified Crops" *Journal of Toxicology and Environmental Health* B (2003) <http://globalseminarhealth.wdfiles.com/local—files.nutrition/Bakshi.pdf> (visited last December 4, 2014).

[64] Ken Roseboro, ed. "Arpad Pusztai and the Risks of Genetic Engineering" *The Organic and Non-GMO Report* (June 2009) <http://www.organicconsumers.org/articles/article_18101.cfm>. (visited last December 6, 2014).

[65] Verzola, *supra* note 61, at 40.

[66] Barak, Mudgil and Khatkar, *supra* note 55, at 555.

is likely to diminish with the anticipated development of alternative types of marker genes.[67]

Increased cancer risk is another critical issue in the consumption of GM foods. A growth hormone genetically modified to stimulate milk production in cows was found to elevate levels of IGF-1 (insulin-like Growth Factor-1, identical versions of which occurs in cows and humans) in cow's milk by 80%. IGF-1 is reported to be a key factor in prostate cancer, breast cancer and lung cancer.[68] Dr. Samuel Epstein of the University of Illinois warned of the danger of high levels of IGF-1 contained in milk cows injected with synthetic bovine growth hormone (*r*BGH), which could be a potential risk factor for breast and gastrointestinal cancers.[69]

Glyphosate, the active ingredient in Monsanto's Roundup® herbicide, has been found to worsen modern diseases. A report published in the journal *Entropy* argues that glyphosate residues, found in most commonly consumed foods in the Western diet courtesy of genetically engineered sugar, corn, soy and wheat, "enhance the damaging effects of other food-borne chemical residues and toxins in the environment to disrupt normal body functions and induce disease." Another research demonstrated a connection between increased use of Roundup with rising autism rates in the US.[70]

Adverse Effects of GMOs to the Environment

Genetically modified crops affect the environment in many ways such as contaminating non-GMO plants, creating super

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[67] Bakshi, *supra* note 63, at 217; Barak, Mudgil and Khatkar, *id*.

[68] Verzola, *supra* note 61, at 40.

[69] Hans R. Larsen, "Milk and the Cancer Connection" *International Health News* (April 1998) <http://www.notmilk.com/drlarsen.html>. (visited last December 6, 2014).

[70] Mercola, *Monsanto's Roundup Herbicide May Be Most Important Factor In Development of Autism and Other Chronic Diseases,* <http://articles.mercola.com/sites/articles/archive/2013/06/09/monsanto-roundup-herbicide.aspx>. (visited last December 6, 2014).

weeds and super pests, harming non-target species, changing soil microbial and biochemical properties, and threatening biodiversity.

There are two primary types of technology so far deployed: insect resistance (*Bt)* and herbicide tolerance (HT). Both have drastic modes of action to kill the target species at high efficiency. *Bt* crops contain a toxin lethal to certain insects, and *Bt* sprays have been used by organic farmers as a last option to deal with certain pests like the corn borer. It is feared that genetically modified *Bt* crops will speed up resistance to *Bt,* thereby rendering the organic spray ineffective.[71] Lab and field tests also indicate that common plant pests such as cotton bollworms, living under constant pressure from GE crops, will soon evolve into "superpests" completely immune to *Bt* sprays and other environmentally sustainable biopesticides.[72] In the case of HT, the technology involves the combined use of a chemical herbicide and a GM plant. The herbicide is generally a broad spectrum herbicide (commonly glyphosate or glufosinate) which kills weeds while leaving the crop plant alive as it is genetically engineered to be resistant to the herbicide. The herbicide acts to inhibit an essential enzyme that is found in all plants and as a result is able to eliminate all weeds whereas most conventional herbicides are selective in their action and target a limited number of weeds. Concern has been raised regarding over-reliance on use of one or two herbicides in increased amounts over time which leads to the emergence of herbicide resistant weeds. Also, the transfer of an herbicide-resistance gene into a weed can convert it into a superweed. Pests and weeds will emerge that are pesticide or herbicide resistant, which means that stronger, more toxic chemicals will be needed to get rid of the pests.[73]

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[71] Ben Lilliston, "Genetically Modified Organisms are Contaminating Organic Crops," reproduced with permission in Genetically Engineered Foods, *supra* note 53, at 55.

[72] Barak, Mudgil and Khatkar, *supra* note 55, at 555.

[73] *Id*.

It is a well-accepted fact that genetically engineered plants can move beyond the field sites and cross with wild relatives.[74] It is by nature a design of plants to cross pollinate to spread genes further afield. Maize, oil seed rape, sugar beet, barley, among others, are wind and insect pollinated, allowing pollen to travel large distances. In GM crop fields, pollen drift and insect pollination create obvious problems for nearby non-GM or organic crops.[75] GM maize could cross-pollinate neighboring non-GM or organic maize crops. Maize pollen can travel at least 500-700 meters and still be viable and distances of several kilometers have even been reported.[76] But many experiments showed varying results and actual cross-pollinations were observed in Mexico up to 200 meters only, while in Oklahoma it was 500 meters. In crop species that are outcrossers, many environmental factors influence the maximum pollination distance such as the size of pollen grains, the humidity in the air, and the wind speed.[77] *Brinjal* is usually self-pollinated, but the extent of cross-pollination has been reported as high as 48% and hence it is classified as cross-pollinated crop. The cone-like formation of anthers favors self-pollination; but since the stigma ultimately projects beyond the anthers, there is an ample opportunity for cross-pollination. The rates of natural cross-pollination may vary depending on genotype, location, and insect activity. The extent of outcrossing has been reported from 3 to 7% in China and from 0 to 8.2% (with a mean of 2.7%) at Asian Vegetable Research Development Centre; however the Indian researchers

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[74] Andreas Bauer-Panskus, Sylvia Hamberger and Christoph Then, "Transgene escape - Global atlas of uncontrolled spread of genetically engineered plants" *Test Biotech* <https://www.testbiotech.org/sites/default/files/Testbiotech_Transgene_Escape.pdf >. (visited last December 6, 2014).

[75] "Contamination of Crops" <http://www.gmeducation.org/environment/p149075-contamination-of-crops.html>. (visited last December 7, 2014).

[76] Gene Watch UK, Fact Sheet No. 3 (Forage Maize), *UK Farm Scale Trials with GM Crops-2000*, <http://www.genewatch.org/pub-537624>. (visited last December 7, 2014).

[77] "*Transgenic Crops: an Introduction and Resource Guide*" <http://cls.casa.colostate.edu/transgeniccrops/croptocrop.html>.

have reported 2 to 48% outcrossing in *brinjal* varieties in India. Outcrossing primarily takes place with the help of insects.[78]

The StarLink incident is also a widely reported GM fiasco. In June 2000, Starlink, a genetically modified yellow corn which contains the pesticide *Bt* in every cell, was found in white corn tortilla chips in Florida, USA. Starlink had been approved for animal feed but not for human consumption due to concerns about dangerous allergic reactions. The Starlink incident is often cited to illustrate how difficult it is to keep genetically modified crops from spreading.[79]

This gene flow to wild species is particularly alarming to environmentalists. The wild species from which our agricultural plants originate are an important genetic resource for further plant breeding if, for example, there is a requirement for improved resistance to climate change or plant pests. Future plant breeding could be jeopardized if transgenes spread into these resources. Similarly, agriculture in the centers of origin could be permanently damaged if transgenes spread into regional landraces.[80] Invasive species can replace a single species or a whole range of species, and they can also change the conditions within ecological systems. Crossing can cause losses in the genetic information of the original species, a reduction in genetic diversity and an ongoing incremental change of genetic identity in the original plants. It is hard to predict which species will become invasive.[81]

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[78] "*Biology of Brinjal*," <http://dbtbiosafety.nic.in/guidelines/brinjal.pdf>

[79] Lilliston, *supra* note 71, at 54.

[80] Testbiotech Report, *supra* note 74, at 7.

A landrace is defined as "a dynamic population(s) of a cultivated plant that has historical origin, distinct identity and lacks formal crop improvement, as well as often being genetically diverse, locally adapted and associated with traditional farming systems." Tania Carolina Camacho Villa, Nigel Maxted, Maria Scholten and Brian Ford-Lloyd, "Defining and Identifying crop landraces," *Characterization and Utilization Plant Genetic Resources: Characterization and Utilization* Vol. 3, Issue 3 (December 2005) <http: // journals.cambridge.org/action/displayAbstract?fromPage = online&aid=689208>.

[81] *Id*. at 39.

Indeed, GM crops could threaten the centers of crop biodiversity or outgrow a local flora to the detriment of native species.[82]

Bt gene in genetically modified crops might be toxic to non-target organisms that consume it. When *Bt* corn sheds its pollen, these are cast into the wind, dusting nearby plants and trees. Concern has been expressed about the potential toxicity of the *Bt* toxin in corn pollen to the monarch butterfly because initial laboratory studies showed increased mortality in larvae. However, in another study it was believed that it is unlikely that a significant risk to those butterflies exists.[83]

On the effect of transgene crops on soil, one study investigated *Cry1Ac* and *CpTI* proteins and their effects on microbial properties and enzyme activities. Results showed that there was persistence of said proteins in soil under 4-year consecutive cultivation of transgenic cottons. Soil microbial biomass carbon, microbial activities, and soil enzyme activities (except urease and phosphodiesterase) significantly decreased in soil under transgenic cottons.[84]

In another review, it was stated that the direct effects of the plant that has been modified is of the most concern since the introduction of transgenic proteins for pest and disease resistance can involve the production of chemical substances that are potentially toxic to non-target soil organisms, including mycorrhizal fungi and soil microfauna that are involved in organic matter decomposition. Experimental studies have shown that the transgenic proteins *Bt* crystal toxin and T4 lysozyme, though used to prevent insect damage to the above ground plant parts,

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[82] <http://onlinelibrary.wiley.com/doi/10.1046/j.0960-7412.2002.001607.x/full>.

[83] Barak, Mudgil and Khatkar, *supra* note 55, at 555-556.

[84] Z.H. Chen, L.J. Chen, Y.L. Zhang, Z.J. Wu, "Microbial properties, enzyme activities and the persistence of exogenous proteins in soil under consecutive cultivation of transgenic cottons (Gossypium hirsutum L.)" *PLANT SOIL ENVIRON.,* 57, 2011 (2): 67-74 <www.agriculturejournals.cz/publicFiles/35214.pdf>. (visited last December 6, 2014).

are not only present in root exudates but that they maintain biological activity after entering the soil.[85]

As to the herbicide glyphosate, recent studies revealed its negative effects on the soil, which include compaction and resultant runoff, the killing of beneficial microbes and bacteria, and the exhaustion of necessary minerals and nutrients that plants require. It was found that glyphosate "locks up" manganese and other minerals in the soil so that they can't be utilized by the plants that need them, and that it is toxic to rhizobia, the bacterium that fixes nitrogen in the soil. There is likewise evidence showing that glyphosates can make their way to groundwater supplies.[86] In a study which tested the effects of the herbicide Roundup on six species of larval amphibians from North America, it was demonstrated that when we "use realistic exposure times and the frequently occurring stress of predators found in natural ecologic communities, one of our most widely applied herbicides (Roundup) has the potential to kill many species of amphibians." At the same time, the study noted that Monsanto Corporation has recently released "an additional formulation of glyphosate (Roundup Biactive), which contains a different (but unspecified) surfactant that is reported to be less toxic."[87]

Evidence of Damage or Threat of Damage to Human Health and the Environment

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[85] Biao Liu, Qing Zeng, Fengming Yan, Haigen Xu, and Chongren Xu, *Review: Effects of Transgenic Plants on Soil Microorganisms*" <http://link.springer.com/article/10.1007/s11104-004-1610-8#page-2>. (visited last December 6, 2014).

[86] E. Vinje, "Is Monsanto's Roundup Killing Our Soil?," *Planet Natural* <http://www.planetnatural.com/roundup-killing-soil/> (visited last December 6, 2014) See also Stephanie Strom, "Misgivings About How a Weed Killer Affects the Soil" *The New York Times* (September 19, 2013) <http://www.nytimes.com/2013/09/20/business/misgivings-about-how-a-weed-killer-affects-the-soil.html?pagewanted=all&_r=0> (visited last December 6, 2014).

[87] R.A. Relyea, "The Lethal Impacts of Roundup and Predatory Stress on Six Species of North American Tadpoles," *Archives of Environmental Contamination and Toxicology* v. 48, n.3, (April 1, 2005). <http://www.mindfully.org/Pesticide/2005/Roundup-Tadpoles-Relyea1apr05.htm> (visited last December 6, 2014).

Both petitioners and respondents submitted documentary evidence consisting of reports of scientific studies and articles in support of their respective positions on the benefits and risks of GM plants.

Further, the parties presented their respective expert witnesses who testified on the allegations raised in the petition concerning damage or threat of damage to human health and the environment resulting from the conduct of *Bt talong* field trials in the Philippines. The CA conducted "hot tubbing," the colloquial term for concurrent expert evidence, a method used for giving evidence in civil cases in Australia. In a "hot tub" hearing, the judge can hear all the experts discussing the same issue at the same time to explain each of their points in a discussion with a professional colleague. The objective is to achieve greater efficiency and expedition, by reduced emphasis on cross-examination and increased emphasis on professional dialogue, and swifter identification of the critical areas of disagreement between the experts.[88]

On November 20, 2012, the parties' expert witnesses testified in a hot tub hearing before the chairman and members of the CA's Special Thirteenth Division. Dr. Chakraborty, Dr. Medina and Dr. Malayang were presented by the petitioners while Dr. Davies, Dr. Halos, Dr. Ebora and Dr. Cariño appeared for the respondents.

The following are summaries of the expert witnesses' judicial affidavits:

For Petitioners

DR. DAVIES, Professor of Plant Physiology at Cornell University, Jefferson Science Fellow serving as senior science advisor on agricultural biotechnology in the US Department of State, and editor for plant physiology for McGraw-Hill Encyclopedia of Science and Technology.

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[88] Mr. Neil J. Young QC, "Expert Witnesses: On the stand or in the hot tub – how, when and why? Formulating the Question for Opinion and Cross-Examining the Experts" Commercial Court Seminar, Quezon City, October 27, 2010.

In his review of agricultural biotechnology around the world, he has not encountered any verifiable report of a field trial of any GM crop that caused damage to the environment and to human health. This involves more than 25,000 field trials in 20 years with crops such as *Bt* eggplant, *Bt* cotton, *Bt* corn, and others. The same applies to the commercial cultivation of *Bt* crops, which have been grown in ever increasing quantities worldwide for 16 years and now comprise the majority of the world acreage of maize and cotton.

A recent European Union (EU) report which concludes that more than 130 EU research projects covering a period of more than 25 years of research involving more than 500 independent research groups, show that consuming foods containing ingredients derived from GM crops is no riskier than consuming the same foods containing ingredients from conventional crops. The World Health Organization (WHO), American Medical Association, US National Academy of Sciences, European Food Safety Authority (EFSA) all have come to the same conclusion.

GMOs have been proven safe as conventionally-bred crops in animal studies. A small number of poorly done studies purportedly claiming negative effects, *should be viewed with great caution and have been highly criticized for their veracity by the overwhelming majority of highly respected scientists*. Many hundreds of studies show no harmful effects. To date, not a single rigorous study of GM foods in animals has revealed any adverse effect; not a single case of allergy, illness, cancer, or death have been shown to be associated with foods derived from GM crops, despite the fact that they have been consumed by Americans for 16 years.

Recent studies indicate that *Bt* crops enhance the ecological diversity in the areas surrounding those where *Bt* crops are grown. Over a period of 13 years, cultivation of *Bt* cotton in China results in an increase in insect diversity and abundance and a decrease in crop damaging insects not only in *Bt* crop fields but also in surrounding non-*Bt* fields.

GM crops deliver significant yield increases, result in less exposure to pesticides, improve food security worldwide, protect against devastating crop losses and famine, improve nutrition, and some GM crop techniques help combat climate change.[89]

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[89] CA *rollo* (Vol. V), pp. 3482-3488.

DR. HALOS, Ph.D. in Genetics, University of California Berkeley, B.S. Agriculture, Major in Agronomy (Plant Breeding), UPLB, and served as Instructor, Associate Professor, Chief Science Research Specialist, Research Director at UPLB, UP Diliman, De La Salle University, Forest Research Institute now Ecosystems Research and Development Bureau of DENR and the Biotechnology Coalition of the Philippines.

From her research, she gathered that the protein product of the *Bt* gene *Cry1Ac* in *Bt* cotton that is also in *Bt* eggplant has been found safe by many food and environmental safety regulatory agencies such as those in Australia, New Zealand, USA, Canada, Brazil, China, India, Mexico, Argentina, South Africa, Japan and EU.

Since 2002, BPI has granted 95 biosafety permits for field trials. Of these 70 field trial permits were for *Bt* corn, cotton and eggplant. No adverse effect of any of these *Bt* crop field trials have been reported. No report of adverse effects of *Bt* crop field trial exists. All claims of adverse health and environmental effects of *Bt* crops has not been scientifically validated. The yearly expansion of GM crop areas in both the developing and industrialized countries is an attestation of the preference of farmers and the economic benefits that accrue to them.

GM crops have positive environmental impact. Currently commercialized GM crops have reduced the adverse impacts of agriculture on biodiversity. The use of *Bt* crops has significantly reduced the use of pesticides, and also increased farmer incomes.[90]

DR. EBORA, Ph. D. in Entomology, Michigan State University; B.S. Agriculture and M.S. Entomology (Insect Pathology/Microbial Control), UPLB; Post-graduate trainings in microbiology and biotechnology, Osaka University, Japan, and Intellectual Property Management and Technology Transfer, ISAAA AmeriCenter, Cornell University, USA. Director, and Research Associate Professor, National Institute of Molecular Biology and Biotechnology (BIOTECH), UPLB; Philippine Coordinator of the Program for Biosafety Systems; former Executive Director, Philippine Council for Industry, Energy and Emerging Technology Research and Development, DOST; former Chair, Biosafety Committee, DOST; and was a Member of the Institutional Biosafety Committees of UPLB and International Rice

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[90] CA *rollo* (Vol. III), pp. 1834-1836.

Research Institute (IRRI); and was extensively involved in the isolation, bioassay or efficacy testing and development of *Bt* as microbial insecticides for the control of Asian corn borer and mosquito larvae at BIOTECH.

The contained field trial experiments, among others, were designed to address concerns on cross-pollination or horizontal gene transfer, pollination distances, harm to beneficial organisms, and development of insect resistance. To prevent cross-pollination, an isolation distance of 200 meters from other areas where eggplants are grown or wild relatives are present, was observed, and with five (5) rows of non-transgenic eggplants that serve as pollen trap plants. As to the flight distance of honeybees reaching 4 kilometers, what was not mentioned is the viability of pollen after it was shed and travelled at a certain distance. Numerous literatures have shown that isolation distances much less than 200 meters is sufficient to prevent cross-pollination. Two studies are cited: Sekara and Bieniasz (2008) noted that cross-pollination at a distance of 50 meters was non-existent; and the Asian Vegetable Research and Development Center (AVRDC) indicated that eggplants produce perfect flowers which may be cross-pollinated but self-pollination is more common, the extent of natural crossing depends upon insect activity and this can be avoided by isolating each variety by 20 meters or with another tall flowering plant. The isolation distance imposed by DA-BPI is 10x the recommended isolation distance; the 200 meters distance was found sufficient for pure seed production in India (the same recommendation by Chen [2001] of AVRDC foundation for seed production purity standards); field studies in 2 locations in India have shown that at a distance beyond 30 meters no more outcrossing could be detected. Taking all these data into account, the 48% outcrossing being raised by petitioners is most likely for adjacent plants and therefore not a valid argument for the on-going field trials.

The *Bt* talong will not directly affect beneficial organisms like pollinators, predators and parasites of insect pests because it is toxic only to caterpillars or insects belonging to Order Lepidoptera (butterfly and moths). The selective toxicity of *Bt* protein in *Bt* talong is partly due to the fact that the gut physiology of these insects is very different from caterpillars, and not all caterpillars are affected by it. There is a significant number of literature on *Bt* protein's selectivity and specificity.

As to the development of insect resistance, this is not possible during the multi-location field trials for *Bt* talong because of low selection

pressure and limited exposure of the insect pest to *Bt* talong. Insect resistance is not unique to GM crops as it is a commonly observed biological reaction of insect pests to control measures like insecticides. In the event *Bt* talong is approved for commercialization and will be widely used by farmers, this concern could be addressed by insect resistance management (IRM); an IRM strategy should be required prior to the commercial release of *Bt* talong.

There is no compelling reason to stop the field trials; on the contrary they should be allowed to proceed so that scientists and researchers will be able to generate valuable data and information which will be helpful in making informed decisions regarding the usefulness of the technology.[91]

For Respondents

DR. MALAYANG III, Ph.D. in Wildland Resource Science, University of California at Berkeley; M.A. Philosophy, M.A. International Affairs (Southeast Asia Studies major in Economics), Ohio University; AB Philosophy, UP Diliman; former Undersecretary of Environment and Natural Resources; served as Environmental Science representative in the National Biosafety Committee of the Philippines and participated in the drafting of the Philippines Biosafety Framework; and student, lecturer and advocate of biodiversity, food security, biosafety and environmental policy.

He is concerned with how GMOs are being introduced for commercial-scale use (as against being used for academic research) in the Philippines on the following grounds: (a) how they might contaminate the indigenous genetic resources of the country; (b) how they may cause an imbalance of predator-prey relationships in ecosystems, so that certain species might dominate ecological niches and erode their biodiversity and ecological stability; (c) how they may erode the ability of farmers to control their genetic resources to sustain their cropping systems; and (d) how much are present biosafety protocols able to safeguard the long-term ecological and economic interests of the Philippines as a particularly biodiversity-rich country and which is, therefore, highly sensitive to genetic pollution; to the extent that its biodiversity is its long-term equity to advances in biotechnology, the most robust measures must be taken so that such resources will not be lost.

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[91] *Id.* at 1940-1944.

Being a highly biodiversity-rich country, biosafety measures in the Philippines must be adopted using a 3-stage approach: Stage 1 – Develop criteria for biosafety measures; meaning, first, adopt a set of standards for determining the level of robustness of biosafety measures and protocols that would be acceptable in the particular case of the Philippines; include required scoping and internal and external validity requirements of impact and safety assessments; Stage 2 – Using the criteria produced in Stage 1, develop biosafety measures and protocols to be adopted in the Philippines; and Stage 3 – Apply the protocol with the highest rigor.

Biosafety must be a public affair involving a broad spectrum of the Filipino state rather than its considerations being restricted only to specific professionals and sectors in the country; biosafety must be based on an enactment of Congress and open to challenge and adjudication against international laws; provisions must be made to make it a crime against humanity to recklessly erode and weaken genetic resources of our people.[92]

DR. MEDINA, Ph. D. in Environmental Biology, University of Guelph, Canada; M.S. (Insect and Plant Ecology) and B.S. Agriculture, UPLB; National Coordinator of MASIPAG; served as resource person in more than a hundred trainings and seminars, both local and abroad; served as member in international agricultural assessment sponsored by Food and Agriculture Organization (FAO), United Nations Environment Program (UNEP), WHO, and the World Bank; worked on a project for development of resistance to corn borer in 1981 at the Institute of Plant Breeding in UPLB, and served as researcher and later Associate Professor of Environmental Management of the UP Open University.

Based on her studies and extensive experience, the *Bt* talong field testing poses the following risks or hazards: (a) While natural *Bt* sprays used in organic farming have little effect on non-target organisms because the bacterial 'pro-toxin' is in an inactive state and only becomes toxic when processed and reduced in the gut of certain (targeted) species of insect larvae, in contrast, *Bt* plants contain an artificial, truncated *Bt* gene and less processing is required to generate the toxin because the toxin is already in its active form. It is therefore less selective, and may harm non-target insects that do not have the enzymes to process the pro-toxin, as well as the

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[92] CA *rollo* (Vol. I), pp. 164-165.

pests for which it is intended; (b) *Bt* proteins from natural *Bt* sprays degrade relatively quickly in the field as a result of ultraviolet light and lose most toxic activity within several days to two weeks after application. In *Bt* crops, however, the *Bt* toxin is produced by the internal system of the plants thus non-degradable by mere exposure to sunlight and generated throughout the entire lifespan of the plant; (c) *Bt* talong can also affect the environment by harming important or beneficial insects directly or indirectly. Genetically engineered *Bt* eggplant, like other *Bt* crops, could be harmful to non-target organisms if they consume the toxin directly in pollen or plant debris. This could cause harm to ecosystems by reducing the numbers of important species, or reducing the numbers of beneficial organisms that would naturally help control the pest species; (c) The evolution of resistance to *Bt* crops is a real risk and is treated as such in ecological science throughout the world. If enough individuals become resistant then the pest control fails; the pest becomes abundant and affects crop yield. Granting the pest control practice is successful, it may also simply swap one pest for another, a phenomenon known as secondary pest outbreak. Several studies have shown that other pest insects are filling the void left by the absence of the one (or very few) insect pests that *Bt* crops target, and this is now the problem with *Bt* maize.

Eggplant is 48% insect pollinated thereby any field release or field testing of genetically modified *Bt* talong will eventually lead to contamination of non-genetically modified eggplant varieties. Insects, particularly honeybees, can fly as far as 4 kilometers and therefore the 200 meters perimeter pollen trap area in the confined field testing set by BPI is not sufficient. And once contamination occurs, genetic cleanup of eggplant or any other plant is impossible. Moreover, intra-specific gene flow from *Bt* talong to other varieties and populations of eggplants should be examined, as cultivated eggplant (*Solanum melongena*) can cross breed with feral populations of *S. melongena*, and it is possible that cultivated varieties can revert to wild phenotypes. Additionally, there is likely to be natural crossing between *Bt* talong and wild relatives. Hybridization with perhaps as many as 29 wild relative species needs to be evaluated carefully and the consequences of any hybridization that occurs needs to be evaluated.

In 2010, the Minister of Environment and Forests of the Government of India, in his decision for moratorium of *Bt Brinjal*, listed potential contamination of eggplant varieties as one of the

reasons why the release of *Bt Brinjal* was not allowed. Dr. Andow of the University of Minnesota also published an 84-pages report on the Environmental Risk Assessment of *Bt Brinjal,* and among his conclusions is that several environmental risks were not considered and nearly all the risk assessment done were inadequate. He concluded that until the risks were understood or managed, there seems to be little reason to approve *Bt Brinjal* release.[93]

DR. CHAKRABORTY, Ph.D., M.S. Biochemistry, B.S. (Honors in Chemistry), Calcutta University; Molecular Biologist, presently Principal Scientist and Head of the Gene Regulation Laboratory in the Council of Scientific and Industrial Research – Indian Institute of Chemical Biology (CSIR-IICB); Member, Governing Body and Executive Committee of the state council of Biotechnology, Government of West Bengal and Chairman of the Biotechnology group of the state council of Science and Technology, Government of West Bengal; Visiting Professor of the National Institute of Science, Technology and Development (CSIR-NISTAD); citizen of India and resident of Kolkata, India.

GMO is a classic example of "paradoxes of consequences", where human actions have unintended consequences, which are in direct opposition to what was intended. The difference in controlled laboratory condition and standards, and real life open field level micro and macro-environment pushes the advantage towards the target and non-target living system, with time. The pest resistance to *Bt* toxin and development of herbicide tolerance (HT) in weeds is just a matter of time. The decade long experience in *Bt* and Ht genes amply proves this point. If we ignore this now — we are manufacturing a global environmental disaster — which will be a crime against humanity. There is no way to recall these GMO from the environment.

Even the short term benefits of GM agriculture are not scale neutral, or location-independent. It will help the monopoly agribusiness and the expenses of monopolistic competition or cooperative organic farming. Hot climate and rich biodiversity is detrimental towards the effectiveness of *Bt* constructs, and helpful towards unintended gene flow. Moreover, the genetic manipulation is no way fail safe or exact. Shotgun techniques are being adapted, aided by focused

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[93] *Id*. at 329-332.

laboratory based screen of traits – rather than the host or the full natural product. The GM labeling is avoided to cover up this major fault.

The tendency to avoid the available risk assessment, and test is very clear in the GM agribusiness. Before going ahead with spread of this technology, even in a batter form, the foremost task is to establish rigorous test and assessment procedures. There are excellent available tools of preteomics, transcriptomics, and metabolomics for detailed compositional analysis in our hand to do this. Please ask, why they are not being employed? In fact, there is not a single centre to test GM products on behalf of the corporate GM Agribusiness house. Thus, low level, long term toxicity of GM foods are yet to be tested. I believe the time has come to establish a standardization facility to carry out such test facility in any country before giving permission to GM trial or cultivation.[94]

The relevant portions of the "hot-tub" hearing held on November 20, 2012, are herein reproduced:

Dr. Cariño:

> x x x This is to clarify something with the *BT Talong* and the *BT Talong* has its substance. It is not supposed to be consumed at the moment still under field trial, so it is not supposed to be eaten at the moment. It has not been released for food nor for feed and so in the context of a confined field test, it has supposed to have it out in the field in a very controlled manner and any produce that comes out from that area is supposed to be destroyed or kept from further safety and analysis only.

Chairperson:

> So, actually, there is no full scientific certainty that it does not cause any harm pertaining to health?

Dr. Cariño:

> *BT Talong* per se, has not been fully [e]valuated yet that is why it is undergoing trials. If reporting of the *BT* toxin in *BT* Talong is *Cry1Ac,* there are numerous studies that had

[94] *Id.* at 2444-2445.

been actually published on relative safety of *Cry1Ac* protein and it is actually considered as an additional protein and the various reviews can be seen in the OECD Digest of risk assessments on *Cry1Ac* protein. Alternatively, if you are looking at the possibility of harm coming from the introduced protein as yet, we have not done a full blown assessment of it as of the moment. But we look at the protein sequence and with a comparison of its sequence with other sequences in the data basis to see if it is similar to this amino acid sequence of other known toxins and, so far, I have actually … in my affidavit, I have actually seen personally that it is not closely related to any of the known toxins that are found into its system.

Chairperson:

So, in effect, we can not really say that *BT Talong* is perfectly safe for human consumption?

Dr. Cariño:

Right now it is not meant to be consumed by human at this point. Let me just clarify one point. When any GM material is supposed to be introduced for food and for feed and before it is actually utilized for life skill production, it goes through several steps. The first step is actually the "lab", laboratory work and it is actually tested in this clean-houses, rolled-out confined limited field test and then it goes to butyl abyss of field tests where it is like generating more and more informations. We are still early on in this pathway, so we are only in the confined field test and, at the moment, the thing is that it is still being tested. The focus is on its efficacy after doing a preliminary assessment of the possible pathological and ecological effect, and that is the pathway that has been recommended by so many academics as well as scientific institutions as well. And, that has been a tract followed by almost all the genetically modified crops that is being introduced in the market today, but at the moment *BT Talong* is not yet a commodity. It is not yet being evaluated as a commodity.

Chairperson:

So, no one in this country has yet eaten this *BT Talong*?

Dr. Cariño:

> No, it has not been eaten, as far as I know. Even in India it has not been consumed by human beings because it has not been introduced as a commodity.

Chairperson:

> But what is the ultimate purpose of growing *BT Talong*? It is not for human consumption, of course?

Dr. Cariño:

> If it passes the safety assessments. That there is always a peak condition that, if it would not to be evaluated in a step of the way much like to evaluate any new product that is coming into the market evaluation, goes on a step-by-step and at least day-to-day basis.

Dr. Davies:

> Your Honor, may I interject, may I suggest with your permission? I would just like to make a little bit of explanation.

Chairperson:

> Proceed.

Dr. Davies:

> I would like to address *"BT"* as a compound which is distinct from a plain in *"Talong."* First of all, I think of the name *BT* toxin is very fortunate. It is really a protein. A protein is an essential constituent of life. It is an essential constituent of our food. In the human body, and in the body of other animals, this protein is under the same as any other protein in food. It has no effect on the human body. This has been shown for many, many years, knowing *BT Talong* but *BT* has been a constituent of "maize" in commercial production for 16 years.

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Dr. Davies:

> x x x So it has been in corn for 16 years after substantial trials. It has been consumed by Americans in corn products and by any other people who in[g]est American maize corn

products x x x. There is not a single case of illness or toxicity or allergenicity that can be or that has been associated with this protein and, therefore, any food containing this protein has been declared by authorities in all the countries that was mentioned by my colleagues, including the European Union and the United States x x x to be as safe as any food derived from the same plant species not containing this gene. I hope that explains a little bit about what it is.

Chairperson:

Are you aware of a study, Dr. Davies, released on September 20 of this year, saying that Monsanto's genetically modified corn is linked to cancer?

Dr. Davies:

Yes. Are you referring, your Honor, to a publication by a French Scientist named Gilles-Eric Seralini? I think this is one of the publications by Seralini's group. Dr. Seralini's work has been refuted by International committees of scientists…

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Dr. Chakraborty:

Your Honor, may I butt in? It is wrong that proteins can not be toxins. Think about the snake venoms. They are poisons, so whether it is protein or not that is not the question. So proteins obviously venoms and proteins and enzymes and they are poisons so protein can be a poison so that is now the point at all to be considered. The second thing is, yeah, low level toxins long term in[g]estion of this *BT* toxin in human or in any other animal have not been tested. So that is true so we do not know direct consumption of this, because notice have been turned down, that is the objective fact. The third point is about the "American Corn," and if I can give you such anecdotes, "American GM Corn" are not labelled, how do you know that? What is its effect? What is its toxicity? And, obviously, there are more than a hundred of papers showing and published in very good journals. I can give many references which have shown the detrimental effect of *BT* Toxin.

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Chairperson:

> But before having this BT *talong* scheduled and allowed for field testing, is it not proper that it should be first determined whether this food product is really safe for eating or not?

Dr. Cariño:

> There is an initial assessment that is generally done and according to the Codex Alimentarius of the WHO, the thing that you do at this early stage of development is to compare the sequence of the protein that is being introduced with published sequence of allergens, as well as toxicants and toxins. So that has been done. Then you have to look for instability under heat conditions because there is seldom do we heat grow eggplants, so is it stable under heating. Is it stable in the presence of digestive juices? And, if the answer is "yes", there is at least fair certainty, a fair assurance that it is likely to be safe but then you start thinking of what other component not present in the product, does this. For example, any product that we consume today has something that is bad for you, otherwise, you will not see it right now. Otherwise all the different herbivores will be eating it up, right? It will be extinct if it does not have anything to protect itself and, so, the thing is one, to quantify how much of that has changed when you lead the genetic modification. So *"Talong*" has been known to have Solanine and glycoalkaloids whose level we'll have to quantify. We have not done that yet. They have not submitted the data for that and this as secondary metabolize whose relative concentration will change depending on the environment to which you actually place the system.

Dr. Chakraborty:

> x x x In india, we have a very bad experience x x x in location field trial with the *BT* Cotton. You known that *BT* Cotton was introduced in India through the back door black market entry. During the field trial, some of those seeds were taken out and given to the farmers for commercial cultivation to black market. Monsanto goes well, Monsanto's *BT* Cotton, like Monsanto, did not sue now apparently sue the company and they compelled the government that farmers

> wanted those things and there was high…how they pressurized the government. Now, in case of *BT* cotton is one thing, but *BT* Eggplant is completely a different thing. That is why [the] Supreme Court in India has taken a very strong stand and, now, the parliamentary committee in India. The Supreme Court has also taken steps stand with the field trial. The first thing in field trial we had to see that whether there is a definite need of this kind of intervention, because the eggplant is a very common vegetable in this part of the world. There are so many hundreds of varieties here, these are the origins of these varieties of this kind of vegetable. It is cheap. It is available everyday. So why you go on changing if there is no crisis in cultivating the eggplants at present. Therefore, when you give it to this patented seeds technology, its prices will increase, lot of restrictions had to be deal. So, who will consume this high price eggplant. Many will be exported, that was why the proponents are looking into it. But, basically, that is the thing that in case of *BT Brinjal*, neighbor partisan is being given. There is a moratorium in India from the Supreme Court and from the government side on field trial of *BT Brinjal*. Now, if x x x the *BT* Eggplant is being taken to the Philippines, we guess, to get in as a bypass, and who will guarantee that it will not go to the farmers?

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Justice Antonio-Valenzuela:

> And, I was wondering in the conduct of the tests, the field testing x x x what would be the effect of the planting….of the existence of the genetically modified organism, for example, on insects, on the soil, on the air? And then I was thinking, does this have this particular protein that result[s] due to the genetic modification? Is it…how is it expelled, for example how does it go into the environment? Or, on the other hand, how does it go inside and out of human system so that does it disintegrate or is it just there forever? I am very curious, sir. You have to educate me.

Dr. Davies:

> x x x Okay, the DNA is in every cell of the eggplant and, so, a very small amount to protein produced by each cell

will be this *BT* protein. It does not get into the environment in general. A very small amount might be in the pollen or in the leaves that fall to the ground but it has been shown to be broken down in the soil by organisms so it will not exist in the environment. The only way that it is going to get into animals or insects is if they eat the fruit and this is what an insect that the *"talong"* fruit and shoot borer will be trying to. But, if it eats it, it reacts with its intestine so that they become toxic to the caterpillar but this is very specific to the digestive system of the caterpillar. It does not affect bees. It does not affect animals. It does not affect humans.

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Dr. Davies:

At the scientific level, it gets changed by alkalinity of the insect gut and reacts with specific receptors of the cells of the walls of the insect gut. But, this is very specific to the gut of these insects namely the "*Lepidoptera*" and some "*coleoptera*" which are the butterflies and the beetles but it will only affect if they try to eat the plant. Now, you are asking us if what is the effect on the environment. x x x I would like to cite x x x a recent paper published in the journal "*Nature*" x x x the most prestigious scientific journal in the world. x x x published in "*Nature*" in June this year and this is the result of a study of "insects" in *BT* Cotton fields in China in 17 locations for 14 years of a long period study. And these scientists revolt that they show a marked increase in the abundance of three types of generalist arthropod predators (ladywings, lacewings and spiders) and a decrease in abundance of aphid pests associated with widespread adoption of *Bt* cotton. And they are referring to China and they conclude that such crops, x x x *BT* crops, can promote beneficial control services in agricultural landscapes. And, it also showed that these effects extend beyond the field. So, essentially x x x they found that there were more insects than in conventionally grown cotton and the insect diversity was greater surrounded than being detrimental to an agriculture ecosystem such *BT* cotton falls beneficial.

Dr. Chakraborty:

> May I interject, your Honor. Now he is citing one paper they are. But in "*Nature*," there was another news article, "Battlefield." One stream ecologist in United States itself, in a university, she has studied the effect of growing *BT* Corn in the field and what is the effect on the stream ecology, the west water, what is happening to other insects, insects in which it is getting that *BT* toxin will not go. Yes, she has found that *stream ecology*…

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Dr. Chakraborty:

> Why was it published in *"Nature"* when that stream ecologist from Loyola University Chicago in Illinois published that paper, published that article in PNAS or *Proceedings of the National Academy of Sciences*, a prestigious journal? Now, they have to desert her. She was abused, so her file was taken out. So people started e-mailing, threatening her. So "*Nature*" has to publish that. How dirty the field has become so they entitled it "Battelfield." If anybody produces any evidence that *BT* Toxin or GM Technology is doing any harm to the environment then it will be battered by the entire English lobby so there is worst the situation. But National Academy of Sciences in United States has taken a strong decision and, in last year, there were six publications that published where strong evidences are being produced about the environmental and ecological damage cause[d] by this technology. So, that is the case.

Dr. Davies:

> Can I respond to that, your Honors?

Dr. Malayang:

> I think Filipinos should be able to talk also here.

Chairperson:

> Can we give a chance to Dr. Malayang?

Dr. Malayang:

> x x x My concern is on the process and participants in vetting the safety of GM crops, not necessarily the intricacies of

the science involved in genetic modification per se which, I think our international friends, would like to focus on. x x x

One, I am concerned with the fallibility of technology. x x x even if it is much founded on or produced from the most robust sciences, a technology could fail to be as useful as it was intended or its use lead to an [un]intended harm to humans and the environment. This is so because science, by nature, as many scientists will agree, is very probabilistic rather than absolutist. Many cases of common knowledge illustrate this point. May I just refer, for the Court's notice for, First, the Nuclear Power Plants in Japan x x x. The best science and the best technology did not necessarily translate to absolute safety.

Second example, the Union Carbide Plant in Bhopal, India. It was among the most advanced production ton at its time, yet, we know what happened. x x x Union Carbide's [hurry] to set up a plant to take advantage of a large pesticide market in India to help the country's farmers led to a massive and deadly safety failure.

The Third example is the green revolution. x x x involves, however, the wide [use] of synthetic chemicals for fertilizer and pesticides that were [at] the time hailed as wonder technologies. Many scientists in the world at that time argued for their wider use but they later turned out to harm people, soils and water. They prove good then bad, so bad that scientists today are using their ill effects as justification for adopting alternative technologies to get us out of the synthetic chemical regime in agriculture.

And finally, the most common example would be the unintended effects of medicine. x x x Medicines are technologies intended to do good but, with even the best science and the vetting processes using rigid safety and risk assessment methods, they still could cause side effects entirely undesired and many of which can cause chronic or acute threats to human life. This includes the use of "DDT" that was used to control lice among soldiers after the II World War which, after all, proved to be very bad.

x x x I am also concerned with the fragility, fragility of the Philippine environment as the place and context, the particular place and context of the introduction of *BT* crops

like *BT talong*. x x x the Philippines is among the world's biologically rich countries. x x x So, many of our insects are not even fully known. We do not know how they all behave to influence the transfer of genetic materials from plants to other plants. We do not fully know what we do not know about the intricate interactions between plants and between insects and other living things that define the universe of our healthful and balanced ecology. The universe of our healthful and balanced ecology certainly go beyond specific crops. I am concerned that, absent a full as against partial understanding of the intricate web of genetic flows and interactions among plants, animals and other living things in our wet and tropical ecosystems, it will require extraordinary care to tamper with any one element of this swirl of interrelationships. This is notwithstanding the seeming preponderance of evidence of safety in other countries and environment that are certainly not the same as ours. x x x we must be extra careful because the effects might be irreversible. Introducing a genetically modified plant x x x could cause a string of changes across many plants that, like the green revolution or in the case of medicine and the two other cases cited above, could turn out and only to be realized much later to be harmful to humans and the environment more than they were intended to be useful. x x x let us ensure that we adopt in the country a biosafety vetting protocol that is: (1) sensitive to our high biodiversity this is a particular condition in the Philippines; and (2) tested for error levels that are acceptable to or which can be tolerated by our people. My affidavit states a three-stage approach to this. x x x the tests that we will be doing is a test process acceptable to all as well rather than merely concocted or designed by just a few people x x x must be a product of wider citizens' participation and reflect both scientific and traditional knowledge and cultural sensitivity of our people. It is in the NBF after all, x x x *introducing BT Talong in the Philippines must be decided on the grounds of both science and public policy and public policy, in this case, must involve full public disclosure and participation* in accepting both the potential gains and possible pains of *BT Talong*. The stakes, both positive and negative, are so high that I believe *BT Talong* would require more public scrutiny and wider democratic decision making beyond the [realm]

> of science. x x x for the sake of our country and our rich biodiversity x x x prudence requires that maximum efforts be exerted to ensure its safety beyond the parameters of science and into the sphere of public policy. For to fail in doing so what might be highly anticipated to be beneficial may in some twist of failure or precaution and prudence and failure for due diligence to establish the safety of *Bt Talong* beyond reasonable doubt, the *BT Talong* may turn out to be harmful after all. This we certainly do not want to do. I submit these views to the Court.

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Dr. Davies:

> x x x another thing I would like to point out to the Court is, if you come into a market in the Philippines and you see nice Talong, it has probably been treated with various insecticides. So, there has been insecticide spray on your tips in your crops which are going to be harm on your farmers, your farmer's children, the insect populations and also dangerous to the consumers as well. By contrast, *Bt Talong*, if it is adopted, the *BT* has been shown to be beneficial to the insects and the environment and also has been shown not to be toxic in food. Therefore, we are changing a highly toxic chemical application for a much more benign modern technique that is beneficial to the environment and beneficial to the consumers. That is my comment with the views just made by my Filipino colleagues, your Honors.

Dr. Malayang:

> x x x You know, in ecology and, I am sure you are aware of this, an expansion of anyone population or a reduction of that population it would still be both not beneficial to the healthful and balanced ecological health of the ecosystem. So to say that because the population of insects are exploded and the diversity of insects exploded as a result of this particular intervention is not necessarily good. That is my first point. The second one, you mentioned x x x the "*talong*" is laden with pesticide. The same pesticide were advised by scientists from the USAID before for us to use in this country because this is how to expand our production of food. This was part of the green revolution, the systemic use of pesticides and fertilizer. Now, of course, they were

misused, I can guarantee that but, again, if that be the case, in the case of pesticide why can it not be in the case of *BT* that it can also be misused? x x x we are talking here not of the science or of the technology but on the policy aspect of the adoption of the technology. As I said, I am talking about the bakery not of a baked-bread.

Dr. Saturnina Halos:

Well, the use of pesticide in the eggplant, right now, is very much abused. x x x In terms of the use of *Bt Talong*, then, that kind of misuse is not going to happen x x x. Now, in the Philippines, we have a very strict highly monitored field testing and I think Dr. Malayang knows about that because he was one of those who prepared the guidelines for the field testing. So that is not going to happen, it is a very strict regulatory system. We are known for that, actually, and…

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Dr. Saturnina Halos:

No, no. It does not happen because we have a risk management plan x x x.

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Dr. Halos:

x x x As far as do we know what is happening after we have given approval, yes, we are monitoring. We are monitoring as far as *BT corn* is concerned. We are monitoring, continuously monitoring, not only for the beneficial insects but also the effects that is continuing, we are also continuing to monitor the weeds, weed population. In weed we decide to spray…

Dr. Malayang:

And why is this, ma'am, why are we monitoring? Because they could be harmful?

Dr. Halos:

No we have to know what is happening.

Dr. Malayang:

> Yes, why? Because if you are sure that they are safe, if you are sure that they are safe, why monitor?

Dr. Halos:

> Well, we are going to give you the data for that because you keep on asking, you know, you asked for a long term and we are going to give you that complete data.

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Dr. Medina:

> I would like to raise several issues because I feel they are misleading sometimes. Dr. Davies mentioned that the *BT* protein is a protein, therefore, it is safe. Are you sure that all proteins are safe, Dr. Davies? Are you aware of anti-nutrients and allergens and other kinds of protein x x x it is a misleading generalization. Secondly, I would like to say also that, when you say that *BT* crops is beneficial to insect population but, how about humans? But, let me tell and inform the Honorable Justices also that, in agriculture, there can be, the pests are there to reduce the yield. There are also diseases so, that this *Bt* is only controlling one kind of pest and, in my monitoring of *BT corn* as an example to this 2 years after the commercialization in 2003, at first planting in 2003, the corn is attacked by about a dozen insect pests and six major diseases. The *Bt* corn was attacked a "stem rot," a fungal disease. And, in this case in eggplant, there are many fungal diseases, "*phomopsis*" x x x So in that case it is not field safe that you will not be using pesticide anymore with *BT* eggplant. When you use the *BT* eggplant, assuming that there is no more insect pests x x x *There are many other methods of control and, therefore, do not assume that you do not use pesticide therefore, BT is the only solution*. That is also a risky and wrong generalization or statement. x x x Dr. Halos x x x says that field tests are safe. I intend to disagree with that. Safe to what? Especially to contamination. If I may use this picture of the field testing of the *Bt* eggplant x x x it was encircled with cyclone wire with a diameter of something like approximately 10 cm. by 7 cm. hole. While bees that can pollinate that, the size is about 1 cm. in length and .5 cm. in diameter of the

insect. The bees and, in that case, they can easily get in and get out and when they settle into the flowers and snip nectars and the fall of the pollen then they can bring out the pollen to contaminate outside that. In fact, even assuming that the fence is very small in size of the mess, the holes, still the insects can fly above that fence because the fence is only about 5 feet in height. So, in that case it is not safe. Some arguments say that "well the pollen will be dead" but, according to this technical manual of the Training Workshop On Data Collection for Researchers And Collaborators of Multi-Location Trials of Fruit and Shoot Borers Resistant Eggplant, that is the *Bt* Eggplant produced by the Institute of Plant Breeding in UPLB who is one of the main researchers the datas, here say according to "Rasco," cited by Dr. Narciso, is that *the pollen can live 8 to 10 days pollen* by ability at 20 to 22 degrees centigrade, with a relative humidity of 50 to 55. x x x Meaning to say, that *pollen can survive*. This can fly as fast as something like 60 kilometers per hours so it just take may be 3 minutes and it can travel 4 kilometers and 4 kilometers is the effective flying distance of a bee in their normal foraging.

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Dr. Medina:

x x x There is no data on the contamination so how come they argue, how can they conclude that it is safe when they have not monitored any potential pollen flow by insect mitigated or insect mediated flow pollen? So, in that case, the conclusion or the statement is really beyond what their data may be is if their data is about safety.

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Dr. Ebora:

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x x x I hope that we will be able to look at the experimental design and you will see that all the things are properly addressed, our risk assessment was done step by step. x x x I beg to disagree with my friend Dr. Medina because it is becoming . . . we are confusing 2 things. We are not referring to contained trial. We are referring to confined field trial and in the design of this particular experiment, you have

your *BT* eggplant, your non-*BT* eggplant so that you can compare the performance with the 2 crops. And, on design, you have 5 rows of plant *BT* eggplants that will serve as a pollen trap. When we say pollen trap is that it just open the pollen from the transgenic. It is going to be trapped by those plants, 5 rows, and then, after that, you have a space of 200 meters surrounding the field which is the isolation distance. That means no eggplant should be present in that particular distance because that is the isolation distance that is found to be safe. x x x we know that *Bt* protein is very specific x x x effective only against caterpillar x x x if they are eaten by other organism, they are not affected because it is very specific. The gut of the larva is very alkaline while the gut of other insects is likely acidic and, in that case, it does not have any harmful effect. x x x So another thing is we are saying that it seems to be ridiculous that you are saying that honeybee is going to fly from the fence and the size were even indicated. I would like to indicate that, that is not the purpose of the fence. It is not to contain the insects. It is to prevent vandalism which is quite, unfortunately, being done by other groups who are against the technology. x x x We should be able to have our own space, our own time, considering the given regulation. Follow them. But our experimentation not be destroyed because it is only then that we will be able to get the valuable data that is needed for an informed decision. Without that we will not be able to proceed and I hope we can discuss this based on the merits of the field trial, not from any other concern because the writ of kalikasan is about the effect of field trial in the environment.

Dr. Medina:

Mr. Justice, can I give this immediate counteract to the one statement of Dr. [Ebora]? He said that the "*Cry1Ac*" is specific to caterpillars and, in fact, only some kinds of caterpillar, some species, if you can read by chemical and by physical research communications this is Volume 271, pages 54-58, authored by Vasquez Pardonnet, published in 2000, publication under letter (b), "*Cry1Ac protoxin*" *binds to the mucosal surface of the mouse' small intestine*. Small intestine ay mammal *po iyan* so, meaning, it is a proxy animal for safety [testing] to humans because we are also

mammals so, the mice are usually the mammals 12 years ago, the data has been already there that there is binding site, therefore *it is not only specific to insects but also to mammals*. x x x he is saying that, by working on the natural *BT* is the same as the transformed *BT* it is not true because the natural *BT* has 1155 "base pairs" of nucleic acids. And the transformed GM Crop contains a fragment of that *BT* gene which is only half of that. And the mechanism, by the way, x x x the natural toxin is broken into smaller pieces inside the intestine of the insects because it is alkaline in terms of its system "ph" and for humans acidic. So it does not work. But, *because the transformed BT is already half, almost half of the normal or natural[ly] occurring BT protein, it is already activated* and, in that case, that is the reason why there is a test and immediate effect to non-insect, meaning, to mammal, so that is the explanation of scientist doing studies on that aspect.

x x x x x x x x x

Dr. Chakraborty:

The scientists have 3 problems: One, the sparks, we have a tunnel vision; the second, fear vision; x x x I will give some example. Yes, *BT* toxin, was it really good biological control agent? But it is a completely different gene when you produce it into an edible plant inside genetically. So, these are 2 different things. What will happen? We are scared that the efficacy, the use of *BT* toxin as a spray, as biological control agent, will be vanished because now there will be resistance against those in *BT* toxin. x x x resistance is coming very quickly, just like antibiotic resistance. x x x The second thing, I have asked many plant biologists this simple question, simple honest question. Do you know any plant that can kill a bee or a moth? No! There is no way, why? Because those are the "pollinators." Plant never kills a bee or a moth that goes against nature. x x x So, nature, for thousands of years, farmers help select or adopt edible non-toxic plants. And, now, with the high science we are converting them, non-toxic edible plant into a toxic plant. So not only toxic for the human, for the root microorganisms. x x x Those eggplants are not only for humans to consume. So human effect, we do not know but what will be the effect? Who will mind the effect? Is it the animal which goes through

it? x x x in India, x x x farmers x x x while growing *BT* cotton x x x the leaves and other they use to attract animals to eat. x x x they found suddenly one thing that the *BT* cotton plants are not touched by those buffalos, those cows, those [boars], but they can distinguish which is *BT* and non-*BT*. x x x and when their animals started dying in some cases, they always blame, it is this animal which has eaten that *BT*? x x x these are [going] against nature. Only few edible seed plants are there and we are converting one safest plant into a poisonous and toxic plant and what is the effect on the root microorganisms on the degrading animals and other? We do not know. That hard thing is the tunnel vision, the confined field trial. x x x why implement this confined field trial? Is this safe? Why do they have to do this x x x these things do good for a normal hybrid that is something but for the gene concept we cannot follow the same separation rules, same rules? So those are used, those separation distincts, those parameters are used not for the gene. So, which is the safe field trial protocol for the gene plants? We do not know. So there goes against [the] writ of kalikasan.

x x x x x x x x x

Justice Antonio-Valenzuela:

How much is the increase in crop yield? x x x

Dr. Halos:

x x x The average increase yield is about 24% and that is for corn. And this data is actually taken by our own Filipino scientists, Dr. Lluroge and Dr. Gonzales.

x x x x x x x x x

Dr. Malayang:

x x x my question is for Ma'am Nina. I have not been up to date lately on the production of corn so, you mean to say that corn production in the country has gone up and, because of that, you are saying that 24% and the income of farmers had gone up as well? Do you mean to say that the price of corn had also gone up as a result of the increase in the volume of corn production in the Philippines?

Dr. Halos:

Well, the price is dictated by the market.

Dr.Malayang:

That is precisely the point.

Dr. Halos:

Yes.

Dr. Malayang:

x x x I am just bringing, hopefully to the attention of the Court, that, when you talk of a technology such as GM Corn or GM Talong affecting market there is also not only the regulatory but economic regime that is attendant to it that makes adjustments. So it may not be harmful to humans because we will not come out when we eat it but it might be harmful to the economy of a particular agricultural crop. x x x

x x x x x x x x x

Dr. Ebora:

x x x there are a lot of local studies being conducted now by entomologists from [UPLB] and those are independent studies. And, precisely, this is to determine the effect on natural enemies and the different insects x x x and some of those are already available. x x x you will be able to protect the environment only if you know how to have a proper information in making the decision. So, again, I am saying that, in field trial, you will be generating a lot of information that you will be able to use in making a wise decision and informed decision.

x x x I would like to correct the impression lodged by the statement of Dr. Chakraborty regarding butterflies and moths. Because they are not affected by *BT* because they are adult insects. The only one that is affected are actually the larva, not even the pupa. So, we would like that to be clear because it might create confusion.

The other thing in resistance. x x x even conventionally bred plant [loses] resistance after sometime and that is the reason why we have a continuous breeding program. So,

it is a natural mechanism by an organism as mode of ad[a]potation. x x x are you telling us that we are going to stop our breeding work because, anyway, they are going to develop resistance. I think it is a wrong message x x x.

The other thing is in terms of the study cited by Dr. Medina regarding the "binding." In toxicology, you can have the effect if you have, for example, the insects, you have a receptor. The toxin will bind into the receptor. Toxin has to fall and then the toxin has re-insert into the membrane. If you eliminate one of those steps you do not have any toxicity. So, that means binding by itself will not be toxicity. It is a wrong impression that, since you have binding, there will be toxicity. — It is simply wrong because, the actuality that it should bind, it should fall then, it should insert, and it is a very common x x x. To say that binding is equivalent to toxicity is simply not true.

The other one is natural *BT* toxin and activated toxin. When you were saying protoxin, protoxin is basically the entire crystal protein. If it is already inside the gut of the insect it has to be clipped by the *purchase* coming from the gut and you have it activated and you have the toxin. So what you have in plant is already the toxin since *the anther and the toxin, and the toxin in microorganisms, the anther which are already clipped by a purchase are the same*. So, to say that they are different is actually wrong. You are comparing protoxin and toxin.

x x x regarding the protein. x x x do you know a lot of proteins of another characteristics and that is why you have to characterize them and you have to separate the protein that are causing problem and protein that are not causing problem. That is why you have allergen and, as explained by Dr. Cariño, you have to check the sequence. x x x

x x x x x x x x x

Dr. Chakraborty:

x x x *the field trial wanted to basically go to the protocol. This is the efficacy, the efficiency of the production not that much into the safety.* You have to look into it carefully that how much will get this efficacy, not the safety to that extent x x x. Second point x x x there is this already mentioned

that European Union there is no consensus. x x x they have published and submitted the systemic list of genetically modified crop need for *new approach in risk assessment. So that is what is needed.* There is another article, how does scientific risk assessment of GM crop fit within wider risk analysis. x x x This is genetic engineering. The production process is very precise in selecting the inserted gene but not in its enhancement. x x x they are never looking into it. The second thing, they do not look into that from the laboratory condition to what is the real life situation. They do not take that into account x x x so this assessment protocol has to be modified or changed. x x x in the IAASTD or International Assessment of Agricultural Knowledge, Science and Technology for Development. There is a supreme body, so many nations, so many experts, scientists x x x. *Only sustainable agricultural practice and that is the only alternative. This GM technology is not going to help them* x x x In my country also, when the *BT* toxin evaluation was there, everybody was telling that this is pro-poor, this is scale neutral so, everybody will be benefitted by that. So, we started questioning. x x x "What are the actual economic analysis indeed? Just show me." Then, they come up with an answer. Scale neutral means that even small farmers initially wanted *BT* cotton and big farmers also wanted *BT* cotton. They are partisans. It is not the economic benefit because, economically, it is not going to be beneficial so it is very much scale dependent its benefit. So, only the big farmers, large farmers and x x x the vegetable field you never can give separation. Chances you never can give *refuge*. The 1/5 of the land given for growing pests so that you cannot do. So it cannot help technology. They have developed this technology for partisan large scale farming to completely automated for *BT* technology where no label will be there. But the failed experiments, the contracts whose patent will be over within 2-3 years, they are testing them in our country. So that is the bottom line.

x x x x x x x x x

Chairperson:

Let us put, probably, a close to this hot tub proceeding now.

The issue that the Court is really interested to resolve is whether or not the conduct of the field trial of *BT* Talong

> by the respondents has violated or has threatened to violate the right of the people to a balanced and healthful ecology. Is there absolute certainty that it has not so violated such right. Because that is the requirement for applying or not applying the precautionary principle. x x x

Dr. Cariño:

> Yes. The answer to that is we have not violated, you know, the right of the people…

Chairperson:

> But there is no absolute certainty?

Dr. Cariño:

> Well, quite certain, your Honor, because we have placed all the necessary measures and they did not show us, you know, *there is no evidence of harm* that has been shown to this Court. There is no evidence at all.

Chairperson:

> That is your opinion.[95]

As shown by the foregoing, the hot tub hearing has not yielded any consensus on the points of contention between the expert witnesses, *i.e.,* the safety of *Bt talong* to humans and the environment. Evidently, their opinions are based on contrasting findings in hundreds of scientific studies conducted from the time *Bt* technology was deployed in crop farming. These divergent views of local scientists reflect the continuing international debate on GMOs and the varying degrees of acceptance of GM technology by states especially the developed countries (USA, EU, Japan, China, Australia, etc.).

Before proceeding to the current state of global GMO research, we briefly address the strong objection of petitioners to the CA's reliance on the research conducted by Prof. Seralini, the French scientist whose study was published in September 2012 in *Food and Chemical Toxicology,* which was criticized as a "controversial

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[95] TSN, November 20, 2012, pp. 34-117; CA *rollo* (Vol. V), pp. 4511-4594.

feeding study." Seralini studied rats consuming Monsanto's Roundup Ready treated corn for two years (using the same kind of rats prone to tumors used by Monsanto in obtaining original approval for its product and the same methodologies, but did it for 2 years which is longer than the 90-day experiment period done by Monsanto). The rats formed massive cancerous tumors. All three test groups of rats, with 10 rats in each group, died more frequently, suffered from liver problems, and had a pronounced number of tumors specifically with grotesque mammary and testicular tumors.[96]

Seralini's findings created an uproar and the study was expunged from the publication in November 2013 even though the Editor-in-Chief found no evidence of fraud or intentional misrepresentation of the data. Seralini stood by his work and further conducted similar laboratory experiments. Critics faulted the experimental method, saying the number of rats studied was too small and their diet was skewed when compared with their natural food intake. But over 300 scientists condemned the retraction, they said that the retraction lacked scientific integrity and requested to reinstate the study. Last June 2014, Seralini's controversial study was **republished** and has passed a third peer review arranged by the journal that is republishing the study, *Environmental Sciences Europe*. The republished version contains extra material addressing criticisms of the original publication and the raw data underlying the study's findings, and accompanied by a separate commentary by Prof. Seralini's team describing the lobbying efforts of GMO crop supporters to force the editor of the *Food and Chemical Toxicology* to retract the original publication.[97]

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[96] Plotner, Becky, "Retracted Scientific Study On GMO Rats REPUBLISHED!!!!," *Nourishing Plot* <http://nourishingplot.com/2014/06/24/retracted-scientific-study-on-gmo-rats-republished/> (visited last December 6, 2014); Plotner, Becky, "GMO Rat Study Forcibly Retracted," *Nourishing Plot* <http://nourishingplot.com/2014/01/05/gmo-rat-study-forcibly-retracted/ > (visited last December 6, 2014).

[97] *Id*.; "Republication of the Seralini study: Science speaks for itself," <http://www.gmoseralini.org/republication-seralini-study-science-speaks/> (visited last December 6, 2014).

The aforesaid incident serves to underscore the crucial role of scientists in providing relevant information for effective regulation of GMOs. There can be no argument that "[s]ince scientific advice plays a key role in GMO regulations, scientists have a responsibility to address and communicate uncertainty to policy makers and the public."[98]

GMOs: The Global Debate

The uncertainties generated by conflicting scientific findings or limited research is not diminished by extensive use at present of GM technology in agriculture. The global area of GM crops has reached over 175 million hectares in 2013, more than a hundredfold increase from 1.7 million hectares in 1996.[99] However, the worldwide debate on safety issues involving GM foods continues.

It has been pointed out that the crux of the controversy surrounding GMOs lies in the very nature of the technology itself. The process of combining inter-species genes, which is called recombinant DNA technology, does not have the checks and balances that are imposed by nature in traditional breeding. Because of this there is a risk *of genetic instability*. This means that no one can make any accurate predictions about the long-term effects of GMOs on human beings and the environment. Extensive testing in this regard is either very expensive or impractical, and there is still a great deal about the process that scientists do not understand.[100]

The basic concepts for the safety assessment of foods derived from GMOs have been developed in close collaboration under

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[98] Anne Ingeborg Myrh and Terje Traavik, "The Precautionary Principle: Scientific Uncertainty and Omitted Research in the Context of GMO Use and Release," <https://www.cbd.int/doc/articles/2008/A-00637.pdf> (visited last December 6, 2014).

[99] James Clive, 2013. Global Status of Commercialized Biotech GM Crops: 2013. *ISAAA Brief* No. 46. ISAAA: Ithaca, NY.

[100] Sonal Panse, "The Advantages & Disadvantages of Genetically Modified Food: Both Sides of the Debate," <http://www.brighthub.com/science/genetics/articles/23358.aspx> (visited last December 6, 2014).

the auspices of the Organization for Economic Co-operation and Development (OECD) and the United Nations' World Health Organization (WHO) and Food and Agricultural Organization (FAO). The OECD's group of experts on biosafety recommended conducting the safety assessment of a GM food on case-by-case basis through comparison to an existing food with a long history of safe use. Thus, the concept of *substantial equivalence* was developed that is widely used by national and international agencies, including the US Food and Drug Administration (FDA), the WHO, OECD and the FAO.[101]

"Substantial equivalence embodies the concept that if a new food or food component is found to be substantially equivalent to an existing food or food component, it can be treated in the same manner with respect to safety (*i.e.*, the food or food component can be concluded to be as safe as the conventional food or food component)."[102] The safety assessment of a genetically modified food is directed by the results of a comparison between the genetically modified food and its conventional counterpart. It follows a stepwise process aided by a series of structured questions. Factors taken into account in the safety assessment include:

- identity;
- source;
- composition;
- effects of processing/cooking;
- transformation process;
- the recombinant DNA (e.g. stability of insertion, potential for gene transfer);
- protein expression product of the novel DNA:
    - effects on function;
    - potential toxicity;
    - potential allergenicity;

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[101] Harry A. Kuiper, Gijs A. Kleter, Hub P.J.M. Noteborn and Esther J. Kok, "Assessment of the Food Safety Issues Related to Genetically Modified Foods, <http://www.data.forestry.oregonstate.edu/orb/BiotechClass/2004%20materials/5A-FOOD%20REG/Plant%20Journal%_202001.pdf>.

[102] Joint FAO/WHO Biotechnology and Food Safety Report, 1996, p. 4.

- possible secondary effects from gene expression or the disruption of the host DNA or metabolic pathways, including composition of critical macro, micro-nutrients, anti-nutrients, endogenous toxicants, allergens, and physiologically active substances; and,
- potential intake and dietary impact of the introduction of the genetically modified food.[103]

The above factors are particularly pertinent to the assessment of foods derived from genetically modified plants.[104] However, the concept of substantial equivalence as the starting point of risk assessment was criticized for being "unscientific and arbitrary" and "intentionally vague and ill-defined to be as flexible, malleable, and open to interpretation as possible." It is likewise argued that "comparisons are designed to conceal significant changes resulting from genetic modifications," "the principle is weak and misleading even when it does not apply, effectively giving producers carte blanche," and that there is insufficiency of background information for assessing substantial equivalence. A paper presented at a WHO workshop pointed out that the main difficulty associated with the biosafety assessment of transgenic crops is the unpredictable nature of transformation. This unpredictability raises the concern that transgenic plants will behave in an inconsistent manner when grown commercially.[105]

The method of testing GM foods was further described as inadequate, as currently the testing procedures consist almost exclusively of specific chemical and biochemical analytical procedures designed to quantitate a specific nutrient or a specific toxin or allergen. It was noted that in actual practice, the

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[103] World Health Organization (WHO), "Safety Aspects of Genetically Modified Foods of Plant Origin," <http://www.fao.org/fileadmin/templates/agns/pdf/topics/ec_june2000_en.pdf> (visited last December 6, 2014).

[104] *Id*. at 5.

[105] Mae-Wan Ho and Ricarda A. Steinbrecher, "Fatal Flaws in Food Safety Assessment: Critique of The Joint FAO/WHO Biotechnology and Food Safety Report," Accessed at <http://www.psrast.org/fao96.htm> (visited last December 6, 2014).

investigator compares only selected characteristics of the genetically engineered food to those of its non-genetically engineered counterpart. These testing schemes are viewed as completely incapable of detecting unsuspected or unanticipated health risks that are generated by the process of genetic engineering itself. Hence, clinical tests are recommended because only such tests have the broad specificity and relevance to human physiology needed to detect the wide range of allergens and toxins that might result from unexpected side-effects of the genetic engineering process.[106]

In another review article, it was pointed out that since a genetic modification is aimed at introducing new traits into organisms, the result will always be a different composition of genes and proteins. The most reasonable interpretation therefore is that a food derived from a GMO is considered substantially equivalent to its traditional counterpart if the genetic modification has not resulted in intended or unintended alterations in the composition of relevant nutrients and inherent toxicants of the organism, and that the new genes and proteins have no adverse impact on the dietary value of the food and do not therefore pose any harm to the consumer or the environment. It was thus concluded that establishing substantial equivalence is not a safety assessment in itself, but is a pragmatic tool to analyze the safety of a new food, and hence in the testing of new foods, the latest scientific methods have to be used. All conceivable efforts to protect consumers from health risks should thus be made, and at the same time, consumers should be adequately informed about the real extent of risks and hazards.[107]

The GMO global debate has so intensified that each side has accused the other camp of mounting "paid advocacy" and

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[106] John Fagan, Ph.D., "The Failings of the Principle of Substantial Equivalence in Regulating Transgenic Foods," <http://www.psrast.org/jfsbqsht.htm> (visited last December 6, 2014).

[107] Marianna Schauzu, "The Concept of Substantial Equivalence in Safety Assessment of Foods Derived From Genetically Modified Organisms" *AgBiotech Net* (April 2000) <http://www.bfr.bund.de/cm/349/schauzu.pdf> (visited last December 6, 2014.)

criticizing studies adverse to their respective positions as flawed or unscientific. Both the agri-business industry, and groups opposed to GMOs including the organic farming industry, had utilized enormous resources and funds for lobbying and media campaigns locally and internationally.

What appears to be highlighted in the promotion of GM crop production is the marked reduction in the use of harmful chemical pesticides.[108] The resulting increase in crop yields grown on relatively small parcels of land is also regarded as a solution to the problem of feeding a fast growing world population. Proponents of GM biotechnology insist that GM foods are safe to humans and the environment based on scientific studies. On the other hand, anti-GM activists disseminate adverse results of recent studies confirming the health and environmental hazards of genetically engineered crop farming. Also, some countries have maintained a firm stance against genetically engineered crops or GM foods, such as France and Austria. Over the years, however, accumulated evidence of the dangers of GMOs, as well as unrealized socio-economic benefits, has been increasingly recognized by the scientific community.

That GE farming increases crop yield has been debunked by new studies proving the contrary. In the article, "*GM Crops Do Not Increase Yield Potential*," the Institute for Responsible Technology cited reports from actual field studies in different countries revealing downward figures for *Bt* crops, as summarized below:

- *Bt* corn took longer to reach maturity and produced up to 12% lower yields than non-GM counterparts.
- Evidence for the "yield drag" of Roundup Ready soybeans has been known for over a decade – with the disruptive effect of the GM transformation process accounting for approximately half the drop in yield.

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[108] R.H. Phipps and J.R. Park, "Environmental Benefits of Genetically Modified Crops: Global and European Perspectives on their Ability to Reduce Pesticide Use," *Journal of Animal and Feed Sciences* (January 31, 2002), <http:///cib.org.br/wp-content/uploads/2011/10/estudos.cientificosambiental_32.pdf> (visited last December 6, 2014).

- Based on a comprehensive evaluation of yield since the introduction of commercial GM crops, the International Assessment of Agricultural Knowledge, Science and Technology (IAASTD) noted that GM crop yields were "highly variable" and in some cases, "yields declined."
- The Union of Concerned Scientists' 2009 report *Failure to Yield*, based on published peer-reviewed studies conducted by academic scientists using adequate controls, concluded that genetically engineered herbicide tolerant soybeans and herbicide-tolerant corn has not increased yields while insect-resistant corn has only marginally improved yields. Traditional breeding outperforms genetic engineering hands down.
- In developing countries, crop failure can have severe consequences as illustrated in India, where a large number of cotton farmers, unable to pay back high interest loans, have committed suicide. Several investigations have implicated the unreliable performance of *Bt* cotton as a major contributor.
- *Bt* cotton was overrun by pests in Indonesia and China. In South Africa, farmers faced pest problems and no increase in yield. The 100,000 hectares planted in 1998 dropped 80% to 22,500 by 2002. As of 2004, 85% of the original *Bt* cotton farmers had given up while those remaining had to be subsidized by the government. Similarly in the US, *Bt* cotton yields are not necessarily consistent or more profitable.[109]

GM technology is thus seen as a failure in terms of addressing food security; rather, it supports corporate control and impedes common persons' access to adequate food. The root cause of hunger is not a lack of food, GM critics say, but a lack of access to food. The poor lack money to buy food and lack of land on which to grow it. It is essential to follow sustainable traditional farming practices that keeps food production in the hands of small-scale farmers, thereby reducing corporate control.[110]

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[109] <http://responsibletechnology.org/docs/gm-crops-do-not-increase-yields.pdf>.

[110] Human Rights Advocates, "Promoting Right to Food Through Food Sovereignty," <http://www.humanrightsadvocates.org/wp-content/uploads/

As regards the existing uncertainties of potential *long-term* effects of the release into the environment of GMOs, the BEETLE (Biological and Ecological Evaluation towards Long-term Effects) study of 2009,[111] made for the European Commission, analyzed more than 700 scientific publications from all over the world about GMOs and their potential effects on environment including biodiversity, and received contributions to online surveys from 100 to 167 invited environmental experts. This study declared the following uncertainties:

- increased fitness of GM plants;
- outbreeding depression after hybridization with wild relatives;
- outcrossing between related species and the fate of a transferred GM trait;
- altered flower phenology;
- altered fecundity, increasing seed (gene) flow;
- increased frequency of horizontal gene flow;
- resistance development of pests;
- effects on non-target organisms;
- effects on non-target organisms due to altered nutritional composition of the GM plant;
- effects on non-target organisms due to accumulation of toxic compounds;
- effects on rhizosphere microbiota;
- effects on symbiotic non-target organisms;
- changes in soil functions caused by GM traits;
- effects on biological control;
- altered use of agrochemicals;
- indirect changes in susceptibility of crops against pathogens;
- adverse effects on agro-biodiversity;
- indirect effects in fertilizer use;
- potential changes in landscape structure;
- increased production of greenhouse gases;
- increased mineral nutrient erosion and fertilizer leaching;
- altered chemical attributes of soil fraction;

2014/03/HRC-25-Promoting-Right-to-Food-Through-Food-Sovereignty.pdf> (visited last December 6, 2014).

[111] <http://ec.europa.eu/food/food/biotechnology/reports_studies/docs/lt_effects_report_en.pdf>.

- emerging of stacked events;
- the necessity of regional differentiation of risk assessments.[112]

A critical observation was made on the argument that there is not enough evidence to reject the hypothesis that GMO and GM food is safe. The fact emphasized was that experiments designed to clarify potential adverse effects on health or the environment are nearly absent in peer-reviewed journals. Scientific uncertainty, omitted research areas, and lack of basic knowledge crucial to risk assessments have become apparent. The present uncertainty warrants further research and it has been demonstrated that there is a risk of bias relying on hypotheses that dominate mainstream science. There is therefore a need for independent research that is without prejudice and unbiased by economic and professional interests.[113] In another article it was noted that the clinical trials carried out to ensure that negative externalities do not affect humans and the environment are conducted by the same private firms that created the products, raising conflict of interest concerns.[114]

While existing literature on health effects of GM foods indicates that they are generally safe, and similar conclusions have been drawn by government agencies and scientific organizations such as FAO/WHO and Society of Toxicology, a growing number of independent scientists have spoken strongly against such generalizations from limited research mostly sponsored by biotech companies.

In 1999, the *Open Letter from World Scientists to All Governments* signed by 815 scientists from 82 countries expressed that they are extremely concerned about the hazards of GMOs

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[112] Prof. Dr. Ludwig Krämer, "Genetically Modified Living Organisms and the Precautionary Principle," <https://www.testbiotech.org/sites/default/files/GMO%20and%20precaution.pdf> (visited last December 7, 2014).

[113] Ingeborg and Traavik, *supra* note 98, at 73, 80-81.

[114] Marcelo Gortari, "GMOs, Risk and the Precautionary Principle," *Public Policy & Governance Review* (July 11, 2013) <http://ppgreview.ca/2013/07/11/gmos-risk-and-the-precautionary-principle/> (visited last December 7, 2014).

to biodiversity, food safety, human and animal health, and demanded a moratorium on environmental releases in accordance with the precautionary principle. They are opposed to GM crops that will intensify corporate monopoly, exacerbate inequality and prevent the essential shift to sustainable agriculture that can provide food security and health around the world, and called a ban on patents of life forms and living processes which threaten food security, sanction biopiracy of indigenous knowledge and genetic resources and violate basic human rights and dignity.[115]

On May 10, 2003, dozens of prominent scientists from various disciplines banded together as an Independent Science Panel on GM at a public conference in London. On June 15, 2003, they released a Final Report[116] as their contribution to the National GM Debate in UK. In a summary[117] of the final report, these scientists declared the following:

> The Case for a GM-Free Sustainable World – A Summary
>
> **Why GM-Free?**
>
> 1. **GM crops failed to deliver promised benefits**
>
> - o No increase in yields or significant reduction in herbicide and pesticide use
> - o United States lost an estimated $12 billion over GM crops amid worldwide rejection
> - o Massive crop failures of up to 100% reported in India
> - o High risk future for agbiotech: "Monsanto could be another disaster waiting to happen for investors"

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[115] "Open Letter from World Scientists to All Government Concerning Genetically Modified Organisms (GMOs)," <http://www.i-sis.org.uk/list.php> (visited last December 7, 2014).

[116] International Assessment of Agricultural Knowledge, Science and Technology for Development (IAASTD), "Agriculture at a Crossroads," <http://www.unep.org/dewa/agassessment/reports/IAASTD/EN/Agriculture%20at%20a%20Crossroads_Global%20Report%20(English).pdf> (visited last December 7, 2014).

[117] "The Case for a GM-Free Sustainable World – A Summary," <http://www.i-sis.org.uk/ispr-summary.php> (visited last December 7, 2014.).

2. **GM crops posing escalating problems on the farm**

   - o Transgenic lines unstable: "most cases of transgene inactivation never reach the literature"
   - o Triple herbicide-tolerant volunteers and weeds emerged in North America
   - o Glyphosate-tolerant weeds plague GM cotton and soya fields, atrazine back in use
   - o Bt biopesticide traits threatening to create superweeds and bt-resistant pests

3. **Extensive transgenic contamination unavoidable**

   - o Extensive transgenic contamination found in maize landraces in remote regions of Mexico
   - o 32 out of 33 commercial seed stocks found contaminated in Canada
   - o Pollen remains airborne for hours, and a 35 mile per hour wind speed is unexceptional
   - o *There can be no co-existence of GM and non-GM crops*

4. **GM crops not safe**

   - o GM crops have not been proven safe: regulation was fatally flawed from the start
   - o The principle of 'substantial equivalence', vague and ill defined, gave companies complete licence in claiming GM products 'substantially equivalent' to non-GM, and hence 'safe'

5. **GM food raises serious safety concerns**

   - o Despite the paucity of credible studies, existing findings raise serious safety concerns
   - o 'Growth-factor-like' effects in the stomach and small intestine of young rats were attributed to the transgenic process or the transgenic construct, *and may hence be general to all GM food*

6. **Dangerous gene products are incorporated into food crops**

   - o Bt proteins, incorporated into 25% of all GM crops worldwide, are harmful to many non-target insects,

and some are potent immunogens and allergens for humans and other mammals

- o Food crops are increasingly used to produce pharmaceuticals and drugs, including cytokines known to suppress the immune system, or linked to dementia, neurotoxicity and mood and cognitive side effects; vaccines and viral sequences such as the 'spike' protein gene of the pig coronavirus, in the same family as the SARS virus linked to the current epidemic; and glycoprotein gene *gp120* of the AIDS virus that could interfere with the immune system and recombine with viruses and bacteria to generate new and unpredictable pathogens.

7. **Terminator crops spread male sterility**

- o Crops engineered with 'suicide' genes for male sterility, promoted as a means of preventing the spread of transgenes, actually spread both male sterility and herbicide tolerance traits *via pollen.*

8. **Broad-spectrum herbicides highly toxic to humans and other species**

- o Glufosinate ammonium and glyphosate, used with herbicide tolerant GM crops that currently account for 75% of all GM crops worldwide, are both systemic metabolic poisons

- o Glufosinate ammonium is linked to neurological, respiratory, gastrointestinal and haematological toxicities, and birth defects in humans and mammals; also toxic to butterflies and a number of beneficial insects, to larvae of clams and oysters, *Daphnia* and some freshwater fish, especially the rainbow trout; it inhibits beneficial soil bacteria and fungi, especially those that fix nitrogen.

- o Glyphosate is the most frequent cause of complaints and poisoning in the UK, and disturbances to many body functions have been reported after exposures at normal use levels; glyphosate exposure nearly doubled the risk of late spontaneous abortion, and children born to users of glyphosate had elevated neurobehavioral

defects; glyphosate retards development of the foetal skeleton in laboratory rats, inhibits the synthesis of steroids, and is genotoxic in mammals, fish and frogs; field dose exposure of earthworms caused at least 50 percent mortality and significant intestinal damage among surviving worms; Roundup (Monsanto's formulation of glyphosate) caused cell division dysfunction that may be linked to human cancers.

9. **Genetic engineering creates super-viruses**

   o The most insidious dangers of genetic engineering are inherent to the process; it greatly enhances the scope and probability of horizontal gene transfer and recombination, the main route to creating viruses and bacteria that cause disease epidemics.

   o Newer techniques, such as DNA shuffling, allow geneticists to create in a matter of minutes in the laboratory millions of recombinant viruses that have never existed in billions of years of evolution

   o Disease-causing viruses and bacteria and their genetic material are the predominant materials and tools of genetic engineering, as much as for the intentional creation of bio-weapons.

10. **Transgenic DNA in food taken up by bacteria in human gut**

   o Transgenic DNA from plants has been taken up by bacteria both in the soil and in the gut of human volunteers; antibiotic resistance marker genes can spread from transgenic food to pathogenic bacteria, making infections very difficult to treat.

11. **Transgenic DNA and cancer**

   o Transgenic DNA known to survive digestion in the gut and to jump into the genome of mammalian cells, raising the possibility for triggering cancer

   o Feeding GM products such as maize to animals may carry risks, not just for the animals but also for human beings consuming the animal products

12. **CaMV 35S promoter increases horizontal gene transfer**

    o Evidence suggests that transgenic constructs with the CaMV 35S promoter could be especially unstable and prone to horizontal gene transfer and recombination, with all the attendant hazards: gene mutations due to random insertion, cancer, re-activation of dormant viruses and generation of new viruses.

13. **A history of misrepresentation and suppression of scientific evidence**

    o There has been a history of misrepresentation and suppression of scientific evidence, especially on horizontal gene transfer. Key experiments failed to be performed, or were performed badly and then misrepresented. Many experiments were not followed up, including investigations on whether the CaMV 35S promoter is responsible for the 'growth-factor-like' effects observed in young rats fed GM potatoes.

GM crops have failed to deliver the promised benefits and are posing escalating problems on the farm. Transgenic contamination is now widely acknowledged to be unavoidable, and hence there can be no co-existence of GM and non-GM agriculture. Most important of all, GM crops have not been proven safe. On the contrary, sufficient evidence has emerged to raise serious safety concerns, that if ignored could result in irreversible damage to health and the environment. GM crops should therefore be firmly rejected now.

The ISP further concluded that "[s]ustainable agricultural practices have proven beneficial in all aspects relevant to health and the environment. In addition, they bring food security and social and cultural well being to local communities everywhere. There is an urgent need for a comprehensive global shift to all forms of sustainable agriculture."[118]

In 2008, a Global Report[119] was released by the International Assessment of Agricultural Knowledge, Science and Technology

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[118] *Id*.

[119] *Supra* note 116.

for Development (IAASTD), a three-year international collaborative effort (2005-2007) developed out of a consultative process involving 900 participants and 110 countries from all over the world. This global initiative assessed agricultural knowledge, science and technology (AKST) in relation to meeting development and sustainability goals of (1) reducing hunger and poverty; (2) improving nutrition, health and rural livelihoods; and (3) facilitating social and environmental sustainability. The report concluded that a radical transformation of the world's food and farming systems – especially the policies and institutions that affect them – is necessary if we are to overcome converging economic and environmental crises and feed the world sustainably. It also warned that technologies such as high-yielding crop varieties, agrochemicals and mechanization have primarily benefited the better-resourced groups in society and transnational corporations, rather than the most vulnerable ones. In general, the IAASTD found little evidence to support a conclusion that modern biotechnologies are well suited to meeting the needs of small-scale and subsistence farmers, particularly under the increasingly unpredictable environmental and economic conditions that they face.[120]

More recently, in 2013, the European Network of Scientists for Social and Environmental Responsibility (ENSSER), an international group of more than 90 scientists, academics and physicians, released a statement that there is no scientific consensus on the safety of GM foods and crops.[121] The statement[122] is herein reproduced:

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[120] International Assessment of Agricultural Knowledge, Science and Technology for Development (IAASTD), "Biotechnology and Sustainable Development,"<www.biosafety-info.net/file_dir/4542994024ca566872c339.pdf> (visited last December 7, 2014).

[121] "No scientific consensus on safety of genetically modified organisms," <http://phys.org/news/2013-10-scientific-consensus-safety-genetically.html> (visited last December 7, 2014).

[122] European Network of Scientists for Social and Environmental Responsibility, "Statement: No scientific consensus on GMO safety," <http://www.ensser.org/increasing-public-information/no-scientific-consensus-on-gmo-safety/> (visited last December 7, 2014).

10/21/13

Statement: No scientific consensus on GMO safety

As scientists, physicians, academics, and experts from disciplines relevant to the scientific, legal, social and safety assessment aspects of genetically modified organisms (GMOs), we strongly reject claims by GM seed developers and some scientists, commentators, and journalists that there is a "scientific consensus" on GMO safety and that the debate on this topic is "over."

We feel compelled to issue this statement because the claimed consensus on GMO safety does not exist. The claim that it does exist is misleading and misrepresents the currently available scientific evidence and the broad diversity of opinion among scientists on this issue. Moreover, the claim encourages a climate of complacency that could lead to a lack of regulatory and scientific rigour and appropriate caution, potentially endangering the health of humans, animals, and the environment.

Science and society do not proceed on the basis of a constructed consensus, as current knowledge is always open to well-founded challenge and disagreement. We endorse the need for further independent scientific inquiry and informed public discussion on GM product safety and urge GM proponents to do the same.

Some of our objections to the claim of scientific consensus are listed below.

1. There is no consensus on GM food safety

Regarding the safety of GM crops and foods for human and animal health, a comprehensive review of animal feeding studies of GM crops found "An equilibrium in the number [of] research groups suggesting, on the basis of their studies, that a number of varieties of GM products (mainly maize and soybeans) are as safe and nutritious as the respective conventional non-GM plant, and those raising still serious concerns." The review also found that most studies concluding that GM foods were as safe and nutritious as those obtained by conventional breeding were "performed by biotechnology companies or associates, which are also responsible [for] commercializing these GM plants."

A separate review of animal feeding studies that is often cited as showing that GM foods are safe included studies that found significant differences in the GM-fed animals. While the review

authors dismissed these findings as not biologically significant, the interpretation of these differences is the subject of continuing scientific debate and no consensus exists on the topic.

Rigorous studies investigating the safety of GM crops and foods would normally involve animal feeding studies in which one group of animals is fed GM food and another group is fed an equivalent non-GM diet. Independent studies of this type are rare, but when such studies have been performed, some have revealed toxic effects or signs of toxicity in the GM-fed animals. The concerns raised by these studies have not been followed up by targeted research that could confirm or refute the initial findings.

The lack of scientific consensus on the safety of GM foods and crops is underlined by the recent research calls of the European Union and the French government to investigate the long-term health impacts of GM food consumption in the light of uncertainties raised by animal feeding studies. These official calls imply recognition of the inadequacy of the relevant existing scientific research protocols. They call into question the claim that existing research can be deemed conclusive and the scientific debate on biosafety closed.

2. There are no epidemiological studies investigating potential effects of GM food consumption on human health

It is often claimed that "trillions of GM meals" have been eaten in the US with no ill effects. However, no epidemiological studies in human populations have been carried out to establish whether there are any health effects associated with GM food consumption. As GM foods are not labelled in North America, a major producer and consumer of GM crops, it is scientifically impossible to trace, let alone study, patterns of consumption and their impacts. Therefore, claims that GM foods are safe for human health based on the experience of North American populations have no scientific basis.

3. Claims that scientific and governmental bodies endorse GMO safety are exaggerated or inaccurate

Claims that there is a consensus among scientific and governmental bodies that GM foods are safe, or that they are no more risky than non-GM foods, are false.

For instance, an expert panel of the Royal Society of Canada issued a report that was highly critical of the regulatory system

for GM foods and crops in that country. The report declared that it is "scientifically unjustifiable" to presume that GM foods are safe without rigorous scientific testing and that the "default prediction" for every GM food should be that the introduction of a new gene will cause "unanticipated changes" in the expression of other genes, the pattern of proteins produced, and/or metabolic activities. Possible outcomes of these changes identified in the report included the presence of new or unexpected allergens.

A report by the British Medical Association concluded that with regard to the long-term effects of GM foods on human health and the environment, "many unanswered questions remain" and that "safety concerns cannot, as yet, be dismissed completely on the basis of information currently available." The report called for more research, especially on potential impacts on human health and the environment.

Moreover, the positions taken by other organizations have frequently been highly qualified, acknowledging data gaps and potential risks, as well as potential benefits, of GM technology. For example, a statement by the American Medical Association's Council on Science and Public Health acknowledged "a small potential for adverse events … due mainly to horizontal gene transfer, allergenicity, and toxicity" and recommended that the current voluntary notification procedure practised in the US prior to market release of GM crops be made mandatory. It should be noted that even a "small potential for adverse events" may turn out to be significant, given the widespread exposure of human and animal populations to GM crops.

A statement by the board of directors of the American Association for the Advancement of Science (AAAS) affirming the safety of GM crops and opposing labelling cannot be assumed to represent the view of AAAS members as a whole and was challenged in an open letter by a group of 21 scientists, including many long-standing members of the AAAS. This episode underlined the lack of consensus among scientists about GMO safety.

4. EU research project does not provide reliable evidence of GM food safety

An EU research project has been cited internationally as providing evidence for GM crop and food safety. However, the report based on this project, "A Decade of EU-Funded GMO Research", presents

no data that could provide such evidence, from long-term feeding studies in animals.

Indeed, the project was not designed to test the safety of any single GM food, but to focus on "the development of safety assessment approaches." Only five published animal feeding studies are referenced in the SAFOTEST section of the report, which is dedicated to GM food safety. None of these studies tested a commercialised GM food; none tested the GM food for long-term effects beyond the subchronic period of 90 days; all found differences in the GM-fed animals, which in some cases were statistically significant; and none concluded on the safety of the GM food tested, let alone on the safety of GM foods in general. Therefore the EU research project provides no evidence for sweeping claims about the safety of any single GM food or of GM crops in general.

5. List of several hundred studies does not show GM food safety

A frequently cited claim published on an Internet website that several hundred studies "document the general safety and nutritional wholesomeness of GM foods and feeds" is misleading. Examination of the studies listed reveals that many do not provide evidence of GM food safety and, in fact, some provide evidence of a lack of safety. For example:

- Many of the studies are not toxicological animal feeding studies of the type that can provide useful information about health effects of GM food consumption. The list includes animal production studies that examine parameters of interest to the food and agriculture industry, such as milk yield and weight gain; studies on environmental effects of GM crops; and analytical studies of the composition or genetic makeup of the crop.
- Among the animal feeding studies and reviews of such studies in the list, a substantial number found toxic effects and signs of toxicity in GM-fed animals compared with controls. Concerns raised by these studies have not been satisfactorily addressed and the claim that the body of research shows a consensus over the safety of GM crops and foods is false and irresponsible.

- Many of the studies were conducted over short periods compared with the animal's total lifespan and cannot detect long-term health effects.

We conclude that these studies, taken as a whole, are misrepresented on the Internet website as they do not "document the general safety and nutritional wholesomeness of GM foods and feeds." Rather, some of the studies give serious cause for concern and should be followed up by more detailed investigations over an extended period of time.

6. There is no consensus on the environmental risks of GM crops

Environmental risks posed by GM crops include the effects of Bt insecticidal crops on non-target organisms and effects of the herbicides used in tandem with herbicide-tolerant GM crops.

As with GM food safety, no scientific consensus exists regarding the environmental risks of GM crops. A review of environmental risk assessment approaches for GM crops identified shortcomings in the procedures used and found "no consensus" globally on the methodologies that should be applied, let alone on standardized testing procedures.

Some reviews of the published data on Bt crops have found that they can have adverse effects on non-target and beneficial organisms – effects that are widely neglected in regulatory assessments and by some scientific commentators. Resistance to Bt toxins has emerged in target pests, and problems with secondary (non-target) pests have been noted, for example, in Bt cotton in China.

Herbicide-tolerant GM crops have proved equally controversial. Some reviews and individual studies have associated them with increased herbicide use, the rapid spread of herbicide-resistant weeds, and adverse health effects in human and animal populations exposed to Roundup, the herbicide used on the majority of GM crops.

As with GM food safety, disagreement among scientists on the environmental risks of GM crops may be correlated with funding sources. A peer-reviewed survey of the views of 62 life scientists on the environmental risks of GM crops found that funding and disciplinary training had a significant effect on attitudes. Scientists with industry funding and/or those trained in molecular biology

were very likely to have a positive attitude to GM crops and to hold that they do not represent any unique risks, while publicly-funded scientists working independently of GM crop developer companies and/or those trained in ecology were more likely to hold a "moderately negative" attitude to GM crop safety and to emphasize the uncertainty and ignorance involved. The review authors concluded, "The strong effects of training and funding might justify certain institutional changes concerning how we organize science and how we make public decisions when new technologies are to be evaluated."

7. International agreements show widespread recognition of risks posed by GM foods and crops

The Cartagena Protocol on Biosafety was negotiated over many years and implemented in 2003. The Cartagena Protocol is an international agreement ratified by 166 governments worldwide that seeks to protect biological diversity from the risks posed by GM technology. It embodies the Precautionary Principle in that it allows signatory states to take precautionary measures to protect themselves against threats of damage from GM crops and foods, even in case of a lack of scientific certainty.

Another international body, the UN's Codex Alimentarius, worked with scientific experts for seven years to develop international guidelines for the assessment of GM foods and crops, because of concerns about the risks they pose. These guidelines were adopted by the Codex Alimentarius Commission, of which over 160 nations are members, including major GM crop producers such as the United States.

The Cartagena Protocol and Codex share a precautionary approach to GM crops and foods, in that they agree that genetic engineering differs from conventional breeding and that safety assessments should be required before GM organisms are used in food or released into the environment.

These agreements would never have been negotiated, and the implementation processes elaborating how such safety assessments should be conducted would not currently be happening, without widespread international recognition of the risks posed by GM crops and foods and the unresolved state of existing scientific understanding.

> Concerns about risks are well-founded, as has been demonstrated by studies on some GM crops and foods that have shown adverse effects on animal health and non-target organisms, indicated above. Many of these studies have, in fact, fed into the negotiation and/or implementation processes of the Cartagena Protocol and Codex. We support the application of the Precautionary Principle with regard to the release and transboundary movement of GM crops and foods.
>
> **Conclusion**
>
> In the scope of this document, we can only highlight a few examples to illustrate that *the totality of scientific research outcomes in the field of GM crop safety is nuanced, complex, often contradictory or inconclusive, confounded by researchers' choices, assumptions, and funding sources, and in general, has raised more questions than it has currently answered.*
>
> Whether to continue and expand the introduction of GM crops and foods into the human food and animal feed supply, and whether the identified risks are acceptable or not, are decisions that involve socioeconomic considerations beyond the scope of a narrow scientific debate and the currently unresolved biosafety research agendas. These decisions must therefore involve the broader society. They should, however, be supported by strong scientific evidence on the long-term safety of GM crops and foods for human and animal health and the environment, obtained in a manner that is honest, ethical, rigorous, independent, transparent, and sufficiently diversified to compensate for bias.
>
> Decisions on the future of our food and agriculture should not be based on misleading and misrepresentative claims that a "scientific consensus" exists on GMO safety.[123]

One of the most serious concerns raised against GM crops is that expressed by one of our political analysts now serving in Congress, *viz:*

> x x x patented GMO seeds concentrate power in the hands of a few biotech corporations and marginalize small farmers. As the statement x x x of the 81 members of the World Future Council put

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[123] Citations omitted.

it, "While profitable to the few companies producing them, GMO seeds reinforce a model of farming that undermines sustainability of cash-poor farmers, who make up most of the world's hungry. GMO seeds continue far-mers' dependency on purchased seed and chemical inputs. The most dramatic impact of such dependency is in India, where 270,000 farmers, many trapped in debt for buying seeds and chemicals, committed suicide between 1995 and 2012."[124]

In sum, current scientific research indicates that the biotech industry has not sufficiently addressed the uncertainties over the safety of GM foods and crops.

Bt Brinjal Controversy in India

Brinjal (eggplant) is a major crop and a popular component of food diet in India, an important ingredient in Ayurvedic medicine, and is of special value for the treatment of diabetes and liver problems. The attempted commercial propagation of *Bt brinjal* spawned intense debate and suffered obstacles due to sustained opposition from local scientists, academicians and non-government organizations in India.

As in the case of the Philippines, proponents of *Bt brinjal* in India, believed to be the origin of eggplant's diversity, said that if the new technology is adopted, decrease in the use of insecticides, substantial increase in crop yields and greater food availability, can be expected. But opponents argued, alongside food safety concerns, that there is a potential for toxic effects on populations of non-target invertebrates, and potential replacement of traditional landraces as farmers may move towards cultivation of a restricted number of GE forms. In addition to these issues, there was the additional concern raised over the transfer of *Bt* transgenes to non-GE *brinjal* or its wild relatives, and the consequences for plant biodiversity.[125]

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[124] Walden Bello, "GMO Wars: The Global Battlefield," *Foreign Policy in Focus* and *TheNation.com* (October 28, 2013), <http://fpif.org/gmo-wars-global-battlefield/> (visited last December 9, 2014).

[125] Dr. John Samuels, "Genetically engineered Bt brinjal and the implications for plant biodiversity – revisited," <http://www.greenpeace.org/seaasia/ph/PageFiles/415937/GE-Bt-brinjal-revisited.pdf> (visited last December 9, 2014).

Writ petitions were lodged before the Supreme Court of India to stop the release into the environment of *Bt brinjal* (*Aruna Rodrigues and Ors, etc. vs. Union of India*). The Court formed a Technical Evaluation Committee (TEC) composed of experts nominated by the parties to undertake a comprehensive evaluation of the feasibility of allowing the open field trials of *Bt brinjal* and submit a final report, and in the event the TEC is unable to submit said final report, it was directed instead to submit an interim report within the period set by the Court on the following issue: *Whether there should or should not be any ban, partial or otherwise, upon conducting of open field tests of the GMOs? In the event open field trials are permitted, what protocol should be followed and conditions, if any, that may be imposed by the Court for implementation of open field trials*." The Court also directed that the TEC would be free to review report or studies authored by national and international scientists if it was necessary.

In its Interim Report dated October 17, 2012, the TEC recommended that, in view of its findings, all field trials should be stopped until certain conditions have been met. A Final Report[126] was eventually submitted to the Court which noted weaknesses in the conditions imposed by the regulatory agencies for conduct of field trials, as follows: 1) post-release monitoring, an important aspect of environmental and health safety (if the GE crop is consumed as food) is not given adequate attention; 2) the importance of need and socio-economic impact assessment of GM products as one of the criteria that should be applied in the evaluation at an early stage; and 3) need for additional tests not currently done such as long-term feeding studies for assessment of chronic and intergeneration toxicity in small animals, genomewide expression analysis in the toxicity studies to screen for possible unintended effects on host physiology. It was recommended that a moratorium on field trials of herbicide tolerant crops until the issue had been examined by an independent

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[126] "CONFIDENTIAL: Final Report of the Technical Expert Committee (TEC)," <http://www.greenpeace.org/india/Global/india/report/2013/TEC-report.pdf> (visited last December 9, 2014).

committee, and also noted that said technology may not be suitable in the Indian socio-economic context due to possible impact of extensive use of broad spectrum herbicides on the environmental biodiversity and smaller average farm size. Examination of the safety dossier of *Bt brinjal* indicated certain concerns on the data, which had not been addressed in the course of regulatory testing leading to approval due to lack of full-time qualified personnel for the purpose. Overall, it was found that the quality of information in several of the applications is far below what would be expected and required for rigorous evaluation by a regulatory body and is unlikely to meet international regulatory guidelines.

On the mechanism of *Cry1A* proteins, the TEC cited studies showing that it is possible under certain conditions for *Cry1A* protein to kill insects that lack the cadherin receptor. Also, while it is generally believed that Cry toxins do not exert an effect on vertebrates as vertebrates lack the receptor for Cry toxins, two studies (one in mice and the other in cows) have provided evidence that Cry proteins can bind to mammalian intestinal epithelial cells. The report also discussed the emergence of resistance in insect pests, health and food safety of *Bt* transgenics, and herbicide tolerant crops and their effect on biodiversity and the environment. Specific recommendations were made to address the foregoing issues and the report concluded that:

> The release of a GM crop into its area of origin or diversity has far greater ramifications and potential for negative impact than for other species. To justify this, there needs to be extraordinarily compelling reasons and only when other choices are not available. GM crops that offer incremental advantages or solutions to specific and limited problems are not sufficient reasons to justify such release. The TEC did not find any such compelling reasons under the present conditions. The fact is that unlike the situation in 1960s there is no desperate shortage of food and in fact India is in a reasonably secure position. The TEC therefore recommends that release of GM crops for which India is a centre of origin or diversity should not be allowed.[127]

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[127] *Id*. at 81-82.

In 2010, responding to large-scale opposition to Bt brinjal's introduction in India, former environment minister Jairam Ramesh placed an indefinite moratorium on its further field testing. This was done after discussions with scientists, both pro and anti-GM crops, activists and farmers across the country.

GMO Field Trials in the Philippines

As earlier mentioned, the conduct of field trials for GE plants and crops in our country is governed primarily by DAO 08-2002 and implemented by the DA through the BPI. Petitioners EMB, BPI and FPA all maintain there was no unlawful deviation from its provisions and that respondents so far failed to present evidence to prove their claim that *Bt talong* field trials violated environmental laws and rules.

Within the DA-BPI, it is the Scientific and Technical Review Panel (STRP) which, as an advisory body, was tasked to "evaluate the potential risks of the proposed activity to human health and the environment based on available scientific and technical information." Under DA Special Order 241 and 384 (2002) the STRP membership was expanded to include "an independent pool of experts…tapped by the [BPI] to evaluate the potential risks of the proposed release of GMOs for field testing, propagation, food, feed to human health and the environment based on available scientific and technical information."

DAO 08-2002 supplements the existing guidelines on the importation and release into the environment of products of modern biotechnology by institutionalizing existing operational arrangements between DA-BPI and the NCBP. Effective July 2003, applications for field test are received and processed by DA-BPI, but the approval process for projects on contained use remains under the supervision of NCBP. A mandatory risk assessment of GM plant and plant products is required prior to importation or release into the environment. Experiments must first be conducted under contained conditions, then the products are tested in field trials the product is reviewed for commercial release. Risk assessment is done according to the principles provided for by the Cartagena Protocol on Biosafety. Risk assessment is science-based, carried out on a case by case manner,

targets a specific crop and its transformation event, adopts the concept of substantial equivalence in identifying risk, allows review, and provides that the absence of scientific information or consensus should not be interpreted to indicate the absence or presence and level of risk.[128]

Greenpeace, however, claims there is actually only a committee of three to five members which conducts the risk assessment, and is aided by an informal group, the DA's Biotech Advisory Team (BAT), of representatives from government biotech regulatory agencies: BPI, BAI, FPA, DENR, DOH and DOST. It also assails the government regulatory agencies for their refusal to open to scrutiny the names and qualifications of those incharge of regulation and risk assessment, and for allowing the entry and use of *all* GMO applications requested by multinational companies.[129]

It must be stressed that DAO 08-2002 and related DA orders are not the only legal bases for regulating field trials of GM plants and plant products. EO 514[130] establishing the National Biosafety Framework (NBF) clearly provides that the NBF shall "apply to the development, adoption and implementation of *all* biosafety policies, measures and guidelines and *in making biosafety decisions* concerning the research, development, handling and use, transboundary movement, *release into the environment* and management of regulated articles.[131] The objective of the NBF is to "[e]nhance the decision-making system on the application of products of modern biotechnology to make it more efficient, predictable, effective, balanced, culturally appropriate, ethical, transparent and participatory."[132] Thus,

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[128] *The National Biosafety Framework FOR the Philippines*. Department of Environment and Natural Resources-Protected Areas and Wildlife Bureau 2004. Quezon City, Philippines.

[129] Greenpeace, "Ties that bind: regulatory capture in the country's GMO approval process" <http://www.greenpeace.org/seasia/ph/Global/seasia/report/2007/10/ties-that-bind-regulatory-cap.pdf> (visited last December 7, 2014).

[130] Approved on March 17, 2006.

[131] EO 514, Sec. 2.1.

[132] *Id*., Sec. 2.2.2.

"the socio-economic, ethical, and cultural benefit and risks of modern biotechnology to the Philippines and its citizens, and in particular on small farmers, indigenous peoples, women, small and medium enterprises and the domestic scientific community, shall be taken into account in implementing the NBF."[133] The NBF also mandates that decisions shall be arrived at in a transparent and participatory manner, recognizing that biosafety issues are best handled with the participation of all relevant stakeholders and organizations who shall have appropriate access to information and the opportunity to participate responsibly and in an accountable manner in biosafety decision-making process.[134]

Most important, the NBF requires the use of precaution, as provided in Section 2.6 which reads:

2.6 ***Using Precaution***. – In accordance with Principle 15 of the Rio Declaration of 1992 and the relevant provisions of the Cartagena Protocol on Biosafety, in particular Articles 1, 10 (par. 6) and 11 (par. 8), the precautionary approach shall guide biosafety decisions. The principles and elements of this approach are hereby implemented through the decision-making system in the NBF;

The NBF contains general principles and minimum guidelines that the concerned agencies are expected to follow and which their respective rules and regulations must conform with. In cases of conflict in applying the principles, the principle of protecting public interest and welfare shall always prevail, and no provision of the NBF shall be construed as to limit the legal authority and mandate of heads of departments and agencies to consider the national interest and public welfare in making biosafety decisions.[135]

As to the conduct of risk assessment to identify and evaluate the risks to human health and the environment, these shall be guided by the following:

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[133] NBF, Sec. 2.5.

[134] *Id*., Sec. 2.7.

[135] *Id*. 2.13.

5.2.1 ***Principles of Risk Assessment.*** – The following principles shall be followed when performing a RA to determine whether a regulated article poses significant risks to human health and the environment:

5.2.1.1 The RA shall be carried out in a scientifically sound and transparent manner based on available scientific and technical information. **The expert advice of and guidelines developed by, relevant international organizations, including intergovernmental bodies, and regulatory authorities of countries with significant experience in the regulatory supervision of the regulated article shall be taken into account in the conduct of risk assessment;**

5.2.1.2 **Lack of scientific knowledge or scientific consensus** shall not be interpreted as indicating a particular level of risk, an absence of risk, or an acceptable risk;

5.2.1.3 The identified characteristics of a regulated article and its use which have the potential to pose significant risks to human health and the environment shall be compared to those presented by the non-modified organism from which it is derived and its use under the same conditions;

5.2.1.4 The RA shall be carried out case-by-case and on the basis of transformation event. The required information may vary in nature and level of detail from case to case depending on the regulated article concerned, its intended use and the receiving environment; and,

5.2.1.5 If new information on the regulated article and its effects on human health and the environment becomes available, and such information is relevant and significant, the RA shall be readdressed to determine whether the risk has changed or whether there is a need to amend the risk management strategies accordingly.

5.2.2 ***Risk Assessment Guidelines.*** – The conduct of RA by concerned departments and agencies shall be in accordance with the policies and standards on RA issued by the NCBP. Annex III of the Cartagena Protocol shall also guide RA. As appropriate, such department and agencies may issue their own respective administrative issuances establishing the appropriate RA under their particular jurisdictions.

5.3 ***Role of Environmental Impact Assessment.*** – The application of the EIA System to biosafety decisions **shall be determined by concerned departments and agencies subject to the requirements of law and the standards set by the NCBP.** Where applicable and under the coordination of the NCBP, concerned departments and agencies shall issue joint guidelines on the matter. (Emphasis supplied)

Considering the above minimum requirements under the most comprehensive national biosafety regulation to date, compliance by the petitioners with DAO 08-2002 is not sufficient. Notably, Section 7 of the NBF mandates a more transparent, meaningful and participatory public consultation on the conduct of field trials beyond the posting and publication of notices and information sheets, consultations with some residents and government officials, and submission of written comments, provided in DAO 08-2002.

SECTION 7. PUBLIC PARTICIPATION

The concerned government departments and agencies, in developing and adopting biosafety policies, guidelines and measures and in making biosafety decisions, shall promote, facilitate, and conduct public awareness, education, meaningful, responsible and accountable participation. They shall incorporate into their respective administrative issuances and processes best practices and mechanisms on public participation in accordance with the following guidelines:

7.1 Scope of Public Participation. – Public participation shall apply **to all stages of the biosafety decision-making process from the time the application is received**. For applications on biotechnology activities related to research and development, limited primarily for contained use, notice of the filing of such application with the NCBP shall be sufficient, unless the NCBP deems that public interest and welfare requires otherwise.

7.2 Minimum Requirements of Public Participation. – In conducting public participation processes, the following minimum requirements shall be followed:

7.2.1 *Notice to all concerned stakeholders, in a language understood by them and through media to which they have access.* Such notice must be adequate, timely, and effective and posted prominently in public places in the areas affected, and in the

case of commercial releases, in the national print media; in all cases, such notices must be posted electronically in the internet;

7.2.2 *Adequate and reasonable time frames for public participation procedures*. Such procedures should allow relevant stakeholders to understand and analyze the benefits and risks, consult with independent experts, and make timely interventions. Concerned departments and agencies shall include in their appropriate rules and regulations specific time frames for their respective public participation processes, including setting a minimum time frame as may be appropriate;

7.2.3 *Public consultations, as a way to secure wide input into the decisions that are to be made.* These could include formal hearings in certain cases, or solicitation of public comments, particularly where there is public controversy about the proposed activities. Public consultations shall encourage exchanges of information between applicants and the public before the application is acted upon. Dialogue and consensus-building among all stakeholders shall be encouraged. Concerned departments and agencies shall specify in their appropriate rules and regulations the stages when public consultations are appropriate, the specific time frames for such consultations, and the circumstances when formal hearings will be required, including guidelines to ensure orderly proceedings. **The networks of agricultural and fisheries councils, indigenous peoples and community-based organizations in affected areas shall be utilized**;

7.2.4 *Written submissions.* Procedures for public participation shall include mechanisms that **allow public participation in writing or through public hearings, as appropriate, and which allow the submission of any positions, comments, information, analyses or opinions.** Concerned departments and agencies shall include in their appropriate rules and regulations the stages when and the process to be followed for submitting written comments; and,

7.2.5 *Consideration of public concerns in the decision-making phase following consultation and submission of written comments.* Public concerns as reflected through the procedures for public participation shall be considered in making the decision. The public shall be informed of the final decision promptly, have access to the decision, and shall be provided with the reasons and considerations resulting in the decision, upon request.

We find that petitioners simply adhered to the procedures laid down by DAO 08-2002 and no real effort was made to operationalize the principles of the NBF in the conduct of field testing of *Bt talong*. The failure of DAO 08-2002 to accommodate the NBF means that the Department of Agriculture lacks mechanisms to mandate applicants to comply with international biosafety protocols. Greenpeace's claim that BPI had approved nearly all of the applications for GMO field trials is confirmed by the data posted on their website. For these reasons, the DAO 08-2002 should be declared invalid.

Significantly, while petitioners repeatedly argued that the subject field trials are not covered by the EIS law, EO 514 clearly mandates that concerned departments and agencies, most particularly petitioners DENR-EMB, BPI and FPA, make a determination whether the EIS system should apply to the release of GMOs into the environment and issue joint guidelines on the matter.

The Philippine EIS System (PEISS) is concerned primarily with assessing the direct and indirect impacts of a project on the biophysical and human environment and ensuring that these impacts are addressed by appropriate environmental protection and enhancement measures. It "aids proponents in incorporating environmental considerations in planning their projects as well as in determining the environment's impact on their project." There are six stages in the regular EIA process. The proponent initiates the first three stages while the EMB takes the lead in the last three stages. Public participation is enlisted in most stages.[136]

Even without the issuance of EO 514, GMO field testing should have at least been considered for EIA under existing regulations of petitioner EMB on new and emerging technologies, to wit:

g) Group V (Unclassified Projects): These are the projects not listed in any of the groups, e.g. **projects using new processes/**

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[136] "The Role of Government Agencies in the Philippine Environmental Impact System: Under the Revised Procedural Manual," <http://www.emb.gov.ph/portal/Portals/21/EIA/EIA%20FOLDER/For%20National%20Government%20Agencies.pdf> (visited last December 9, 2014).

technologies with uncertain impacts. This is an interim category – unclassified projects will eventually be classified into their appropriate groups after EMB evaluation.[137] (Emphasis supplied)

All government agencies as well as private corporations, firms and entities who intend to undertake activities or projects which will affect the *quality of the environment* are required to prepare a detailed Environmental Impact Statement (EIS) prior to undertaking such development activity.[138] An environmentally critical project (ECP) is considered by the EMB as "likely to have significant adverse impact that may be sensitive, irreversible and diverse" and which "include activities that have significant environmental consequences."[139] In this context, and given the overwhelming scientific attention worldwide on the potential hazards of GMOs to human health and the environment, their release into the environment through field testing would definitely fall under the category of ECP.

During the hearing at the CA, Atty. Segui of the EMB was evasive in answering questions on whether his office undertook the necessary evaluation on the possible environmental impact of *Bt talong* field trials subject of this case and the release of GMOs into the environment in general. While he initially cited lack of budget and competence as reasons for their inaction, he later said that an amendment of the law should be made since projects involving GMOs are not covered by Proclamation No. 2146.[140] Pertinent portions of his testimony before the CA are herein quoted:

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[137] Section 7.g, Revised Procedural Manual for DAO 2003-30 on the Overview of the Philippine EISS (PEISS).

[138] RA 8550 (Philippine Fisheries Code), Sec. 12.

[139] *Overview of the Environmental Impact Assessment Process*, 25 September 2013. Accessed at <https://www.doe.gov.ph/microsites/ipo%20web/linked%20files/2013/MEIF2013/03_DENR_Procedures.pdf>.

[140] Proclaiming Certain Areas and Types of Projects as Environmentally Critical and Within the Scope of the Environmental Impact Statement System Established Under Presidential Decree No. 1586. Issued December 14, 1981.

ATTY. SORIANO:

Let us go back Mr. Witness to your answer in Question No. 5 regarding the list under the PEISS law. Granting Mr. Witness that a certain project or undertaking is not classified as environmentally critical project, how would you know that the BT talong field testing is not located in an environmentally critical area this time?

ATTY. ACANTILADO:

Objection Your Honor, argumentative.

HON. J. DICDICAN:

Witness may answer.

ATTY. SEGUI:

As far as my recollection can serve me, in a reading of the Petition itself, somewhere along the Petition, petitioners never alleged that the project, the subject matter rather of this instant petition, is within an environmentally critical project.

ATTY. SORIANO:

Your Honor the Witness did not answer the question.

HON. J. DICDICAN:

Please answer the question.

ATTY. SEGUI:

Personally I have conferred with our personnel from the Environmental Impact Assessment Division and they intimated to me that the locations of the project, rather of this subject matter of the instant petition, not within any declared environmentally critical area.

HON. J. BARRIOS:

In other words, you are aware of the area where the BT Talong experiments are being conducted. Is that the premise?

ATTY. SEGUI:

Judging from previous discussions we had . . . judging from the Petition, and showing it to the as I said personnel from

Environmental Impact Division at our office, as I said they intimated to me that it's not within declared environmentally critical area.

HON. J. BARRIOS:

That being the case, you did not act further? [**You] did not make any further evaluation, on whether the activity has an environmental impact?** Is that the correct premise?

ATTY. SEGUI:

Well Your Honors I may be the Chief of the Legal Division of the EMB, I handle more of the legal aspects of the Bureau's affairs. But when it comes to highly technical matters, I have to rely on our technical people especially on environmentally impact assessment matters.

ATTY. SORIANO:

I will just ask him another question Your Honors. So did the Department of Agriculture Mr. Witness coordinate with your Office with regard the field testing of BT Talong?

ATTY. SEGUI:

I'm sorry Your Honors I am not privy to that personally.

ATTY. SORIANO:

Mr. Witness, the question is did the Department of Agriculture coordinate with your Office with regard the field testing of BT Talong as required under the law?

ATTY. SORIANO:

Already answered your Honor, objection.

HON. J. DICDICAN:

The witness in effect said he does not know, he's not in a position to answer.

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ATTY. SORIANO:

Did the EMB Mr. Witness perform such evaluation in the case of BT Talong field testing?

ATTY. ACANTILADO:

Your Honor that is speculative, the witness has just answered a while ago that the EMB has not yet received any project with respect to that Your Honor. So the witness would not be in a position to answer that Your Honors.

HON. J. DICDICAN:

Lay the basis first.

ATTY. SORIANO:

The earlier answer Your Honor of the witness is in general terms. My second question, my follow-up question is specifically Your Honor the BT talong field testing.

ATTY. SEGUI:

Well from where I sit Your Honors, it would appear that it could be categorized as unclassified...

HON. J. VALENZUELA:

Unclassified?

ATTY. SEGUI:

As the section will initially provide. But there must be prior … may I continue to harp on that Your Honors. There must be prior … let's say conditions … there must be prior evaluation and assessment just the same by the EMB.

HON. J. VALENZUELA:

Prior to what Mr. Witness?

ATTY. SEGUI:

We will categorize it as unclassified but there must be … (interrupted)

HON. J. VALENZUELA:

So initially you call it unclassified and then you say prior to…

ATTY. SEGUI:

I'm sorry Your Honors, may I reform.

HON. J. VALENZUELA:

Yes please.

ATTY. SEGUI:

Initially they will be considered/categorized as unclassified but there will be hopefully a subsequent evaluation or assessment of the matter to see if we also have the resources and expertise if it can be finally unclassified. I should say should fall within the fairview of the system, the EIA system. In other words, it's in a sort of how do you say that it's in a state of limbo. So it's unclassified, that's the most we can do in the meantime.

HON. J. VALENZUELA:

And Mr. Witness you also said that the agency the EMB is without the capability to evaluate the projects such as this one in particular?

ATTY. SEGUI:

Yes, Your Honors as of now.

HON. J. VALENZUELA:

So therefore, when you say initially it's unclassified and then you're saying afterwards the EMB needs evaluation but then you're saying the EMB is without any capability to evaluate then what happens?

ATTY. SEGUI:

Well Your Honors, I did not draft the regulation myself. As the Chief of the Legal of the EMB **that's how we interpret it**. **But the truth of the matter is with all pragmatism we don't have the resources as of now and expertise to do just that.**

HON. J. BARRIOS:

So in other words you admit that the EMB is without any competence to make a categorical or initial examination of this uncategorized activity, is that what you mean?

ATTY. SEGUI:

It would appear, yes.

HON. J. BARRIOS:

What do you think would prompt your office to make such initial examination?

ATTY. SEGUI:

Well executive fee at the usual dictates . . . the Secretary of the DENR probably even by request of the parties concerned.

HON. J. BARRIOS:

So that means you are waiting for a request? Are you not? Pro-active in this activity in performing your obligations and duties?

ATTY. SEGUI:

Well Your Honors, the national budget if I may . . . I attend budget hearings myself. **The budget for the environment is hardly . . . the ratio is . . . if we want to protect indeed the environment as we profess, with all due respect if Congress speaks otherwise.**

HON. J. BARRIOS:

May I interrupt, can we go into specifics. From what I have read so far, under No. 2 of your Judicial Affidavit, [you] are saying that the EMB is tasked in advising the DENR on matters related to environmental management, conservation and pollution control, right?

ATTY. SEGUI:

Yes.

HON. J. BARRIOS:

Thereafter you stated that you are tasked mainly with PD 1586 which refers to Environmental Critical Areas of Projects and more specifically focused on Proclamation No. 2146. With respect to this BT Talong, you mentioned that this is at first is uncategorized, it's not within?

ATTY. SEGUI:

It's not within Proclamation 2146 Your Honor.

HON. J. BARRIOS:

> But you did mention that under the rules and regulations, even in an uncategorized activity, pertaining to the environment, your Office has the mandate and then you later say that your Office is without competence, do I follow your line of standing?

ATTY. SEGUI:

> Yes, precisely it will be categorized as per Section 7 as unclassified because it doesn't fall as of now within Proclamation 2146.

HON. J. BARRIOS:

> Yes, but under the implementing rules your Office has the mandate to act on other unclassified activities and you answered that your Office has no competence.

ATTY. SEGUI:

> Proclamation 2146 executed by then Pres. Marcos, the IRR pointed to was executed by I believe the Secretary of DENR. We need an amendment of 2146.[141] (Emphasis supplied)

The foregoing stance of the EMB's Chief of the Legal Division is an indication of the DENR-EMB's lack of serious attention to their mandate under the law in the implementation of the NBF, as provided in the following sections of EO 514:

> 4.9 ***Mandate of the Department of Environment and Natural Resources.*** – As the primary government agency responsible for the conservation, management, development and proper use of the country's environment and natural resources, the Department of Environment and Natural Resources (DENR) **shall ensure that environmental assessments are done and impacts identified in biosafety decisions.** It shall also take the lead in evaluating and monitoring regulated articles intended for bioremediation, the improvement of forest genetic resources, and wildlife genetic resources.
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> x x x x x x x x x

[141] TSN, February 7, 2013, pp. 13-16, 18-20.

4.12 ***Focal Point and Competent National Authorities.***

4.12.1 For purposes of Article 19 of the Cartagena Protocol on Biosafety, the national focal point responsible for liaison with the Secretariat shall be the Department of Foreign Affairs. The competent national authorities, responsible for performing the administrative functions required by the Protocol, shall be, depending on the particular genetically modified organisms in question, the following:

x x x x x x x x x

4.12.1.4 The Department of Environment and Natural Resources, for **biosafety decisions covered by the Protocol that concern** regulated organisms intended for bioremediation, the improvement of forest genetic resources, and wildlife genetic resources, and **applications of modern biotechnology with potential impact on the conservation and sustainable use of biodiversity.** (Emphasis supplied)

On the supposed absence of budget mentioned by Atty. Segui, EO 514 itself directed the concerned agencies to ensure that there will be funding for the implementation of the NBF as it was intended to be a multi-disciplinary effort involving the different government departments and agencies.

SEC. 6. *Funding.* – The DOST, DENR, DA, and DOH shall allocate funds from their present budgets to implement the NBF, including support to the operations of the NCBP and its Secretariat. Starting 2006 and thereafter, the funding requirements shall be included in the General Appropriations Bill submitted by each of said departments to Congress.

These concerned departments shall enter into agreement on the sharing of financial and technical resources to support the NCBP and its Secretariat.

All told, petitioners government agencies clearly failed to fulfil their mandates in the implementation of the NBF.

Application of the Precautionary Principle

The precautionary principle originated in Germany in the 1960s, expressing the normative idea that governments are obligated to "foresee and forestall" harm to the environment.

In the following decades, the precautionary principle has served as the normative guideline for policymaking by many national governments.[142] The Rio Declaration on Environment and Development, the outcome of the 1992 United Nations Conference on Environment and Development held in Rio de Janeiro, defines the rights of the people to be involved in the development of their economies, and the responsibilities of human beings to safeguard the common environment. It states that the long term economic progress is only ensured if it is linked with the protection of the environment.[143] For the first time, the precautionary approach was codified under Principle 15, which reads:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

Principle 15 codified for the first time at the global level the precautionary approach, which indicates that lack of scientific certainty is no reason to postpone action to avoid potentially serious or irreversible harm to the environment. It has been incorporated in various international legal instruments.[144] The Cartagena Protocol on Biosafety to the Convention on Biological Diversity, finalized and adopted in Montreal on January 29, 2000, establishes an international regime primarily aimed at regulating trade in GMOs intended for release into the environment, in accordance with Principle 15 of the Rio Declaration on Environment and Development. The Protocol thus provides:

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[142] "*GMOs, Risks and the Precautionary Principle*" by Marcelo Gortari, *supra* note 114.

[143] Principles 1, 2, 3 and 4. <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163 > (visited last December 7, 2014).

[144] The Global Development Resource Center, "The Rio Declaration: Principle 15 – The Precautionary Approach," <http://www.gdrc.org/u-gov/precaution-7.html> (visited last December 9, 2014).

Article

10

DECISION PROCEDURE

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6. Lack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of a living modified organism on the conservation and sustainable use of biological diversity in the Party of import, taking also into account risks to human health, shall not prevent that Party from taking a decision, as appropriate, with regard to the import of the living modified organism in question as referred to in paragraph 3 above, in order to avoid or minimize such potential adverse effects.

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Article

11

PROCEDURE FOR LIVING MODIFIED ORGANISMS INTENDED FOR DIRECT USE AS FOOD OR FEED, OR FOR PROCESSING

8. Lack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of a living modified organism on the conservation and sustainable use of biological diversity in the Party of import, taking also into account risks to human health, shall not prevent that Party from taking a decision, as appropriate, with regard to the import of that living modified organism intended for direct use as food or feed, or for processing, in order to avoid or minimize such potential adverse effects.

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Annex III

RISK ASSESSMENT

General principles

x x x x x x x x x

4. Lack of scientific knowledge or scientific consensus should not necessarily be interpreted as indicating a particular level of risk, an absence of risk, or an acceptable risk.

The precautionary principle applies when the following conditions are met[145]:

- there exist considerable scientific uncertainties;
- there exist scenarios (or models) of possible harm that are scientifically reasonable (that is based on some scientifically plausible reasoning);
- uncertainties cannot be reduced in the short term without at the same time increasing ignorance of other relevant factors by higher levels of abstraction and idealization;
- the potential harm is sufficiently serious or even irreversible for present or future generations or otherwise morally unacceptable;
- there is a need to act now, since effective counteraction later will be made significantly more difficult or costly at any later time.

The Rules likewise incorporated the principle in Part V, Rule 20, which states:

PRECAUTIONARY PRINCIPLE

SEC. 1. *Applicability*. – When there is a lack of full scientific certainty in establishing a causal link between human activity and environmental effect, the court shall apply the precautionary principle in resolving the case before it.

The constitutional right of the people to a balanced and healthful ecology shall be given the benefit of the doubt.

SEC. 2. *Standards for application.* – In applying the precautionary principle, the following factors, among others, may be considered: (1) threats to human life or health; (2) inequity to present or future

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[145] "*The Precautionary Principle*," World Commission on the Ethics of Scientific Knowledge and Technology (COMEST). March 2005. <http://unesdoc.unesco.org/images/0013/001395/139578e.pdf>.

generations; or (3) prejudice to the environment without legal consideration of the environmental rights of those affected.

Under this Rule, the precautionary principle finds direct application in the evaluation of evidence in cases before the courts. The precautionary principle bridges the gap in cases where scientific certainty in factual findings cannot be achieved. By applying the precautionary principle, the court may construe a set of facts as warranting either judicial action or inaction, with the goal of preserving and protecting the environment. This may be further evinced from the second paragraph where bias is created in favor of the constitutional right of the people to a balanced and healthful ecology. In effect, the precautionary principle shifts the burden of evidence of harm away from those likely to suffer harm and onto those desiring to change the status quo. An application of the precautionary principle to the rules on evidence will enable courts to tackle future environmental problems before ironclad scientific consensus emerges.[146]

For purposes of evidence, the precautionary principle should be treated as a principle of last resort, where application of the regular Rules of Evidence would cause in an inequitable result for the environmental plaintiff — (a) settings in which the risks of harm are uncertain; (b) settings in which harm might be irreversible and what is lost is irreplaceable; and (c) settings in which the harm that might result would be serious. When these features — **uncertainty**, the **possibility of irreversible harm**, and the **possibility of serious harm** — coincide, the case for the precautionary principle is strongest. When in doubt, cases must be resolved in favor of the constitutional right to a balanced and healthful ecology. Parenthetically, judicial adjudication is one of the strongest fora in which the precautionary principle may find applicability.[147]

Assessing the evidence on record, as well as the current state of GMO research worldwide, the Court finds all the three

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[146] ANNOTATION TO THE RULES OF PROCEDURE FOR ENVIRONMENTAL CASES.

[147] *Id*.

conditions present in this case – uncertainty, the possibility of irreversible harm and the possibility of serious harm.

Eggplants (*talong*) are a staple vegetable in the country and grown by small-scale farmers, majority of whom are poor and marginalized. While the goal of increasing crop yields to raise farm incomes is laudable, independent scientific studies revealed uncertainties due to unfulfilled economic benefits from *Bt* crops and plants, adverse effects on the environment associated with use of GE technology in agriculture, and serious health hazards from consumption of GM foods. For a biodiversity-rich country like the Philippines, the natural and unforeseen consequences of contamination and genetic pollution would be disastrous and irreversible.

Alongside the aforesaid uncertainties, the non-implementation of the NBF in the crucial stages of risk assessment and public consultation, including the determination of the applicability of the EIS requirements to GMO field testing, are compelling reasons for the application of the precautionary principle. There exists a preponderance of evidence that the release of GMOs into the environment *threatens* to damage our ecosystems and not just the field trial sites, and eventually the health of our people once the *Bt* eggplants are consumed as food. Adopting the precautionary approach, the Court rules that the principles of the NBF need to be operationalized first by the coordinated actions of the concerned departments and agencies before allowing the release into the environment of genetically modified eggplant. The more prudent course is to immediately enjoin the *Bt talong* field trials and approval for its propagation or commercialization until the said government offices shall have performed their respective mandates to implement the NBF.

We have found the experience of India in the *Bt brinjal* field trials — for which an indefinite moratorium was recommended by a Supreme Court-appointed committee till the government fixes regulatory and safety aspects — as relevant because majority of Filipino farmers are also small-scale farmers. Further, the precautionary approach entailed inputs from all stakeholders, including the marginalized farmers, not just the scientific

community. This proceeds from the realization that acceptance of uncertainty is not only a scientific issue, but is related to public policy and involves an ethical dimension.[148] For scientific research alone will not resolve all the problems, but participation of different stakeholders from scientists to industry, NGOs, farmers and the public will provide a needed variety of perspective foci, and knowledge.[149]

Finally, while the drafters of the NBF saw the need for a law to specifically address the concern for biosafety arising from the use of modern biotechnology, which is deemed necessary to provide more permanent rules, institutions, and funding to adequately deal with this challenge,[150] the matter is within the exclusive prerogative of the legislative branch.

WHEREFORE, the petitions are **DENIED.** The Decision dated May 17, 2013 of the Court of Appeals in CA-G.R. SP No. 00013 is hereby **MODIFIED**, as follows:

1. The conduct of the assailed field testing for *Bt talong* is hereby **PERMANENTLY ENJOINED**;

2. Department of Agriculture Administrative Order No. 08, series of 2002 is declared **NULL AND VOID**; and

3. Consequently, any application for contained use, field testing, propagation and commercialization, and importation of genetically modified organisms is **TEMPORARILY ENJOINED** until a new administrative order is promulgated in accordance with law.

No pronouncement as to costs.

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[148] Ingeborg Myhr and Traavik, *supra* note 98.

[149] Anne Ingeborg-Myhr and Terje Traavik, "Genetically Modified (GM) Crops: Precautionary Science and Conflicts of Interests" <http://www.pages.drexel.edu/~ls39/peer_review/Myhr.pdf> (visited last December 9, 2014).

[150] Department of Environment and Natural Resources – Protected Areas and Wildlife Bureau, "The National Biosafety Framework for the Philippines," <http://www.unep.org/biosafety/files/PHNBFrep.pdf> (visited last December 9, 2014).

SO ORDERED.

Sereno, C.J., Leonardo-de Castro, Peralta, Bersamin, del Castillo, Perez, Mendoza, Reyes, and *Perlas-Bernabe, JJ.,* concur.

Velasco, Jr. and *Leonen, JJ.,* see concurring opinions.

Carpio and *Jardeleza, JJ.,* no part.

Brion, J., on official leave.

CONCURRING OPINION

VELASCO, JR., *J.*:

Technological and scientific advances no longer involve raw materials manipulation and transformation. It now embraces changing the very genetic make-up of live organisms, altering and even mixing characteristics of flora, fauna, microorganisms, among others, for various purposes, including attempts to increase agricultural yield and improve and develop sustainable pest control.

The Philippines is not insulated from this genetic modification of organisms as it is, in fact, a regulated activity in this jurisdiction. But, in view of the possible dangers that the activity poses to the biodiversity-rich environs of the country, environmental protection in the Philippines has evolved to adapt to these progresses and is still being further strengthened via executive, legislative, and judicial efforts.

At bar are consolidated petitions seeking the reversal of the Decision of the Court of Appeals (CA) dated May 17, 2013, as well as its Resolution dated September 20, 2013, in CA-G.R. SP No. 00013 which permanently enjoined the conduct of field trials for the genetically modified eggplant, commonly known as "*Bt Talong*," on concerns for biosafety.

Biosafety is a condition in which the probability of harm, injury and damage resulting from the intentional and unintentional

and manageable levels.[1] "Regulated article" refers to genetically modified organisms[2] (GMOs), which are "living modified organisms" under the Cartagena Protocol on Biosafety and refers to any living organism that possesses a novel combination of genetic material obtained through the use of modern biotechnology.[3] Regulated articles also include the products of GMOs.[4]

Prior, however, to the introduction of biotechnology and genetic modification of organisms in the Philippines, one of the main enactments governing environmental protection is Presidential Decree No. 1151 (PD 1151) or the *Philippine Environmental Policy* issued by then President Ferdinand E. Marcos on June 6, 1977.

The Philippine Environmental Impact Statement System (PEISS)

PD 1151, which put in place the use of Environmental Impact Statements in this jurisdiction, declares as the State's continuing policy (a) to create, develop, maintain and improve conditions under which man and nature can thrive in productive and enjoyable harmony with each other; (b) to fulfill the social, economic and other requirements of present and future generations of Filipinos; and (c) to insure the attainment of an environmental quality that is conducive to a life of dignity and well-being.

In pursuit of its above-stated policy, Section 4 of PD 1151 requires thusly:

> [A]ll agencies and instrumentalities of the national government, including government-owned or controlled corporations, as well as private corporations, firms and entities shall prepare, file and include in every action, project or undertaking which significantly affects the quality of the environment a detailed statement on —
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> (a) the environmental impact of the proposed action, project or undertaking;

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[1] Item 3.3, Section 3, EO 514, s. 2006.

[2] Sub-item 3.3.12, Item 3.3, Section 3, EO 514, s. 2006.

[3] Sub-item 3.3.2, Item 3.3, Section 3, EO 514, s. 2006.

[4] Sub-item 3.3.12, Item 3.3, Section 3, EO 514, s. 2006.

(b) any adverse environmental effect which cannot be avoided should the proposal be implemented;
(c) alternative to the proposed action;
(d) a determination that the short-term uses of the resources of the environment are consistent with the maintenance and enhancement of the long-term productivity of the same; and
(e) whenever a proposal involves the use of depletable or non-renewable resources, a finding must be made that such use and commitment are warranted.

Before an environmental impact statement (EIS) is issued by a lead agency, all agencies having jurisdiction over, or special expertise on, the subject matter involved shall comment on the draft environmental impact statement made by the lead agency within thirty (30) days from receipt of the same.

Thereafter, to give more teeth to the EIS requirement, PD 1586[5] was issued on June 11, 1978, establishing the EIS System (PEISS), instituting a systems-oriented and integrated approach to the filing of the EIS in coordination with the whole environmental protection program of the State.[6] Section 2 thereof states:

There is hereby established an Environmental Impact Statement System founded and based on the environmental impact statement required under Section 4 of Presidential Decree No. 1151, of all agencies and instrumentalities of the national government, including government-owned or controlled corporations, as well as private corporations, firms and entities, for every proposed project and undertaking which significantly affect the quality of the environment.

To reiterate, Section 4 of PD 1151, on the other hand, provides:

Environmental Impact Statements. Pursuant to the above enunciated policies and goals, all agencies and instrumentalities of the national government, including government-owned or controlled corporations, as well as private corporations, firms and entities shall prepare, file

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[5] Establishing An Environmental Impact Statement System Including Other Environmental Management Related Measures And For Other Purposes.

[6] Philippine Judicial Academy, *A Sourcebook on Environmental Rights and Legal Remedies*, p. 58.

and include in every action, project or undertaking which significantly affects the quality of the environment a detailed statement on

(a) the environmental impact of the proposed action, project or undertaking
(b) any adverse environmental effect which cannot be avoided should the proposal be implemented
(c) alternative to the proposed action
(d) a determination that the short-term uses of the resources of the environment are consistent with the maintenance and enhancement of the long-term productivity of the same; and
(e) whenever a proposal involves the use of depletable or nonrenewable resources, a finding must be made that such use and commitment are warranted.

Before an environmental impact statement is issued by a lead agency, all agencies having jurisdiction over, or special expertise on, the subject matter involved shall comment on the draft environmental impact statement made by the lead agency within thirty (30) days from receipt of the same.

As part of the PEISS, Section 4 of PD 1586 provides that "the President of the Philippines may, on his own initiative or upon recommendation of the National Environmental Protection Council, by proclamation declare certain projects, undertakings or areas in the country as environmentally critical." Pursuant thereto, Proclamation No. 2146 was issued on December 14, 1981, declaring certain areas[7] and types of

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[7] **B. Environmentally Critical Areas**

1. All areas declared by law as national parks, watershed reserves, wildlife preserves and sanctuaries;
2. Areas set aside as aesthetic potential tourist spots;
3. Areas which constitute the habitat for any endangered or threatened species of indigenous Philippine Wildlife (flora and fauna);
4. Areas of unique historic, archaeological, or scientific interests;
5. Areas which are traditionally occupied by cultural communities or tribes;
6. Areas frequently visited and/or hard-hit by natural calamities (geologic hazards, floods, typhoons, volcanic activity, etc.);
7. Areas with critical slopes;
8. Areas classified as prime agricultural lands;
9. Recharged areas of aquifers;

projects[8] as environmentally critical and within the scope of the Environmental Impact Statement System established under PD 1586.[9]

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10. Water bodies characterized by one or any combination of the following conditions:
a. tapped for domestic purposes
b. within the controlled and/or protected areas declared by appropriate authorities
c. which support wildlife and fishery activities
11. Mangrove areas characterized by one or any combination of the following conditions:
a. with primary pristine and dense young growth;
b. adjoining mouth of major river systems;
c. near or adjacent to traditional productive fry or fishing grounds;
d. which act as natural buffers against shore erosion, strong winds and storm floods;
e. on which people are dependent for their livelihood.
12. Coral reefs, characterized by one or any combinations of the following conditions:
a. with 50% and above live coralline cover;
b. spawning and nursery grounds for fish;
c. which act as natural breakwater of coastlines.

[8] **A. Environmentally Critical Projects**
I. Heavy Industries
a. Non-ferrous metal industries
b. Iron and steel mills
c. Petroleum and petro-chemical industries including oil and gas
d. Smelting plants
II. Resource Extractive Industries
a. Major mining and quarrying projects
b. Forestry projects
1. Logging
2. Major wood processing projects
3. Introduction of fauna (exotic-animals) in public/private forests
4. Forest occupancy
5. Extraction of mangrove products
6. Grazing
c. Fishery Projects
1. Dikes for/and fishpond development projects
III. Infrastructure Projects
a. Major dams
b. Major power plants (fossil-fueled, nuclear fueled, hydroelectric or geothermal)
c. Major reclamation projects
d. Major roads and bridges

[9] *Republic v. City of Davao*, G.R. No. 148622, September 12, 2002, 388 SCRA 691.

In connection therewith, the same provision declares that "[n]o person, partnership or corporation shall undertake or operate any such declared environmentally critical project or area without first securing an Environmental Compliance Certificate (ECC) issued by the President or his duly authorized representative."[10]

For those projects that are identified to be *environmentally non-critical*, Section 5 of the same law provides that "[a]ll other projects, undertakings and areas not declared by the Presidents as environmentally critical shall be considered as non-critical and shall not be required to submit an environmental impact statement."

Thus and simply put, under the PEISS, if the project is itself identified to be environmentally critical or to be undertaken at an environmentally critical area, the proponent has to secure an ECC. If, however, the project is identified under the PEISS as environmentally non-critical and is not to be undertaken in an environmentally critical area, then the proponent will secure a Certificate of Non-Coverage (CNC) instead of an ECC.

It is, however, well to note that even though a project may be certified as not covered by the environmental impact assessment requirement, still, there is nothing that will bar the government agencies concerned from requiring from the proponent the adoption of additional environmental safeguards that they may deem necessary.[11]

Hence, before the entry of biotechnology in Philippine jurisdiction and the introduction of GMOs to its soil, and even after such, it is the PEISS that primarily governs projects that have or may have an impact on the country's ecological balance and makeup, whether the project involves biotechnology or not. And it was only in 1990, or almost a decade after the issuance of Presidential Proclamation No. 2146 identifying environmentally critical areas and projects, when the government began regulating Biotechnology research in the country.

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[10] Section 4, PD 1586.

[11] Sec. 5, PD 1586.

Philippine Regulations on Biotechnology and Biosafety

In 1987, scientists from the University of the Philippines Los Baños (UPLB) and the International Rice Research Institute (IRRI), the Quarantine Officer of the Bureau of Plant Industry (BPI), and the Director for Crops of the Philippine Council for Agriculture, Forestry and Natural Resources Research and Development (PCARRD), recognizing the potential harm of the introduction of exotic species and genetic engineering, formed a committee and formulated the biosafety protocols and guidelines for genetic engineering and related research activities for UPLB and IRRI researchers. The committee went on to draft a Philippine biosafety policy, which was submitted to the Office of the President.[12]

On the basis of said submission, on October 15, 1990, then President Corazon C. Aquino signed Executive Order No. 430 (EO 430) constituting the National Committee on Biosafety of the Philippines (NCBP) among other purposes.[13] Said directive was issued in recognition of the value of biotechnology and its high potential to improve the quality of human life, as well as the possible concomitant risks and hazards that biotechnology may pose to health safety, environment, and society.[14]

EO 430 created the National Committee on Biosafety of the Philippines (NCBP) and vested upon it the following functions, to wit:

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[12] *Evolution of the Philippine Biosafety System*, Department of Agriculture-Bureau of Plant Industry, http://biotech.da.gov.ph/. Last accessed, December 7, 2015.

[13] http://www.ncbp.dost.gov.ph/19-guidelines/24-executive-order-no-430-s-1990. Last accessed November 23, 2015.

[14] WHEREAS, the impact of the new technologies on health, agriculture, chemical and pharmaceutical, and environment and natural resources has been a continuing worldwide concern of many countries;

WHEREAS, biotechnology has high potential to improve the quality of human life may have concomitant risks and hazards to health safety, the environment and society;

WHEREAS, the hazards associated with the processes and the products of researches in biotechnology may be minimized, if not totally eliminated, by the different containment levels and procedures observed in the laboratories and greenhouses;

(a) Identify and evaluate potentials hazards involved in initiating genetic engineering experiments or the introduction of new species and genetically engineered organisms and recommend measures to minimize risks;
(b) Formulate and review national policies and guidelines on biosafety, such as the safe conduct of work on genetic engineering, pests and their genetic materials for the protection of public health, environment and personnel and supervise the implementation thereof;
(c) Formulate and review national policies and guidelines in risk assessment of work biotechnology, and supervise the implementation thereof;
(d) Develop working arrangements with the government quarantine services and institutions in the evaluation, monitoring, and review of projects vis-a-vis adherence to national policies and guidelines on biosafety;
(e) Assist in the development of technical expertise, facilities and other resources for quarantine services and risk assessments;
(f) Recommend the development and promotion of research programs to establish risk assessment protocols and assessment of long-term environmental effects of biological research covered by these guidelines;
(g) Publish the results of internal deliberation and agency reviews of the committee;
(h) Hold public deliberations on proposed national policies, guidelines and other biosafety issues;
(i) Provide assistance in the formulation, amendment of pertinent laws, rules and regulations; and
(j) Call upon the assistance of any government agency, department, office, bureau including government-owned and/or controlled corporations.[15]

Pursuant to its mandate, the NCBP published the first version of the Philippine National Biosafety Guidelines in 1991 (1991

WHEREAS, most of the risks are associated with the field testing and eventual deliberate release of genetically manipulated/engineered organisms into environment;

WHEREAS, there is a need to constitute a body that shall undertake the study and evaluation of existing laws, policies and guidelines on biotechnology and its related matters, and recomment such measures for its effective utilization and prevetion of possible pernicious efects in the environment. (EO 430, s. 1990)

[15] Section 4, EO 430 s. 1990.

Guidelines). Said Guidelines governs regulating the importation, transfer and use of GMOs and potentially harmful exotic species in the Philippines, with focus on potentially hazardous work performed under contained conditions. Since the publication of the first edition, the NCBP has received and evaluated more than eighty (80) project proposals, all of which were to be performed under contained conditions. However, recognizing the rapid advances in other countries in respect of field trials of selected GMOs, the NCBP decided to look into the adequacy and relevance of the Guidelines, particularly as it relates to planned release.

In 1996, the NCBP started to review the Guidelines with the view of revising it to address the concerns of both the scientific and environmental communities. Hence, the second edition was issued on May 15, 1998. Series No. 3 of the second edition contains the guidelines on the deliberate release of GMOs and Potentially Harmful Exotic Species (PHES) into the Philippine Environment.[16] Furthermore, it specifically repealed the provisions of the 1991 Guidelines on field release of regulated materials which are inconsistent therewith.[17]

From 1990 to 2002, the NCBP's scope of mandate included research and development in the laboratory, screenhouse and in the field.[18] **Regulation of field testing was later removed from the NCBP's mandate** when the Department of Agriculture (DA) issued Administrative Order No. 8 (AO No. 8, s. 2002) or the "Rules and Regulations for the Importation and Release into the Environment of Plants and Plant Products Derived from the Use of Modern Biotechnology."

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[16] *NCBP Monograph* dated May 15, 1998.

[17] SECTION 9. REPEALING CLAUSE All provisions of the Philippine Biosafety Guidelines (1991 edition), particularly Part III, paragraph 2.3 (Field release of Regulated Materials), which are inconsistent with this Monograph are hereby repealed.

[18] p. 15, *Biosafety Regulations in the Philippines: A Review of the First fifteen Years, Preparing for the Next Fifteen*, A Report of the National Committee on Biosafety of the Philippines (NCBP), by the National Academy on Science and Technology (NAST), Department of Science and Technology (DOST), NCBP, and the Program for Biosafety Systems (2009).

AO No. 8, s. 2002 was approved on April 3, 2002 and became operational in July 2003.[19] It covers the importation or release into the environment of:

1. Any plant which has been altered or produced through the use of modern biotechnology if the donor organism, host organism, or vector or vector agent belongs to any of the genera or taxa classified by BPI as meeting the definition of plant pest or is a medium for the introduction of noxious weeds; or
2. Any plant or plant product altered or produced through the use of modern biotechnology which may pose significant risks to human health and the environment based on available scientific and technical information.[20]

Furthermore, it specifically provides that it shall not apply to the contained use of a regulated article, which is within the regulatory supervision of the NCBP.[21] With these, the administrative order thus transferred regulation of field testing of biotech crops to the DA's Bureau of Plant Industry (BPI), among others.[22]

With DA AO No. 8, s. 2002, field tests and eventual commercial propagation of biotech crops would be handled by the DA-BPI, instead of the NCBP, starting July 2003. Thus, DA AO 8 redefined the NCBP's tasks to focus on contained facility R & D involving genetically modified organisms. However, NCBP continued to review and formulate policies on biotechnology as well as review and modify the science-based risk assessment of protocols to be used by the regulatory agencies implementing the commercial guidelines. All applications for

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[19] *Id*.

[20] Item A, Section 2, DA AO No. 8, s. 2002.

[21] Item B, Section 2, DA AO No. 8, s. 2002.

[22] pp. 29-30, *Biosafety Regulations in the Philippines: A Review of the First fifteen Years, Preparing for the Next Fifteen*, A Report of the National Committee on Biosafety of the Philippines (NCBP), by the National Academy on Science and Technology (NAST), Department of Science and Technology (DOST), NCBP, and the Program for Biosafety Systems (2009).

field tests received before July 1, 2003 remained under the supervision of the NCBP until their completion.[23]

Meanwhile, or on September 11, 2003, the ratification by the Philippines of the Cartagena Protocol on Biosafety entered into force, prompting the issuance by then President Gloria Macapagal-Arroyo of Executive Order No. 514 (EO 514), series of 2006 on March 17, 2006. Said executive order established the National Biosafety Framework (NBF), prescribed guidelines for its implementation, strengthening the NCBP, among others.

EO 514 highlighted the need to enhance the existing biosafety framework to better respond to the challenges presented by further advances in modern biotechnology and to comply with the administrative requirements of the Cartagena Protocol on Biosafety.[24] Consistent with these, the NBF has the following objectives, viz:

> 2.2.1. Strengthen the existing science-based determination of biosafety to ensure the safe and responsible use of modern biotechnology so that the Philippines and its citizens can benefit from its application while avoiding or minimizing the risks associated with it;
> 2.2.2. Enhance the decision-making system on the application of products of modern biotechnology to make it more efficient, predictable, effective, balanced, culturally appropriate, ethical, transparent and participatory; and
> 2.2.3. Serve as guidelines for implementing international obligations on biosafety.

In order to put these objectives into action, EO 514 strengthened the NCBP through the expansion of its composition[25] and functions.

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[23] p. 15, *Biosafety Regulations in the Philippines: A Review of the First fifteen Years, Preparing for the Next Fifteen*, A Report of the National Committee on Biosafety of the Philippines (NCBP), by the National Academy on Science and Technology (NAST), Department of Science and Technology (DOST), NCBP, and the Program for Biosafety Systems (2009).

[24] WHEREAS, there is a need to enhance the existing biosafety framework to better respond to the challenges presented by further advances in modern biotechnology and to comply with the administrative requirements of the Cartagena Protocol on Biosafety.

[25] Sub-section 4.2 (Composition of the NCBP), Section 4 (Administrative Framework) (EO 514).

Anent its composition, EO 514 provides thusly:

The NCBP shall be composed of the following: The Secretaries of the Departments of Science and Technology, Agriculture, Health, Environment and Natural Resources, Foreign Affairs, Trade and Industry, and Interior and Local Governments or their designated representatives.

The DOST Secretary shall be the permanent Chair; A consumer representative appointed by the President from a list submitted by nationally recognized consumer organizations, serving for a term of three (3) years, renewable for another term;

A community representative from the farmers, fisherfolk and indigenous sector appointed by the President from a list submitted by nationally recognized sectoral organizations, serving for a term of three (3) years, renewable for another term;

4.2.4 A representative from industry appointed by the President from a list submitted by the Secretary of Trade and Industry, serving for a term of three (3) years, renewable for another term; and,

A biological scientist, physical scientist, environmental scientist, health scientist, and social scientist to be endorsed by the DOST Secretary upon the recommendation of recognized professional and collegial bodies such as the National Academy of Science and Technology (NAST) and the Philippine Social Science Council (PSSC), and appointed by the President, each serving for a term of three (3) years, renewable for another term.

This new NCBP was then directed to, among others:

1. set the national scientific and technical biosafety standards on methods and procedures for ensuring biosafety in the country, consistent with existing laws; and
2. to develop basic policies on addressing public interests on biosafety, provided that the same are consistent with law and if such policies are found insufficiently addressed in existing mandates and regulations of pertinent agencies.[26]

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[26] SECTION 4. ADMINISTRATIVE FRAMEWORK. The administrative mechanism for biosafety decisions shall be as follows:

(a) National scientific and technical biosafety standards and standards on methods and procedures for ensuring biosafety in the country shall be

The DA was designated as the agency that shall address biosafety issues related to the country's agricultural productivity and food security.[27] Additionally, the DA was directed to exercise such jurisdiction and other powers that it has been conferred with under existing laws, in coordination with other concerned departments and agencies, and consistent with the requirements of transparency and public participation as provided in Sections 6 and 7 of the NBF. Moreover, it was mandated to take the lead in evaluating and monitoring plant and plant products derived from the use of modern biotechnology, as provided in Department of Agriculture Administrative Order No. 008, s. 2002.

The Department of Science and Technology (DOST), on the other hand, is to take the lead in ensuring that the best available science is utilized and applied in adopting biosafety policies, measures and guidelines, and in making biosafety decisions. It also was tasked to ensure that such policies, measures, guidelines and decisions are made on the basis of scientific information that is of the highest quality, multi-disciplinary, peer-reviewed, and consistent with international standards as they evolve.[28]

The Department of Environment and Natural Resources (DENR) was mandated **to ensure that environmental**

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set by the NCBP consistent with existing laws: Basic policies on addressing public interests on biosafety shall be developed by the NCBP, provided the same are consistent with law and if such policies are found insufficiently addressed in existing mandates and regulations of pertinent agencies;

(b) Member-agencies of the NCBP shall continue to perform their regulatory functions in accordance with their legal mandates, provided that their policies and programs relating to biosafety shall be discussed in the NCBP for purposes of harmonization with other agencies' functions;

(c) Other concerned agencies shall coordinate with NCBP on matters that may affect biosafety decisions as provided in Sections 4.7 to 4.14;

(d) Administrative functions required under the Cartagena Protocol on Biosafety shall be performed by agencies as provided in Section 4.14 and 4.15; and,

(e) The role of stakeholders and the general public shall be recognized and taken into account as provided in Sections 6 and 7. (EO 514)

[27] Item 4.8, Section 4 [Administrative Framework], EO 514.

[28] Item 4.7, Section 4 [Administrative Framework], EO 514.

assessments are done and impacts identified in biosafety decisions. It shall also take the lead in evaluating and monitoring regulated articles intended for bioremediation, the improvement of forest genetic resources, and wildlife genetic resources.[29]

With respect to its functions, Item 4.6, Section 4 of EO 514 provides thusly:

4.6 Powers and Functions of the NCBP. As the lead body in implementing the NBF, the NCBP shall have the following powers and functions:

4.6.1 Biosafety Policy Functions

Assist concerned departments and agencies in formulating, reviewing, or amending their respective policies, measures and guidelines on biosafety;

Hold public deliberations on proposed national policies, guidelines, and other biosafety issues;

4.6.1.3 Provide assistance in the formulation, amendment of pertinent laws, rules and regulations;

4.6.1.4 In coordination with concerned departments and agencies and consistent with the requirements of transparency and public participation as provided in Sections 6 and 7 of the NBF, shall take the lead in periodically reviewing the NBF;

Issue detailed guidelines on the conduct of socio-economic impact evaluation of biosafety decisions; and,

Propose to Congress necessary and appropriate legislation.

4.6.2 Accountability Functions

4.6.2.1 Monitor the implementation of the NBF by concerned departments and agencies;

4.6.2.2 Ensure coordination among competent national authorities that have shared mandates;

4.6.2.3 **Ensure that NCBP guidelines, and the principles and processes established in this Framework are complied with by concerned departments and agencies**; and,

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[29] Item 4.9, Section 4 [Administrative Framework], EO 514.

Review procedures for accountability in biosafety decision-making by competent national authorities, with particular emphasis on ensuring independence and impartiality in such decisions.

4.6.3 Scientific Functions

4.6.3.1 Facilitate the study and evaluation of biosafety research and control and minimize the concomitant risks and hazards associated with the deliberate release of regulated articles in the environment;

4.6.3.2 Identify and evaluate potential hazards involved in modern biotechnological experiments or the introduction of regulated articles and recommend measures to minimize risks;

4.6.3.3 Recommend the development and promotion of research programs to establish risk assessment protocols and assessment of long-term environmental effects of regulated articles;

4.6.3.4 Develop working arrangements with the government quarantine services and institutions in the evaluation, monitoring, and review of projects vis-a-vis adherence to national policies and guidelines on biosafety;

4.6.3.5 Review and develop guidelines in the risk assessment of regulated articles for contained use;

4.6.3.6 **Assist other agencies in developing risk assessment guidelines and procedures of regulated articles for field trials** and commercial release;

4.6.3.7 Review the appointment of the members of the Institutional Biosafety Committees created by institutions engaged in activities involving regulated articles, upon recommendation by their respective heads of institutions;

4.6.3.8 Publish the results of internal deliberations and agency reviews of the NCBP;

4.6.3.9 Hold, discussions on the comparative ecological, economic and social impacts of alternative approaches to attain the purposes/objectives of the proposed genetic modification products and/or services; and,

4.6.3.10 Perform such functions as may be requested by concerned departments and agencies.

4.6.4 Capacity Building Functions

4.6.4.1 Assist in the development of technical expertise, facilities, and other resources for quarantine services and risk assessments; and,

4.6.4.2 Take the lead in developing and implementing a national capacity-building program for biosafety.

As to its effect on existing policies, rules, and issuances, specifically DA AO No. 8, s. 2002, it is well to note that Section 8[30] of EO 514 specifically provided that DA AO No. 8, s. 2002 remains to be in force and effect.

Despite the issuance, however, of EO 514, new biosafety policies or guidelines on GMO field testing have yet to be issued. Furthermore, DA AO No. 8, s. 2002 has not been amended. As such, it remains to be the rules that primarily govern the conduct of field trials for genetically engineered plants and crops in our jurisdiction, as noted by the *ponencia*.

As it stands, application for field testing of regulated articles is governed by Part III (Approval Process for Field Testing of Regulated Articles) of DA AO No. 8, s. 2002, Section 7 of which states that:

No regulated article shall be released into the environment for field testing, unless: (i) a *Permit to Field Test* has been secured from the BPI; and (ii) the regulated article has been tested under contained conditions in the Philippines. x x x

It is important, however, to emphasize that despite the issuance of DA AO No. 8, s. 2002, the NBF, and the NCBP Guidelines,

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[30] Section 8. Repealing and Amending Clause. All orders, rules and regulations or parts thereto which are inconsistent with any of the provisions of this Order are hereby repealed or amended accordingly. For the avoidance of doubt, the following issuances, unless amended by the respective issuing departments or agencies, shall continue to be in force and effect: Department of Agriculture Administrative Order No. 008, s. 2002; the NCBP Guidelines on the Contained Use of Genetically Modified Organisms, except for provisions on potentially harmful exotic species which are hereby repealed; and all Bureau of Food and Drugs issuances on products of modern biotechnology.

other statutory requirements or those required by agencies remain in full force and effect.[31] This is bolstered by the fact that EO 514, as mentioned by the *ponencia*, requires the determination by the concerned departments or agencies of whether the Philippine Environmental Impact Assessment (EIA) System should be applied to biosafety decisions.[32] EO 514 also requires the DENR, as a member of the NCBP, to ensure that environmental assessments are done and impacts identified in biosafety decisions.[33]

The Present Controversy

The *Bt Talong* is a type of eggplant bio-engineered to develop resistance to *lepidopteran larvae*, through the incorporation of crystal toxin genes from the soil bacterium *Bacillus thuringiensis* (*Bt*) which triggers the production of the protein *Cry1Ac* which is toxic to the said target insect pests.

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[31] The NCBP reviews proposals on modern biotechnology applications for the benefit of the final approving bodies (agencies which have regulatory functions on specific areas such as the Department of Agriculture's Bureau of Plant Industry or the Department of Health or the Department of Environment and Natural Resources which are official members of the NCBP). The NCBP's actions of "approval" or "disapproval" of biotechnology applications is restricted to "research and development, technical aspects (whether or not, on the basis of existing science, safety risk are considered acceptable); scientific advice (i.e., it is directed to pertinent line agencies to provide them a basis for acting on proposed applications; its action ("approved" or "disapproved") is not a final permission to do the application; its action does not preclude any other requirements of laws or by line agencies; final permission is to be granted by appropriate line agencies." [*Biosafety Regulations in the Philippines: A Review of the First fifteen Years, Preparing for the Next Fifteen*, A Report of the National Committee on Biosafety of the Philippines (NCBP), by the National Academy on Science and Technology (NAST), Department of Science and Technology (DOST), NCBP, and the Program for Biosafety Systems (2009), p. 15]

[32] Role of Environment lmpact Assessment. The application of the EIA System to biosafety decisions shall be determined by concerned departments and agencies subject to the requirements of law and the standards set by the NCBP. Where applicable and under the coordination of the NCBP, concerned departments and agencies shall issue joint guidelines on the matter. [Item 5.3, Section 5, EO 514].

[33] Item 4.9, Section 4 [Administrative Framework], EO 514.

Under the regulatory supervision of the NCBP, a contained experiment was started in 2007 and officially completed on March 3, 2009. The NCBP, thus, issued a Certificate of Completion of Contained Experiment stating that "During the conduct of the experiment, all the biosafety measures have been complied with and no untoward incident has occurred."

After securing the necessary permits, the UPLB commenced the field testing of *Bt Talong* on various dates, in the following approved sites: Kabacan, Borth Cotabato; Sta. Maria, Pangasinan; Pili, Camarines Sur; Bago Oshiro, Davao City; and Bay, Laguna.

Reacting to the conduct of the field testing, the *Sangguniang Barangay* of Pangasugan, Baybay, Leyte complained about the lack of information on the nature and uncertainties of the field testing in their barangay. Too, the Davao City Government, in opposition thereto due to lack of transparency and public consultation, ordered the uprooting and disposal of the *Bt* eggplants. Similarly, the *Sangguniang Bayan* of Sta. Barbara, Iloilo passed a resolution suspending the field testing due to the following: lack of public consultation, absence of adequate study to determine the effect of *Bt talong* field testing on friendly insects, absence of risk assessment on the potential impacts of GM crops on human health and the environment, and the possibility of cross-pollination of *Bt* eggplants with native species or variety of eggplants, and serious threat to human health if these were introduced in the market.

On April 26, 2012, respondents filed a petition for writ of *kalikasan* and writ of continuing mandamus with prayer for the issuance of a Temporary Environmental Protection Order (TEPO). They allege that the *Bt Talong* field trials violate their constitutional right to a healthful and balanced ecology considering that:

1. The required environmental compliance certificate under Presidential Decree No. 1151 was not secured prior to the project implementation;
2. As a regulated article under DAO 8-2002, *Bt Talong* is presumed harmful to human health and the environment,

and there is no independent, peer-reviewed study on its safety for human consumption and on the environment;

3. A study conducted by Professor Gilles-Eric Seralini showed adverse effects on rats who were fed *Bt* corn, while local scientists also attested to the harmful effects of GMOs to human and animal health;
4. *Bt* crops can be directly toxic to non-target species as highlighted by a research conducted in the US which demonstrated that pollen from *Bt* Maize was toxic to the Monarch butterfly;
5. Data from the use of *Bt Cry1Ab* maize indicate that beneficial insects have increased mortality when fed on larvae of a maize pest, the corn borer, which had been fed on *Bt*, and hence non-target beneficial species that may feed on eggplant could be similarly affected;
6. Data from China show that the use of *Bt* crops (*Bt* cotton) can exacerbate populations of other secondary pests;
7. The built-in pesticides of *Bt* crops will lead to *Bt*-resistant pests, thus increasing the use of pesticides, contrary to the claims by GMO manufacturers;
8. The 200-meter perimeter pollen trap area in the field testing set by BPI is not sufficient to stop contamination of nearby non-*Bt* eggplants because pollinators such as honeybees can fly as far as four (4) kilometers and an eggplant is 48% insect-pollinated; and
9. The field test project did not comply with the required public consultation under Sections 26 & 27 of the Local Government Code.

The full acceptance by the project proponents of the findings in the MAHYCO Dossier was strongly assailed on the ground that these do not precisely and adequately assess the numerous hazards posed by *Bt Talong* and its field trial.

On these premises, the following reliefs were prayed for:

1. Upon the filing of the petition, a Temporary Environmental Protection Order should be issued:
    a. Enjoining Bureau of Plant Industry (BPI) and Fertilizer and Pesticide Authority (FPA) of the DA

from processing for field testing, and registering as herbicidal product *Bt talong* in the Philippines;

b. Stopping all pending field testing of *Bt talong* anywhere in the Philippines; and

c. Ordering the uprooting of planted *Bt talong* for field trials as their very presence poses significant and irreparable risks to human health and the environment;

2. Upon the filing of the petition, issue a writ of continuing mandamus commanding:

a. Respondents to submit to and undergo the process of environmental impact statement system under the Environmental Management Bureau (EMB);

b. Respondents to submit independent, comprehensive, and rigid risk assessment, field test report, regulatory compliance reports and supporting documents, and other material particulars of the *Bt talong* field trial;

c. Respondents to submit all its issued certifications on public information, public consultation, public participation, and consent of the local government units in the barangays, municipalities, and provinces affected by the field testing of *Bt talong*;

d. Respondent regulator, in coordination with relevant government agencies and in consultation with stakeholders, to submit an acceptable draft of an amendment of the National Biosafety Framework of the Philippines, and DA Administrative Order No. 08, defining or incorporating an independent, transparent, and comprehensive scientific and socio-economic risk assessment, public information, consultation, and participation, and providing for their effective implementation, in accord with international safety standards; and

e. Respondent BPI of the DA, in coordination with relevant government agencies, to conduct balanced nationwide public information of the nature of *Bt talong* and *Bt talong* field trial, and a survey of social acceptability of the same.

3. Upon filing of the petition, issue a writ of *kalikasan* commanding respondents to file their respective returns and explain why they should not be judicially sanctioned for violating or threatening to violate or allowing the violation of the above-enumerated laws, principles, and international principles and standards, or committing acts, which would result into an environmental damage of such magnitude as to prejudice the life, health, or property of petitioners in particular and of the Filipino people in general;

4. After hearing and judicial determination, to cancel all *Bt talong* field experiments that are found to be violating the abovementioned laws, principles, and international standards; and recommend to Congress curative legislations to effectuate such order.

On May 2, 2012, the Court issued a writ of *kalikasan* against International Service for the Acquisition of Agri-Biotech Applications, Inc. (ISAAA), EMB/BPI/FPA and UPLB, ordering them to make a verified return within a non-extendible period of ten (10) days, as provided in Sec. 8, Rule 7, of the Rules of Procedure for Environmental Cases.

ISAAA, EMB/BPI/FPA, UPLB Foundation, Inc., and UP Mindanao Foundation, Inc. (UPMFI) filed their respective verified returns. They all argued that the issuance of writ of *kalikasan* is not proper because in the implementation of the *Bt talong* project, all environmental laws were complied with, including public consultations in the affected communities, to ensure that the people's right to a balanced and healthful ecology was protected and respected. They also asserted that the *Bt talong* project is not covered by the Philippine Environmental Impact Statement (PEIS) Law and that *Bt talong* field trials will neither significantly affect the quality of the environment nor pose a hazard to human health. ISAAA contended that the NBF amply safeguards the environment policies and goals promoted by the PEIS Law. For its part, UPLBFI asserted that there is a "plethora of scientific works and literature, peer-reviewed, on the safety of *Bt talong* for human consumption."

ISAAA argued that the allegations regarding the safety of *Bt talong* as food are irrelevant in the field trial stage as none of the eggplant will be consumed by humans or animals, and all materials that will not be used for analyses will be chopped, boiled, and buried following the Biosafety Permit requirements. Too, it cited a 50-year history of safe use and consumption of agricultural products sprayed with commercial *Bt* microbial pesticides and a 14-year history of safe consumption of food and feed derived from *Bt* crops.

UPMFI contends that the *Bt talong* planted in Davao City have already been uprooted by the City officials. And there having been no further field trials conducted thereat, there is no violation of the constitutional rights of persons or damage to the environment with respect to Davao City that will justify the issuance of a writ of *kalikasan*.

Finally, it is argued that the precautionary principle is not applicable considering that the field testing is only a part of a continuing study being done to ensure that the field trials have no significant impact on the environment. There is, thus, no resulting environmental damage of such magnitude as to prejudice the life, health, or property of inhabitants in two or more cities or provinces.

On July 10, 2012, the Court referred the case to the CA for acceptance of the return of the writ and for hearing, reception of evidence, and rendition of judgment. The following issues were submitted for the CA's resolution:

1. Whether or not Greenpeace, et al. have the legal standing to file the petition for writ of *kalikasan*;
2. Whether or not the case presented a justiciable controversy; and
3. Whether or not said petition had been rendered moot and academic by the alleged termination of the *Bt talong* field testing.

Under its Resolution dated October 12, 2012, the CA resolved that: (1) Greenpeace, et al. possess the requisite legal standing to file the petition; (2) assuming *arguendo* that the field trials

have already been terminated, the case is not yet moot since it is capable of repetition yet evading review; and (3) the alleged non-compliance with environmental and local government laws present justiciable controversies for resolution by the court.

After trial on the merits, the CA, on May 17, 2013, rendered a Decision in favor of Greenpeace, et al., thus:

WHEREFORE, in view of the foregoing premises, Judgment is hereby rendered by us **GRANTING** the petition filed in this case. The respondents are **DIRECTED** to:

(a) Permanently cease and desist from further conducting *bt talong* field trials; and
(b) Protect, preserve, rehabilitate and restore the environment in accordance with the foregoing judgment of this Court.

No costs.

SO ORDERED.

The CA found that existing regulations issued by the DA and the DOST are insufficient to guarantee the safety of the environment and the health of the people. It likewise applied the precautionary principle set forth in Section 1, Rule 20 of the Rules of Procedure for Environmental Cases, stressing the fact that the "over-all safety guarantee of the *bt talong*" and whether it poses a threat to human health remain unknown. In view of said uncertainty, the CA upheld the primacy of the people's constitutional right to a healthful and balanced ecology.

Then, in its September 20, 2013 Resolution, the CA rejected UPLB's argument that its ruling violated the latter's constitutional right to academic freedom. The CA held that the writ issued by the Court did not stop the research on *Bt talong* but only the particular procedure adopted in the conduct of the field trials and only at this time when there is yet no law in the form of a congressional enactment for ensuring its safety and levels of acceptable risks when introduced into the environment.

The CA, in justifying its ruling, relied on the theory that the introduction of a genetically modified plant into our ecosystem is an "ecologically imbalancing act." The CA noted that the *Bt*

talong is a technology involving a deliberate alteration of an otherwise natural state of affairs, designed to alter the natural feed-feeder relationships of the eggplant.

From the foregoing, the following issues were presented for this Court's resolution:

1. Legal standing of respondents;
2. Mootness;
3. Violation of the doctrines of primary jurisdiction and exhaustion of administrative remedies;
4. Application of the law on environmental impact statement/ assessment on projects involving the introduction and propagation of GMOs in the country;
5. Evidence of damage or threat of damage to human health and the environment in two or more provinces, as a result of the *Bt talong* field trials;
6. Neglect or unlawful omission committed by the public respondents in connection with the processing and evaluation of the applications for *Bt talong* field testing; and
7. Application of the precautionary principle.

Anent the technical aspect of the case, it is clear from the *ponencia*'s lengthy discussion that the safety or danger of introduction of GMOs, in general, to the natural environment through field testing has yet to be settled with scientific certainty, if it could indeed be settled. Furthermore, the subject matter of the instant petition—that is, field testing of a GMO—is truly of a highly complex nature and this complexity is strongly demonstrated by the fact that the matter remains to be hotly debated in the scientific community. However, it is respectfully submitted that the instant petition can be resolved, and the right to a balanced and healthful ecology sufficiently protected, on a purely legal ground.

Anent the invocation of the Precautionary Principle under A.M. No. 09-6-8-SC or the Court's Rules of Procedure for Environmental Cases, it is submitted that such is not necessary in the instant petition since, as mentioned, it could be sufficiently settled on purely legal grounds and without a heavy, if not complete, reliance on the scientific aspect of the case. As correctly

mentioned by the *ponencia*, it is an evidentiary rule that must be applied only as a last resort. Thus, if an environmental case can be settled and the people's environmental rights sufficiently protected without applying this principle, then the courts should refrain from doing so.

Among the numerous issues presented for this Court's consideration are alleged neglect or unlawful omission committed by the public respondents in connection with the processing and evaluation of the applications for *Bt talong* field testing and the applicability of the Philippine Environmental Impact Statement System (PEISS) to GMO field trials. It is in these matters that, in my opinion, the petitioner-agencies failed.

Petitioner-agencies maintain that the subject field trials are not covered by the PEISS. It is submitted, however, that the PEISS also covers GMO field trials on the following grounds:

First, as previously mentioned, EO 514 clearly requires the DENR to **ensure that environmental assessments are done and impacts identified in biosafety decisions**.[34] This, in itself, is a clear indication that GMO field trials fall within the purview of our PEISS.

Under EO 514, "biosafety decisions" apply to the development, adoption and implementation of all biosafety policies, measures and guidelines and in **making decisions concerning the research, development, handling and use, transboundary movement, release into the environment** and management of regulated articles.[35]

Thus, EO 514 calls for the conduct of environmental assessments and impact identification—which precisely is the purpose of the PEISS—whenever biosafety decisions are to be made with respect to the research, development, handling and use, transboundary movement, and release into the environment of regulated articles, which are, to reiterate, GMOs. To my

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[34] *Id*.

[35] Item 3.3 [Definitions], Section 3 [Scope, Objectives and Definitions], EO 514.

mind, "making [biosafety] decisions concerning the research, development, handling and use, transboundary movement, release into the environment and management of regulated articles" include determining the coverage or non-coverage of a GMO field trial under the PEISS, as well as the propriety of issuing an ECC or a CNC for a particular project.

Second, **the assessment of the direct and indirect impacts of a project on the biophysical and human environment and ensuring that these impacts are addressed by appropriate environmental protection and enhancement measures is the primary concern of the PEISS** as declared in Article 1, Section 1 (Basic Policy and Operating Principles) of the DENR AO No. 30 s. 2003 (DAO 30, s. 2003) or the Implementing Rules and Regulations (IRR) for the Philippine Environmental Impact Statement (EIS) System.

Third, Section 4, paragraph 4.1, Article II of DAO 30, s. 2003, provides that projects that pose **potential significant impact to the environment** shall be required to secure an ECC.

Anent this possibility of negatively affecting the environs, it is argued that the introduction of the *Bt talong* to the natural environment in connection with the field trials will not adversely affect the condition of the field trial sites, banking on the absence of documented significant and negative impact of the planting of *Bt corn* in the Philippines, among others. However, it is curious that in blocking the application of the precautionary principle, petitioners contradict this prior assertion when they maintained that **field testing is only a part of a continuing study being done to ensure that the field trials have no significant and negative impact on the environment**. This, to my mind, only goes to show that it is erroneous for them to maintain that the field trials in question will not adversely affect the environment when they themselves admit that such is not yet a scientific certainty, hence the conduct of further research on the matter. And without this certainty that the project will leave no footprint on the natural environment, as well as a certification to that effect, it should be presumed that the field trial poses a potential significant impact to the environment for which an ECC is required.

Fourth, the Revised Procedural Manual for DENR AO No. 30, s. 2003 (Revised Manual) enumerates the projects that are covered by the PEISS. Said enumeration, as the *ponencia* pointed out, includes Group V (Unclassified Projects) which pertains to those projects using new processes/technologies with uncertain impacts.[36]

Fifth, Item 8 of said Revised Manual, governing the EIA Report Types and Generic Contents, requires a Project Description Report (PDR) for Group V projects, **to ensure new processes/ technologies or any new unlisted project does not pose harm to the environment.** The Group V PDR is a basis for either issuance of a CNC or classification of the project into its proper project group.

Lastly, there is **no evidence that a Certificate of Non-Coverage for the *Bt talong* field trials was issued by the DENR, through its Environmental Management Bureau.**

To my mind, the above grounds should have prompted the DENR to require from the project proponents an EIA or at the very least evaluated the project's coverage or non-coverage as pre-condition to the allowance of the field testing. In this regard, **the DENR—as a member of the NCBP with the clear mandate of making certain that environmental assessments are done in the conduct of GMO research, and as the agency tasked to enforce the PEISS—may have been remiss in its duty**.

It may be that there is a confusion as to the requirements before field testing a GMO may be allowed considering that the regulation that governs applications therefor, that is, DA AO No. 8, s. 2002, makes no mention of the necessity of an EIA or the applicability of the PEISS. Additionally, per the NCBP's Report,[37]

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[36] *See* List of Covered Projects of the Philippine EIS System, item (g), *Revised Procedural Manual for DENR AO No. 30 s. 2003* [DAO 03-30].

[37] *Biosafety Regulations in the Philippines: A Review of the First fifteen Years, Preparing for the Next Fifteen*, A Report of the National Committee on Biosafety of the Philippines (NCBP), by the National Academy on Science and Technology (NAST), Department of Science and Technology (DOST), NCBP, and the Program for Biosafety Systems (2009).

it was pointed out that the applicability of the PEISS to field trials was a hotly discussed issue. While securing an ECC or a CNC was the perceived requirement for EIA in biosafety valuations, there were those who argued that the EIA can take many years to conduct and cost millions of pesos and could, therefore, delay field tests and discourage proponents. It was likewise maintained that under the present practice of the NCBP, the confinement afforded by the screenhouse and/or contained fields already provides a means to prevent or minimize any adverse environmental impact and, thus, an EIA may not be required.

Per said Report, however, it was also stated that an environmental assessment may be required when a confined field test involves new species, organisms or novel modifications that raise new issues. Considering that data on the *Bt talong*, as admitted by the proponents, is still being collected through research and field trials, and that its effects not only on the environment but also on human health are yet to be determined with scientific certainty, caution calls that the DENR-EMB should have applied the required standard of precaution under EO 514, which requires that the precautionary approach shall guide biosafety decisions in accordance with Principle 15 of the Rio Declaration of 1992[38] and the relevant provisions of the Cartagena Protocol on Biosafety, in particular Articles 1,[39] 10 (par.6)[40]

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[38] Principle 15 - In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

[39] Article 1 [Objective] - In accordance with the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development, the objective of this Protocol is to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, and specifically focusing on transboundary movements.

[40] 6. Lack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of a living modified organism on the conservation and sustainable

and 11 (par. 8) [41] thereof.[42] In this respect, EO 514 requires thusly:

SECTION 5. DECISION-MAKING PROCESSES

Biosafety decisions shall be made in accordance with existing laws and the following guidelines:

Standard of Precaution. In accordance with Article 10 (par. 6) and Article 11 (par. 8) of the Cartagena Protocol on Biosafety, **lack of scientific certainty or consensus due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of a genetically modified organism on the environment**, particularly on the conservation and sustainable use of biological diversity, and on human health, **shall not prevent concerned government departments and agencies from taking the appropriate decision to avoid or minimize such potential adverse effects.** In such cases, **concerned government department and agencies shall take the necessary action to protect public interest and welfare.**

Thus, in case there was, indeed, doubt as to the applicability or non-applicability of the PEISS to biotechnology research, the DENR-EMB, in accordance with its mandate, should have observed such standard of precaution and applied the PEISS to field trials of GMOs by requiring from project proponents the prior securing of an ECC or a CNC.

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use of biological diversity in the Party of import, taking also into account risks to human health, shall not prevent that Party from taking a decision, as appropriate, with regard to the import of the living modified organism in question as referred to in paragraph 3 above, in order to avoid or minimize such potential adverse effects.

[41] 8. Lack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of a living modified organism on the conservation and sustainable use of biological diversity in the Party of import, taking also into account risks to human health, shall not prevent that Party from taking a decision, as appropriate, with regard to the import of that living modified organism intended for direct use as food or feed, or for processing, in order to avoid or minimize such potential adverse effects.

[42] Item 2.6, EO 514.

Additionally, it is but timely to clarify that DA AO No. 8, s. 2002 did not expressly state that projects falling under its coverage are withdrawn from the operation of the PEISS. As a matter of fact, the DENR-EMB itself recognizes that "**the PEISS is supplementary and complementary to other existing environmental laws**."[43] This is further bolstered by the PEISS' role in relation to the functions of other government agencies. In this regard, it was highlighted that it is inherent upon the EIA Process to undertake a comprehensive and integrated approach in the review and evaluation of environment-related concerns of government agencies (GAs), local government units (LGUs) and the general public. The subsequent EIA findings shall provide guidance and recommendations to these entities as a basis for their decision making process.[44]

As such, it must be that whenever a project falls within the purview of the PEISS and DA AO No. 8, s. 2002, as well as other relevant laws, as Philippine biosafety regulations now stand and as required by the NBF, **the project proponent is required to comply with all applicable statutory or regulatory requirements, not just DA AO No. 8, s. 2002.**

With these, it is respectfully submitted that the omission by the project proponents of securing an ECC or CNC, whichever is proper for its project, prior to the conduct of the field testing, and the DENR-EMB's failure to evaluate GMO field trials within the purview of the PEISS and simply allowing the trials to be conducted without a prior determination of whether the conduct of an EIA or the prior securing of an ECC is a condition sine qua non for its conduct, warrant the issuance of a permanent environmental protection order directing:

a. herein project proponents to cease and desist from continuing any pending *Bt talong* field trials without first complying with other applicable environmental laws, including the PEISS; and

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[43] *Overview of the Philippine EIS System (PEISS), Revised Procedural Manual for DENR AO No. 30 s. 2003*, p. 3 [DAO 03-30].

[44] *Id*.

b. the DENR-EMB to apply the PEISS to GMO field trials.

On these premises, I vote to **DENY** the petition on the grounds that the project proponents failed to comply with the requirements under the PEISS and that the DENR-EMB failed to require from the project proponents the securing of an ECC or a CNC prior to the field testing of the *Bt talong*.

CONCURRING OPINION

LEONEN, *J.*:

I concur in the result of the majority's opinion.

The Petition for Writ of Kalikasan of Greenpeace Southeast Asia (Philippines), et al. (now respondents), insofar as it assails the field testing permit granted to private petitioners, should have been dismissed and considered moot and academic by the Court of Appeals. The Petition for Writ of Kalikasan was filed only a few months before the two-year permit expired and when the field testing activities were already over. Thus, the pending Petitions which assail the Decision of the Court of Appeals should be granted principally on this ground. There was grave abuse of discretion which amounts to excess of jurisdiction.

This does not necessarily mean that petitioners in G.R. No. 209271 can proceed to commercially propagate Bt talong. Under Department of Agriculture Administrative Order No. 8, Series of 2002, the proponent should submit a new set of requirements that will undergo a stringent process of evaluation by the Bureau of Plant Industry and other agencies. Completion of field testing by itself does not guarantee commercial propagation.

To recall, the introduction of genetically modified products, ingredients, and processes requires three (3) mandatory stages of regulatory review. Propagation is not allowed until there is full field testing. Field testing is not allowed unless there are laboratory experiments under contained conditions.

Application for each stage has its own set of unique requirements. The standards of review have their own level of

rigor. All the applications for each stage should be published. Public participation in each stage must not only be allowed but should be meaningful.

Furthermore, commercial propagation will not happen immediately with Bt talong because Administrative Order No. 8 is null and void. In its salient parts, it is inconsistent with the basic guidelines provided in our Constitution, violative of our binding international obligations contained in the Cartagena Protocol on Biosafety to the Convention on Biodiversity (Cartagena Protocol), and effectively disregards the Executive Orders issued by the President in the fields of biodiversity and biosafety.

The effect of the invalidity of Administrative Order No. 8 is that petitioners cannot proceed further with any field testing or propagation for lack of administrative guidelines. Any test or propagation of transgenic crops should await valid regulations from the executive or restatements of policy by Congress.

Furthermore, the Petitions in this case should be granted because the Court of Appeals, in adopting the "hot tub" method to arrive at its factual findings, gravely abused its discretion. The transcript of the proceedings presided by the Court of Appeals Division shows how this method obfuscated further an already complicated legal issue. Courts of law have a precise and rigorous method to ferret out the facts of a case, a method which is governed by our published rules of evidence. By disregarding these rules, the Court of Appeals acted whimsically, capriciously, and arbitrarily.

This is an important case on a novel issue that affects our food security, which touches on the controversial political, economic, and scientific issues of the introduction of genetically modified organisms into the consumer mainstream. This court speaks unanimously in narrowing down the issues and exercising restraint and deference. This court must allow the competencies of the administrative regulatory bodies and Congress to fully and meaningfully evolve.

I

The cessation of the validity of all the biosafety permits issued to the University of the Philippines Los Baños in June 2012 and the termination of all field trials as of August 10, 2012 render the Petition for Writ of Kalikasan moot and academic.[1] The Petition for Writ of Kalikasan was originally filed before us on April 26, 2012.[2]

A brief overview of the regulatory process outlined in Administrative Order No. 8 will assist us in providing a framework to put the Petition in context.

Administrative Order No. 8 recognizes three (3) stages before genetically modified organisms—as products, ingredients, or processes—may become commercially available.

The first stage is the **Contained Use** where research on regulated articles is limited inside a physical containment facility for purposes of laboratory experimentation.[3]

The second stage is **Field Testing** where regulated articles are intentionally introduced into the environment in a highly regulated manner also for experimental purposes. It is specifically recognized that in field testing, no specific physical containment measures shall be undertaken "to limit that contact of the regulated article with . . . the general population and the environment."[4]

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[1] *Ponencia*, p. 41.

[2] *Id*. at 11.

[3] DA Adm. Order No. 8 (2002), Sec. 1(E):

E. "Contained Use" means the use of a regulated article for research and development inside a physical containment facility intended to limit its contact with, and to provide for a high level of safety for, the general population and the environment and which has been inspected and approved by NCBP.

[4] DA Adm. Order No. 8 (2002), Sec. 1(I):

I. "Field testing" means any intentional introduction into the environment of a regulated article for purposes of research and development and for which no specific physical containment measures are used to limit the contact of the regulated article with, and to provide for a high level of

Prior to field testing, the results of the contained experiments are taken into consideration.

Finally, the **Propagation** stage is where regulated articles are introduced into commerce.

Each stage is distinct. Subsequent stages can only proceed if the prior stage/s are completed and clearance is given to engage in the next regulatory stage. This is evident from the requisites for conducting each stage.

For contained use, the importation or the removal from point of entry of the material requires (i) authorization given by the Bureau of Plant Industry; and (ii) a letter of endorsement issued by the National Committee on Biosafety of the Philippines.[5] The National Committee on Biosafety of the Philippines, on the other hand, proceeds with its own processes for evaluation of the application for contained use.

Field testing requires that "(i) a Permit to Field Test has been secured from the [Bureau of Plant Industry]; and (ii) **the regulated article has been tested under contained conditions** in the Philippines."[6]

Release for commercial propagation will not be allowed unless "(i) a Permit for Propagation has been secured from [the Bureau of Plant Industry]; (ii) **it can be shown that based on field testing conducted in the Philippines, the regulated article will not pose any significant risks to the environment**; (iii) food and/or feed safety studies show that the regulated article will not pose any significant risks to human and animal health; and (iv) if the regulated article is a pest-protected plant, its transformation event has been duly registered with the [Fertilizer and Pesticide Authority]."[7]

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safety for, the general population and the environment. Field testing may be conducted in a single site or in multiple sites.

[5] DA Adm. Order No. 8 (2002), Sec. 6.

[6] DA Adm. Order No. 8 (2002), Sec. 7.

[7] DA Adm. Order No. 8 (2002), Sec. 9.

Clearly, mere completion of a preceding stage is no guarantee that the subsequent stage shall ensue. While each subsequent stage proceeds from the prior ones, each stage is subject to its unique set of requisites.

It is, thus, improper to rely on the expectation that commercial propagation of Bt talong shall ensue after field testing. For the process to proceed to commercial propagation, the concerned applicants are still required to formally seek the permission of the Bureau of Plant Industry by filing an application form. There is no presumption that the Bureau of Plant Industry will favorably rule on any application for commercial propagation. It is also not a valid presumption that the results of field testing are always favorable to the proponent for field testing let alone for those who will continue on to propagation.

The alleged actual controversy in the Petition for Writ of Kalikasan arose out of the proposal to do field trials. The reliefs in these remedies did not extend far enough to enjoin the use of the results of the field trials that have been completed. ***Essentially, the findings should be the material to provide more rigorous scientific analysis of the various claims made in relation to Bt talong.***

The original Petition was anchored on the broad proposition that respondents' right to a healthful and balanced ecology was violated on the basis of the grant of the permit. With the cessation of the validity of the biosafety permits and the actual termination of all field trials, the very subject of the controversy adverted to by respondents became moot. Similarly because of the Petition's specificity, the case could not be considered capable of repetition yet evading review and, thus, an exception to the rule on mootness.

II

Nevertheless, for the guidance of the bench and bar, the validity of the biosafety permits is discussed. The biosafety permits should have been declared null and void due to the invalidity of Administrative Order No. 8.

Administrative Order No. 8 was created to facilitate agricultural development and enhance the production of agricultural crops

through modern biotechnology.[8] As early as October 15, 1990, President Corazon Aquino recognized the importance of modern biotechnology and issued Executive Order No. 430[9] to create the National Committee on Biosafety of the Philippines. The National Committee on Biosafety of the Philippines acts as the body that studies and evaluates the laws, policies, and guidelines relating to biotechnology.

The role of the National Committee on Biosafety of the Philippines was further strengthened in 2006 under Executive Order No. 514, which established the National Biosafety Framework for the Philippines. The Framework applies "to the development, adoption and implementation of all biosafety policies, measures and guidelines and in making biosafety decisions concerning the research, development, handling and use, transboundary movement, release into the environment and management of regulated articles."[10]

Currently, there is no legislation in relation to biotechnology or biosafety. The closest legislation is under Republic Act No. 8435, otherwise known as the Agriculture and Fisheries Modernization Act of 1997. This law makes it an objective of the state "[t]o modernize the agriculture and fisheries sectors by transforming these sectors from a resource-based to a technology-based industry."[11] In line with this, Congress initially allocated 4% of the 10% research and development fund for agriculture to be used to support the biotechnology program.[12]

A more recent law, Republic Act No. 10068, otherwise known as the Organic Agriculture Act of 2010, also promotes the use of biotechnology but specifically excludes genetically modified

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[8] DA Adm. Order No. 8 (2002), first Whereas clause.

[9] Exec. Order No. 430 (1990), otherwise known as Constituting the National Committee on Biosafety of the Philippines (NCBP) and for Other Purposes.

[10] Exec. Order No. 514, Sec. 2.1.

[11] Rep. Act No. 8435, Sec. 3(a).

[12] Rep. Act No. 8435, Sec. 111(5).

organisms.[13] The law does not provide regulatory standards for genetically modified organisms.

Aside from the enactment of domestic executive orders and laws, Administrative Order No. 8 was enacted to comply with the Cartagena Protocol on Biosafety to the Convention on Biodiversity. The Convention on Biodiversity came into force on December 29, 1993, and the Cartagena Protocol on Biosafety supplemented the Convention on Biodiversity by providing policy standards for biosafety in the use of living modified organisms.[14]

On April 3, 2002, then Department of Agriculture Secretary Leonardo Q. Montemayor issued Administrative Order No. 8, otherwise known as the Rules and Regulations for the Importation and Release into the Environment of Plants and Plant Products Derived from the Use of Modern Biotechnology. Administrative Order No. 8, Series of 2002, is a regulatory mechanism issued pursuant to the state's police power. It is designed to minimize and manage[15] the risks both to human health and to the environment of genetically modified organisms or plant products altered or generated through "modern biotechnology."[16] These genetically modified organisms or plant products are, in turn,

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[13] Rep. Act No. 10068, Sec. 3(b) *Organic agriculture* includes all agricultural systems that promote the ecologically sound, socially acceptable, economically viable and technically feasible production of food and fibers. Organic agriculture dramatically reduces external inputs by refraining from the use of chemical fertilizers, pesticides and pharmaceuticals. It also covers areas such as, but not limited to, soil fertility management, varietal breeding and selection under chemical and pesticide-free conditions, the use of biotechnology and other cultural practices that are consistent with the principles and policies of this Act, and enhance productivity without destroying the soil and harming farmers. consumers and the environment as defined by the International Federation of Organic Agriculture Movement (IFOAM); *Provided,* **That the biotechnology herein referred to shall not include genetically modified organisms or GMOs.** (Emphasis supplied)

[14] Cartagena Protocol on Biosafety to the Convention on Biological Diversity <https://www.cbd.int/doc/legal/cartagena-protocol-en.pdf> (visited December 1, 2015).

[15] DA Adm. Order No. 8 (2002), sixth Whereas clause.

[16] Defined in DA Adm. Order No. 8 (2002), Sec. 1(N).

results of human ingenuity and legally recognized patentable inventions to which their creators hold proprietary rights.

III

Two constitutional provisions bear upon the issues relied upon by private respondents in this case. Both are found in Article II, viz.:

Section 15. The State shall protect and promote the right to health of the people and instill health consciousness among them.

Section 16. The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.

Traditionally, these provisions articulate the doctrine that health and ecological concerns are proper purposes of regulation and, therefore, can be the basis of the state's exercise of police power.[17] Having constitutionally ordained goals and principles are, per se, compelling state interests.[18]

Thus, restricting the rights to property and liberties does not deny their holders their "due process of law" provided there is a discernable rational relationship between the regulatory measure and these legitimate purposes. We have, prior to the 1987 Constitution, adopted a fairly consistent deferential standard of judicial review considering that the Congress has more leeway in examining various submissions of a wider range of experts

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[17] See *Laguna Lake Development Authority v. Court of Appeals*, G.R. No. 110120, March 16, 1994, 231 SCRA 292, 307-308 [Per *J.* Romero, Third Division].

[18] See for example *Diocese of Bacolod v. COMELEC*, G.R. No. 205728, January 21, 2015 <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2015/january2015/205728.pdf> 50 [Per *J.* Leonen, *En Banc*], citing CONST., Art. II, Secs. 12 and 13; *Soriano v. Laguardia, et al.*, 605 Phil. 43, 106 (2009) [Per *J.* Velasco, Jr., *En Banc*]. In *Diocese of Bacolod,* we stated:

> "Compelling governmental interest would include constitutionally declared principles. We have held, for example, that 'the welfare of children and the State's mandate to protect and care for them, as *parens patriae*, constitute a substantial and compelling government interest in regulating . . . utterances in TV broadcast.'"

and has the power to create the forums for democratic deliberation on various approaches.

In recent times, we have included a higher degree of review of regulatory measures by requiring that there shall be a judicially discernable demonstration that the measure is least restrictive of fundamental rights.

Thus, in *Serrano v. Gallant Maritime Services,*[19] this court recognized "three levels of scrutiny":

> There are three levels of scrutiny at which the Court reviews the constitutionality of a classification embodied in a law: a) the deferential or rational basis scrutiny in which the challenged classification needs only be shown to be rationally related to serving a legitimate state interest; b) the middle-tier or intermediate scrutiny in which the government must show that the challenged classification serves an important state interest and that the classification is at least substantially related to serving that interest; and c) strict judicial scrutiny in which a legislative classification which impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class is presumed unconstitutional, and the burden is upon the government to prove that the classification is necessary to achieve a compelling state interest and that it is the least restrictive means to protect such interest.
>
> Under American jurisprudence, strict judicial scrutiny is triggered by suspect classifications based on race or gender but not when the classification is drawn along income categories.[20] (Citations omitted)

This exacting level of scrutiny has been considered in several instances in recent jurisprudence. In *Estrada v. Escritor*,[21] this court required the state, through the Office of the Solicitor General, to show that the means adopted to pursue the state's interest of preserving the integrity of the judiciary by maintaining a high standard of morality and decency among its personnel

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[19] 601 Phil. 245 (2009) [Per *J.* Austria-Martinez, *En Banc*].

[20] *Id*. at 282-283.

[21] 529 Phil. 110 (2006) [Per *J.* Puno, *En Banc*].

was the least restrictive means vis-à-vis respondent's religious freedom. More recently, our Decisions in *Diocese of Bacolod v. Commission on Elections*[22] and *Social Weather Stations v. Commission on Elections*[23] considered the propriety of measures adopted to regulate speech in the context of political exercises.

The requirement of adopting the least restrictive means requires that respondent agencies show that there were alternatives considered within the democratic and deliberative forums mandated by law and that clear standards were considered within transparent processes. It is not for this court to consider the validity of the standards chosen. We must, however, be convinced that there is such a standard, that it was assiduously applied, and the application was consistent.

IV

Sections 15 and 16 of Article II are, thus, not simply hortatory rights. They are as much a part of the fundamental law as any other provision in the Constitution. They add to the protection of the right to life in Article III, Section 1.

To recall, this important provision states:

Section 1. No person shall be deprived of life, liberty or property without due process of law.

This norm is phrased as a traditional limitation on the powers of the state. That is, that the state's inherent police powers cannot be exercised arbitrarily but must be shown to have been reasonable and fair.[24]

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[22] G.R. No. 205728, January 21, 2015 <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2015/january2015/205728.pdf> 50 [Per *J.* Leonen, *En Banc*].

[23] G.R. No. 208062, April 7, 2015 <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2015/april2015/208062.pdf> [Per *J.* Leonen, *En Banc*].

[24] See *City of Manila v. Laguio, Jr.*, G.R. No. 118127, April 12, 2005, 455 SCRA 308 [Per. *J.* Tinga, *En Banc*]; *White Light Corp. v. City of Manila*, 596 Phil. 444 (2009) [Per *J.* Tinga, *En Banc*].

The right to life is textually broad to signal the intention that the sphere of autonomy is assumed to encompass life both in terms of its physical integrity and in terms of its quality.[25]

Sections 15 and 16, however, impose on the state a positive duty to "promote and protect" the right to health and to "promote and advance" the right of "the people to a balanced and healthful ecology." With respect to health and ecology, therefore, the state is constitutionally mandated to provide affirmative protection. The mandate is in the nature of an active duty rather than a passive prohibition.

These provisions represent, in no small measure, a shift in the concept of governance in relation to society's health. It is a recognition that if private actors and entities are left to themselves, they will pursue motivations which may not be too advantageous to nutrition or able to reduce the risks of traditional and modern diseases. At best, the actors may not be aware of their incremental contributions to increasing risks. At worse, there may be conscious efforts not to examine health consequences of products and processes introduced in the market. It is expedient for most to consider such costs as extraneous and affecting their final profit margins.

In short, the constitutional provisions embed the idea that there is no invisible hand[26] that guides participants in the economic market to move toward optimal social welfare in its broadest developmental sense.

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[25] See Dissenting Opinion of *J.* Leonen in *Spouses Imbong v. Ochoa, Jr.*, G.R. Nos. 204819, 204934, 204957, 204988, 205003, 205043, 205138, 205478, 205491, 205720, 206355, 207111, 207172, and 207563, April 8, 2014, 721 SCRA 146, 731–847 [Per *J.* Mendoza, *En Banc*] discussing that:

"The constitutional right to life has many dimensions. Apart from the protection against harm to one's corporeal existence, it can also mean the "right to be left alone." The right to life also congeals the autonomy of an individual to provide meaning to his or her life. In a sense, it allows him or her sufficient space to determine quality of life. A law that mandates informed choice and proper access for reproductive health technologies should not be presumed to be a threat to the right to life. It is an affirmative guarantee to assure the protection of human rights."

[26] See ADAM SMITH, THE WEALTH OF NATIONS (1776).

Producers, by their very nature, participate in the market motivated by their objective to recover costs and maximize their profits. Costs for them usually refer to their pecuniary expenditures. Costs suffered incidentally by the ecology of the locations of their factories or by the health of their consumers are not costs which producers readily and naturally internalize.[27] In an unregulated market, they do not spend their capital to mitigate or remedy these types of damages.[28] In many instances, there is the tendency even to avoid incurring expenses to find out whether these types of damages actually occur. Environmental damage and health risks are, thus, externalities which are usually invisible to them. Externalities are costs which remain unrecognized in the private transaction between the producers and their consumers.

Of course, producers will respond to both the quantity and quality of demand in a market. In an unregulated market, collective consumer preferences will define the types of products that producers will sell. In turn, this will provide the strongest incentive for producers to specialize their products in an efficient and economical manner.

Consumers, however, are also shaped by the incentives in the market. The nature of the benefits which defines incentives is likewise framed by the pervading culture.

Health and consciousness may evolve among consumers. There are, for instance, those who will definitely purchase organic, nontransgenic, and unadulterated food products as a matter of personal choice. There will also be those who, like many of the private respondents in this case, evolve movements to convince the consumers to shift their tastes and their preferences.

Choices of consumers also depend on the consciousness that the present culture sponsors:

Consciousness can be defined as "the way people conceive of the 'natural' and normal way of doing things, their habitual patterns

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[27] JOSEPH E. STIGLITZ, *ECONOMICS OF THE PUBLIC SECTOR* 215 (2000).

[28] *Id*. at 223.

of talk and action, and their commonsense understanding of the world."[29]

Legal consciousness, on the other hand, is simply "all the ideas about the nature, function and operation of law held by anyone in society at a given time."[30] This means that the culture and framework of defining incentives and making choices among our consumers also depend on the content of the law and its interpretation in administrative regulatory issuances and judicial decisions.

The imperative for the state's more active participation in matters that relate to health and ecology is more salient given these perspectives and the pervasive impact of food on our population.

At its bare minimum, Sections 15 and 16 imply that the standard to be used by the state in the discharge of its regulatory oversight should be clear. This is where Administrative Order No. 8 fails. While providing for processes, it does not refer to any standard of evaluating the applications to be presented before the Department of Agriculture or, in field testing, the Scientific Review Technical Panel. There are many of such standards available based on best practices. For instance, the regulators may be required to evaluate applications so that there is a scientific demonstration of a "reasonable certainty of no harm"[31] to both health and

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[29] DAVID M. ENGEL, *How Does Law Matter in the Constitution of Legal Consciousness?* in HOW DOES LAW MATTER 112 (1998), *citing* SALLY ENGLE MERRY, *Getting Justice and Getting Even: Legal Consciousness among Working Class Americans* 5 (1990).

[30] *Id.*, *citing* David Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 592. He, however, refers to Sarat who "hastens to explain that he rejects the approach of 'radical individualization,' that he studies consciousness rather than attitudes because the latter inappropriately presents 'a picture of persons influenced by a variety of factors, thinking, choosing, deciding autonomously how and what to think.'"

[31] The United States' Federal Food, Drug, and Cosmetics Act initially coined the standard "reasonable certainty of no harm" with respect to food safety evaluations. *See* Daryl M. Freedman, *Reasonable Certainty of No Harm: Reviving the Safety Standard for Food Additives, Color Additives, and Animal Drugs,* 7 ECOLOGY, L.Q. (1978). <http://scholarship.law.berkely.edu/elq/vol7/iss2/2> (Last Visited: December 1, 2015. The Food and

environment in all aspects in the creation, testing, and propagation of genetically modified ingredients, processes, or products.

Without these standards, Sections 15 and 16 become meaningless. Hence, in this regard, Administrative Order No. 8 is null and void.

V

In addition to constitutional provisions under Article II, the Philippines also sources its environmental obligations from conventions and subsequent protocols. On May 24, 2000, the Philippines became one of the signatories to the Cartagena Protocol on Biosafety to the Convention on Biodiversity.[32] By September 11, 2003, the Cartagena Protocol entered into force in the Philippines.[33]

The Cartagena Protocol's objective is to ensure "an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology. . . ."[34] Article 23 of the Cartagena Protocol[35]

Agriculture Organization of the United Nations reiterated this standard in their GMO Food Safety Assessment: Tool For Trainers, p. 8. <http://www.fao.org/3/a-i0110e.pdf> (Last Visited: December 1, 2015).

[32] *Parties to the Protocol and signature and ratification of the Supplementary Protocol* <https://bch.cbd.int/protocol/parties/> (visited December 1, 2015).

[33] Preambular clause in Exec. Order No. 514 (2006).

[34] Cartagena Protocol on Biosafety to the Convention on Biological Diversity <https://www.cbd.int/doc/legal/cartagena-protocol-en.pdf> (visited December 1, 2015).

[35] Cartagena Protocol, Art. 23. PUBLIC AWARENESS AND PARTICIPATION. 1. The Parties shall: (a) Promote and facilitate public awareness, education and participation concerning the safe transfer, handling and use of living modified organisms in relation to the conservation and sustainable use of biological diversity, taking also into account risks to human health. In doing so, the Parties shall cooperate, as appropriate, with other States and international bodies; (b) Endeavour to ensure that public awareness and education encompass access to information on living modified organisms identified in accordance with this Protocol that may be imported.

2. The Parties shall, in accordance with their respective laws and regulations, consult the public in the decision-making process regarding living modified

stresses that the public must be consulted in the decision-making process regarding living modified organisms, and that the decisions made with this regard must be communicated to the public.[36]

The Cartagena Protocol emphasizes that risk assessment should be carried out in a scientifically sound manner.[37] In addition, Annex III of the Cartagena Protocol also provides that risk assessment must also be done in a *transparent* manner.[38]

Subsequent executive actions reflect the obligations of the Philippines under the Cartagena Protocol. Executive Order No. 514, which established the National Biosafety Framework, was enacted "to comply with the administrative requirements of the Cartagena Protocol on Biosafety," among other reasons.[39] Executive Order No. 514 restructured the National Committee on Biosafety of the Philippines, an interagency, multisectoral body in charge of the National Biosafety Framework.[40]

The National Biosafety Framework has provisions on Access to Information (Section 6)[41] and Public Participation

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organisms and shall make the results of such decisions available to the public, while respecting confidential information in accordance with Article 21.

3. Each Party shall endeavour to inform its public about the means of public access to the Biosafety Clearing-House.

[36] Cartagena Protocol, Art. 23.2.

[37] Cartagena Protocol, Art. 15.1. Risk assessments undertaken pursuant to this Protocol shall be carried out in a scientifically sound manner, in accordance with Annex III and taking into account recognized risk assessment techniques. Such risk assessments shall be based, at a minimum, on information provided in accordance with Article 8 and other available scientific evidence in order to identify and evaluate the possible adverse effects of living modified organisms on the conservation and sustainable use of biological diversity, taking also into account risks to human health.

[38] Cartagena Protocol, Annex III(3).

[39] Exec. Order No. 514, Whereas clause.

[40] Exec. Order No. 514, Sec. 4.1.

[41] Exec. Order No. 514, Sec. 6. ACCESS TO INFORMATION.

The right of the public and the relevant stakeholders to information related to biosafety decisions is recognized and shall always be respected in accordance

(Section 7).[42] The provisions envision a culture of constant communication and feedback from the public regarding biosafety decisions, risk assessment processes, product monitoring, and product identification.

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with guidelines to be issued by the NCBP, which shall include, among others, the following:

6.1 Information on Applications. Concerned departments and agencies shall, subject to reasonable limitations to protect confidential information as provided below, disclose all information on such applications in a prompt and timely manner. Such departments and agencies may require applicants to provide the information directly to concerned stakeholders.

6.2 Confidential Information. In all applications for approvals, whether domestic or foreign, concerned departments and agencies shall ensure that it has procedures and regulations to determine and protect confidential information; Provided, however, that the concerned agencies may refuse declaring the confidentiality of such information if it is necessary to enable the concerned stakeholders to effectively conduct a scientific risk assessment.

6.3 Information on Biosafety Decisions. The public and stakeholders shall have access to all biosafety decisions and the information on which they are based, subject to limitations set in Section 6.2 of this Framework. Such decisions shall summarize the application, the results of the risk assessment, and other relevant assessments done, the public participation process followed, and the basis for approval or denial of the application.

6.4 Information on Risk Management, Product Monitoring, and Product Identification. All relevant stakeholders shall have access to information related to risk management and product monitoring. Information on product identification shall be provided to the general public.

[42] Exec. Order No. 514, Sec. 7. PUBLIC PARTICIPATION.

The concerned government departments and agencies, in developing and adopting biosafety policies, guidelines and measures and in making biosafety decisions, shall promote, facilitate, and conduct public awareness, education, meaningful, responsible, and accountable participation. They shall incorporate into their respective administrative issuances and processes best practices and mechanisms on public participation in accordance with the following guidelines:

7.1 Scope of Public Participation. Public participation shall apply to all stages of the biosafety decision-making process from the time the application is received. For applications on biotechnology activities related to research and development, limited primarily for contained use, notice of the filing of such application with the NCBP shall be sufficient, unless the NCBP deems that public interest and welfare requires otherwise.

Executive Order No. 514, while not a statute, provides binding policies and rules for the executive agencies of government in their task of implementing its legal obligations under the Cartagena Protocol. Hence, all actions of agencies involved in the execution of biosafety in the Philippines must follow the Cartagena Protocol, the National Biosafety Framework, and our Constitution.

7.2 Minimum Requirements of Public Participation. In conducting public participation processes, the following minimum requirements shall be followed:

7.2.1 Notice to all concerned stakeholders, in a language understood by them and through media to which they have access. Such notice must be adequate, timely, and effective and posted prominently in public places in the areas affected, and in the case of commercial releases, in the national print media. In all cases, such notices must be posted electronically in the internet;

7.2.2 Adequate and reasonable time frames for public participation procedures. Such procedures should allow relevant stakeholders to understand and analyze the benefits and risks, consult with independent experts, and make timely interventions. Concerned departments and agencies shall include in their appropriate rules and regulations specific time frames for their respective public participation processes, including setting a minimum time frame as may be appropriate;

7.2.3 Public consultations, as a way to secure wide input into the decisions that are to be made. These could include formal hearings in certain cases, or solicitation of public comments, particularly where there is public controversy about the proposed activities. Public consultations shall encourage exchanges of information between applicants and the public before the application is acted upon. Dialogue and consensus-building among all stakeholders shall be encouraged. Concerned departments and agencies shall specify in their appropriate rules and regulations the stages when public consultations are appropriate, the specific time frames for such consultations, and the circumstances when formal hearings will be required, including guidelines to ensure orderly proceedings. The networks of agricultural and fisheries councils, indigenous peoples and community-based organizations in affected areas shall be utilized;

7.2.4 Written submissions. Procedures for public participation shall include mechanisms that allow public participation in writing or through public hearings, as appropriate, and which allow the submission of any positions, comments, information, analyses or opinions. Concerned departments and agencies shall include in their appropriate rules and regulations the stages when and the process to be followed for submitting written comments; and,

Like the National Biosafety Framework established by Executive Order No. 514, Administrative Order No. 8 cites the Cartagena Protocol as a source of obligation of the state to regulate transgenic plants.[43]

Administrative Order No. 8 fails to meet certain standards required under the Cartagena Protocol.

This Order requires an applicant for field testing of a regulated article to create an Institutional Biosafety Committee. It is the applicant who chooses the members of the Institutional Biosafety Committee.

The composition of the Institutional Biosafety Committee includes three scientist members and two community representatives who "shall not be affiliated with the applicant apart from being members of its [Institutional Biosafety Committee] and shall be in a position to represent the interests of the communities where the field testing is to be conducted."[44] As an apparent assurance for the lack of bias of these community representatives, the National Committee on Biosafety of the Philippines must approve the composition of the Institutional Biosafety Committee.[45]

The manner of choosing the composition of the Institutional Biosafety Committee is problematic. It reduces meaningful compliance in our commitments enunciated in the Cartagena Protocol into mere artifice. It defies the guidelines set by the National Biosafety Framework.

7.2.5 Consideration of public concerns in the decision-making phase following consultation and submission of written comments. Public concerns as reflected through the procedures for public participation shall be considered in making the decision. The public shall be informed of the final decision promptly, have access to the decision, and shall be provided with the reasons and considerations resulting in the decision, upon request.

[43] DA Adm. Order No. 8 (2002), Whereas clause.

[44] DA Adm. Order No. 8 (2002), Sec. 1(L).

[45] DA Adm. Order No. 8 (2002), Sec. 1(L).

Both the Cartagena Protocol and National Biosafety Framework require participation from community members. However, in Administrative Order No. 8, the applicant has the initial choice as to the community representatives who will participate as members of the Institutional Biosafety Committee. The approval by the National Committee on Biosafety of the Philippines is not a sufficient mechanism to check this discretion. This interagency committee can only approve or disapprove community representatives that were already selected by the applicant. The applicant does not have any incentive to choose the critical community representatives. The tendency would be to choose those whose dissenting voices are tolerable. Worse, the National Committee on Biosafety of the Philippines, apart from not being a sufficient oversight for people's participation, is a government body. A government body is not the community that should supposedly be represented in the Institutional Biosafety Committee.

In addition, there are other problems with public participation in Administrative Order No. 8. For field testing under Administrative Order No. 8, the only opportunity for public participation is under Sections 8(G) and 8(H). Under Section 8(G), the public consultation on an application is prompted by the posting of the Public Information Sheet on Field Testing, which shall be posted in three conspicuous places in the barangay/city/municipality for three consecutive weeks. The interested party is given thirty (30) days within which to file a written comment on the application.

The posting of the Public Information Sheet in three conspicuous places near the field testing site is not enough to raise awareness regarding the field testing being applied for. The subject matter in transgenic transformation is too complex and its consequences too pervasive as to simply leave this through the fictional notice of public posting. The positive duty of the state requires more in terms of the creation of public awareness and understanding. For instance, the Department of Agriculture is competent and large enough so as to make actual face to face community meetings reasonable.

Also, under the National Biosafety Framework, there must be posting on the Internet to capture the attention of relevant stakeholders.[46] This is not required under Section 8(G).

The mechanism under Administrative Order No. 8 does not even require that local government authorities be apprised about the proposed field testing. Certainly, engaging local government authorities invites more meaningful public discourse.

Section 8(H) requires the creation of a Scientific and Technical Review Panel. This is a group of three independent scientists that reviews the risk assessment conducted by the Institutional Biosafety Committee. The Scientific and Technical Review Panel does not have a community representative. It is also tasked to evaluate—based on the individual scientist's own standards—whether the proposed field testing poses significant risks on human health and the environment. How the points raised during the mandatory public hearings will be considered in the issuance of the field testing permits is not covered by Administrative Order No. 8. In this regard, there is no standard or process.

The nonchalant attitude of the regulatory framework is best seen in this case. Petitioners alleged that there was some public consultation prior to field testing. These consultations, however, were not documented. The only proof of such consultation was a bare allegation made by Miss Merle Palacpac of the Department of Agriculture in her judicial affidavit.[47]

The absence of an effective mechanism for public feedback during the application process for field testing means that Administrative Order No. 8 fails in meeting the public participation requirement of the Cartagena Protocol and the National Biosafety Framework. The current mechanisms have all the badges of a "greenwash":[48] merely an exhibition of symbolic compliance to environmental and biosafety policy.

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[46] Exec. Order No. 514, Sec. 7.2.1.

[47] Judicial Affidavit of Merle Bautista Palacpac dated Feb. 4, 2013, pp. 16-17, par. 56.

[48] The term is often used in reference to businesses and corporations that mislead consumers about the business' environmental performance or the

The insouciant approach to public participation during the application process is obvious as there is no appeal procedure for third parties under Administrative Order No. 8. The regulation does not consider that communities affected may want to question the exercise of discretion by the Department of Agriculture or the Bureau of Plant Industry. Section 18 of Administrative Order No. 8 only covers appeals for "[a]ny person whose permit has been revoked or has been denied a permit or whose petition for delisting has been denied by the Director of [Bureau of Plant Industry]." Procedural due process is taken away from the public.

VI

Due to these fundamental deficiencies, Administrative Order No. 8 is null and void. In its present form, it cannot be used as the guidelines to regulate further field testing or commercial propagation of Bt talong. Until a law or a new regulation is passed consistent with the Constitution, our treaty obligations, and our laws, no genetically modified ingredient process or product can be allowed to be imported, field tested, or commercially propagated.

VII

Science is not just a body of knowledge; it is the result of the application of the scientific methodology.[49] The direction of the methodology depends on the objective of each study or research. The scientific methodology tests a hypothesis, or a proposed statement of relationships between factors or variables that acts as a tentative answer to a specific research question.[50]

From the hypothesis, a scientist reviews related literature and records observations relating to the hypothesis. Sampling,

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environmental benefits of a product. Magali A. Delmas and Vanessa Cuerel Burbano, *The Drivers of Greenwashing* <http://www.ioe.ucla.edu/media/files/Delmas-Burbano-CMR-2011-gd-ldh.pdf> (visited December 1, 2015).

[49] Mother and Child Health: Research Methods, Chapter 1: Scientific Method 1 <http://www.oxfordjournals.org/our_journals/tropej/online/ce_ch1.pdf> (visited December 1, 2015).

[50] *Id*. at 3.

observations, and measurements must be **accurate and replicable**. These areas are vulnerable to errors that may distort a research's conclusions.[51] In order to confirm found observations, a scientist can design tests in order to make observations under controlled conditions.[52]

This basic process is also found in the environmental risk assessments conducted for transgenic crops. There are four important steps in Environmental Risk Assessments:

(1) Initial evaluation – This step determines whether risk assessment is required.

(2) Problem formulation – This step involves the formulation of risk hypothesis to be tested in the laboratory and field. An example of a risk hypothesis is whether the transgenic crop affects nontargeted organisms.

(3) Controlled experiment and gathering information – These are done first in the laboratory, and then under controlled field conditions.

(4) Risk evaluation[53]

The results of scientific experimentation with transgenic crops form part of science. However, these research articles must be rigorously and deliberately examined to scrutinize their subject matter, the hypothesis and methodology deployed, and the cogency of the conclusions drawn from the observed findings.

Certainly, the conclusions in studies concerning Bt maize may not always be valid with respect to Bt talong. Some of the variables may be the same. Obviously, both transgenic crops include the vector *bacillus thuringiensis*. However, there will also be obvious differences because of the difference of the

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[51] *Id*. at 4.

[52] *Id*. at 6.

[53] Detlef Bartsch, *et al., Field Testing of Transgenic Plants* in PLANT BIOTECHNOLOGY AND GENETICS: PRINCIPLES, TECHNIQUES, AND APPLICATIONS 313 (2008).

crops, their behavior in various environments, the manner in which they reproduce, their uses, and their consequences.

Currently, there is more literature regarding the viability and safety of Bt maize because it is already being commercially propagated. On the other hand, Bt talong is still being studied and assessed and is not yet ready for commercial release. The application for field testing for Bt talong under the correct conditions is itself part of the scientific inquiry to test hypotheses both for or against its propagation.

The Court of Appeals, instead of relying on these standards of science, employed a "hot tub" examination of experts. It took into account literature on Bt maize or Bt cotton, and various arguments and studies conducted for Bt maize. It then made conclusions, without a rigorous explanation of its methodology and standards for credibility, from these studies.

Without these rigorous explanations, the Court of Appeals committed grave abuse of discretion when it considered Bt maize research. Ideally, the Court of Appeals should have scrutinized the results of the contained experimentation with respect to Bt talong because the results were the basis for the Bureau of Plant Industry's allowance of field testing.[54] It should have examined whether the experimentation conducted may be replicated and whether it will yield the same result.

The experts could have also been asked individually about the results of contained experimentation and if the contained experiments answered research objectives relating not only to the viability of the product, but the impact to the environment should the product undergo field testing. The first objective is in line with the commercial interests of the applicant, while the latter objective is more in tune with the state's policy of protecting the right of the people to a balanced and healthful ecology. The imposition of the latter objective should have been the role of the Bureau of Plant Industry because it was the authorizing agency for field testing permits.

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[54] Petition of Environmental Management Bureau, *et al.*, Annex "E".

The Court of Appeals committed grave abuse of discretion by relying only on the study of Dr. Gilles-Eric Seralini who made a study involving a completely different transgenic crop. This court tasked the Court of Appeals to assess the propriety of the issuance of field testing permits with respect to Bt talong, not to draw conclusions about Bt talong based on one scientific literature on Bt maize.

The results of the field testing of Bt talong should still be subject to confirmatory tests involving the same variables in order to attain a level of statistical reliability. However, these subsequent field testing must be done under regulations consistent with our Constitution and international obligations. They must be conducted under a regulatory agency that will have the competence to be actively involved in the scientific inquiry.

VIII

The results of this case are neither an endorsement nor a repudiation of genetically modified ingredients, processes, and food products. This should neither be interpreted as a rebuke of the avowed mandates of respondents, many of whom have distinguished themselves in their advocacies.

Certainly, there is a need for leaders, organizations, and dedicated movements that amplify the concerns of communities, groups, and identities which tend to be put in the margins of forums dominated by larger and more politically connected commercial interests. This includes forums that create and implement regulatory frameworks. Liberal democratic deliberations at times fail to represent the silenced majority as it succumbs to the powerful minority.

While acknowledging this reality, we also need to be careful that the chambers of this court do not substitute for the needed political debate on public issues or the analytical rigor required by truths in science. We are Justices primarily. While politics and science envelope some of our important decisions, we should not lose the humility that the Constitution itself requires of us. We are an important part of the constitutional order: always only a part, never one that should dominate. Our decisions have

the veneer of finality. It should never, however, be disguised superiority in any form or manner.

Political debates indeed also mature when we pronounce the nature of fundamental rights in concrete cases. Before cases ripen—or, as in this case, when it has become moot—restraint will be the better approach. We participate in the shaping of the content of these fundamental rights only with the guidance of an actual case. This, among others, distinguishes the judicial function from the purely political engagement.

Restraint is especially required when the remedy chosen is a Petition for the issuance of a Writ of Kalikasan, which is designed to prevent an actual or imminent environmental catastrophe. Again, in this case, the field testing ended. There is yet no permit to commercially propagate Bt talong. The results of the field testing of the genetically modified food crop have not been presented for evaluation by any of the relevant agencies charged with its eventual regulation. Moreover, the results of the field testing have not been presented for proper public scrutiny.

If any, the resolution of this case implies rigor in environmental advocacy. Vigilance and passion are the hallmarks of the public interest movement. There is no reason that the members of this movement should not evolve the proper skills and attitudes to properly work the legal system and understand the role of the judicial process. Environmental advocacy also requires an understanding of science and the locating of the proper place of various norms such as the precautionary principle. After all, representation of marginalized community voices deserves excellent representation and responsible leadership. Filing a judicial remedy almost two years too late and without the required scientific rigor patently required by the allegations and the arguments misses these standards.

But, we cannot just leave things as they are especially when patent unconstitutional provisions surface and where deference will amount to a denial of the positive constitutional duties we are required to discharge. There are grave errors in Administrative Order No. 8 that stack decisions made by the Department of Agriculture and the Bureau of Plant Industry in favor of the

commercial applicant. We have so far only evaluated the provisions in accordance with law and found them wanting. By declaring Administrative Order No. 8 null and void, there is now incentive for either Congress or our administrative bodies to review the present regulatory framework and bring it not only to legal fiat but also to address all concerns including those voiced by respondents in this case.

Food safety and food security are vital for the assurance of human dignity. We can only hope that the complex issues relating to genetic modification of the food we eat be debated deliberately, vigorously, and with all the scientific rigor and rationality required in the proper public forums. Food safety and food security are complex issues requiring the benefit of all the wisdom of all our people.

ACCORDINGLY, I vote to declare Administrative Order No. 8, Series of 2002, of the Department of Agriculture null and void, being violative of the Constitution, our treaty obligations under the Cartagena Protocol, and the instructions of the President under Executive Order No. 514.

EN BANC

[G.R. Nos. 216007-09. December 8, 2015]

PEOPLE OF THE PHILIPPINES, *petitioner, vs.* **LUZVIMINDA S. VALDEZ and THE SANDIGANBAYAN (FIFTH DIVISION),** *respondents.*

SYLLABUS

1. REMEDIAL LAW; SPECIAL CIVIL ACTIONS; PETITION FOR *CERTIORARI*; FILING A MOTION FOR RECONSIDERATION IS A CONDITION *SINE QUA NON*;

EXCEPTIONS; PRESENT.— The general rule is that a motion for reconsideration is a condition *sine qua non* before a petition for *certiorari* may lie, its purpose being to grant an opportunity for the court *a quo* to correct any error attributed to it by a re-examination of the legal and factual circumstances of the case. However, the rule is not absolute and jurisprudence has laid down the following exceptions when the filing of a petition for *certiorari* is proper notwithstanding the failure to file a motion for reconsideration: (a) where the order is a patent nullity, as where the court *a quo* has no jurisdiction; (b) where the questions raised in the *certiorari* proceedings have been duly raised and passed upon by the lower court, or are the same as those raised and passed upon in the lower court; (c) where there is an urgent necessity for the resolution of the question and any further delay would prejudice the interests of the Government or of the petitioner or the subject matter of the petition is perishable; (d) where, under the circumstances, a motion for reconsideration would be useless; (e) where petitioner was deprived of due process and there is extreme urgency for relief; (f) where, in a criminal case, relief from an order of arrest is urgent and the granting of such relief by the trial court is improbable; (g) where the proceedings in the lower court are a nullity for lack of due process; (h) where the proceeding was *ex parte* or in which the petitioner had no opportunity to object; and, (i) where the issue raised is one purely of law or public interest is involved. The issue being raised here is one purely of law and all the argument, *pros* and *cons* were already raised in and passed upon by public respondent; thus, filing a motion for reconsideration would be an exercise in futility. Likewise, as petitioner claims, the resolution of the question raised in this case is of urgent necessity considering its implications on similar cases filed and pending before the Sandiganbayan. As it appears, there have been conflicting views on the matter such that the different divisions of the anti-graft court issue varying resolutions. Undeniably, the issue is of extreme importance affecting public interest. It involves not just the right of the State to prosecute criminal offenders but, more importantly, the constitutional right of the accused to bail.

2. CRIMINAL LAW; MALVERSATION OF PUBLIC FUNDS THRU FALSIFICATION OF OFFICIAL/PUBLIC DOCUMENTS; PROPER PENALTY WHERE THE

AMOUNT INVOLVED EXCEEDS ₱22,000.— The rulings in *Pantaleon, Jr.* and analogous cases are in keeping with the provisions of the RPC. Specifically, Article 48 of which states that in complex crimes, "the penalty for the most serious crime shall be imposed, the same to be applied in its maximum period." Thus, in Malversation of Public Funds thru Falsification of Official/Public Documents, the prescribed penalties for malversation and falsification should be taken into account. Under the RPC, the penalty for malversation of public funds or property if the amount involved exceeds ₱22,000.00 shall be *reclusion temporal* in its maximum period to *reclusion perpetua*, aside from perpetual special disqualification and a fine equal to the amount of the funds malversed or equal to the total value of the property embezzled. On the other hand, the penalty of *prision mayor* and a fine not to exceed ₱5,000.00 shall be imposed for falsification committed by a public officer. Considering that malversation is the more serious offense, the ***imposable*** penalty for Malversation of Public Funds thru Falsification of Official/Public Documents if the amount involved exceeds ₱22,000.00 is *reclusion perpetua*, it being the maximum period of the ***prescribed*** penalty of "*reclusion temporal* in its maximum period to *reclusion perpetua*."

3. **REMEDIAL LAW; CRIMINAL PROCEDURE; BAIL; FOR PURPOSES OF BAIL APPLICATION, THE TERM "PUNISHABLE" UNDER SECTIONS 4 AND 7, RULE 114 OF THE REVISED RULES OF CRIMINAL PROCEDURE SHOULD REFER TO PRESCRIBED, NOT IMPOSABLE, PENALTY.—** In Our mind, the term *"punishable"* should refer to ***prescribed***, not ***imposable***, penalty. *People v. Temporada*, which was even cited by petitioner, perceptibly distinguished these two concepts: The RPC provides for an initial penalty as a general prescription for the felonies defined therein which consists of a range of period of time. This is what is referred to as the "**prescribed penalty**." For instance, under Article 249 of the RPC, the prescribed penalty for homicide is *reclusión temporal* which ranges from 12 years and 1 day to 20 years of imprisonment. Further, the Code provides for attending or modifying circumstances which when present in the commission of a felony affects the computation of the penalty to be imposed on a convict. This penalty, as thus modified, is referred to as the "**imposable penalty**." In the case of homicide which is committed with one ordinary

aggravating circumstance and no mitigating circumstances, the imposable penalty under the RPC shall be the prescribed penalty in its maximum period. From this imposable penalty, the court chooses a single fixed penalty (also called a straight penalty) which is the "**penalty actually imposed**" on a convict, *i.e.*, the prison term he has to serve. x x x Following *Temporada*, for the complex crime of Malversation of Public Funds thru Falsification of Official/Public Documents involving an amount that exceeds ₱22,000.00, the **"prescribed penalty"** is *reclusion temporal* in its maximum period to *reclusion perpetua*. After trial, should the commission of such crime be proven by the prosecution beyond reasonable doubt, the **"imposable penalty"** is *reclusion perpetua* in view of the RPC mandate that the prescribed penalty of *reclusion temporal* maximum to *reclusion perpetua* shall be applied in its maximum. The falsification, which is the means used to commit the crime of malversation, is in the nature of a generic aggravating circumstance that effectively directs the imposition of the prescribed penalty in its maximum period. The phrases *"shall be applied"* and *"shall impose,"* found in Articles 63 and 64, respectively, of the RPC, are of similar import as the phrase *"shall be imposed"* found in Article 48. Both Articles 63 and 64 refer to the penalty to be imposed after considering the aggravating or mitigating circumstance/s. Finally, the **"penalty actually imposed"** is still *reclusion perpetua*, considering that the ISL finds no application as the penalty is indivisible.

4. ID.; ID.; AN ACCUSED CHARGED OF MALVERSATION OF PUBLIC FUNDS THRU FALSIFICATION OF OFFICIAL/PUBLIC DOCUMENTS INVOLVING AN AMOUNT THAT EXCEEDS ₱22,000 IS ENTITLED TO BAIL AS A MATTER OF RIGHT; EXPLAINED.— For purposes of bail application x x x the appropriate rule is to grant bail as a matter of right to an accused who is charged with a complex crime of Malversation of Public Funds thru Falsification of Official/Public Documents involving an amount that exceeds ₱22,000.00. x x x Indeed, the trial is yet to proceed and the prosecution must still prove the guilt of the accused beyond reasonable doubt. It is not amiss to point that in charging a complex crime, the information should allege each element of the complex offense with the same precision as if the two (2) constituent offenses were the subject of separate prosecutions. Where a complex crime is charged and the evidence fails to

support the charge as to one of the component offenses, the defendant can be convicted of the offense proven. At this point, there is no certainty that Valdez would be found guilty of Malversation of Public Funds thru Falsification of Official/ Public Documents involving an amount that exceeds ₱22,000.00. Falsification, like an aggravating circumstance, must be alleged and proved during the trial. For purposes of bail proceedings, it would be premature to rule that the supposed crime committed is a complex crime since it is only when the trial has terminated that falsification could be appreciated as a means of committing malversation. Further, it is possible that only the elements of one of the constituent offenses, *i.e.,* either malversation or falsification, or worse, none of them, would be proven after full-blown trial. It would be the height of absurdity to deny Valdez the right to bail and grant her the same only after trial if it turns out that there is no complex crime committed. Likewise, it is unjust for Us to give a stamp of approval in depriving the accused person's constitutional right to bail for allegedly committing a complex crime that is not even considered as inherently grievous, odious and hateful. To note, Article 48 of the RPC on complex crimes does not change the nature of the constituent offenses; it only requires the imposition of the maximum period of the penalty prescribed by law. When committed through falsification of official/public documents, the RPC does not intend to classify malversation as a capital offense. Otherwise, the complex crime of Malversation of Public Funds thru Falsification of Official/Public Documents involving an amount that exceeds ₱22,000.00 should have been expressly included in Republic Act No. 7659. If truly a non-bailable offense, the law should have already considered it as a special complex crime like robbery with rape, robbery with homicide, rape with homicide, and kidnapping with murder or homicide, which have prescribed penalty of *reclusion perpetua*.

5. CRIMINAL LAW; CONSTRUCTION; RULE OF LENITY, APPLIED; PENAL STATUTES ARE CONSTRUED STRICTLY AGAINST THE STATE AND LIBERALLY IN FAVOR OF THE ACCUSED.— The inequity of denying bail as a matter of right to an accused charged with Malversation of Public Funds thru Falsification of Official/Public Documents involving an amount that exceeds ₱22,000.00 is palpable when compared with an accused indicted for plunder, which is a heinous crime punishable under R.A. No. 7080, as amended

by R.A. No.7659 and R.A. 9346. Observe that bail is not a matter of right in plunder committed through malversation of public funds, but the aggregate amount or total value of ill-gotten wealth amassed, accumulated or acquired must be at least Fifty Million Pesos (₱50.000.00). In contrast, an accused who is alleged to have committed malversation of public funds thru falsification of official/public documents, which is not a capital offense, is no longer entitled to bail as a matter of right if the amount exceeds ₱22,000.00, or as low as ₱22,000.01. Such distinction is glaringly unfair and could not have been contemplated by the law. The foregoing interpretation is more favorable to Valdez as an accused following the rule of lenity: Intimately related to the *in dubio pro reo* principle is the rule of lenity. The rule applies when the court is faced with two possible interpretations of a penal statute, one that is prejudicial to the accused and another that is favorable to him. The rule calls for the adoption of an interpretation which is more lenient to the accused. The time-honored principle is that penal statutes are construed strictly against the State and liberally in favor of the accused. When there is doubt on the interpretation of criminal laws, all must be resolved in favor of the accused. Since penal laws should not be applied mechanically, the Court must determine whether their application is consistent with the purpose and reason of the law.

VILLARAMA, JR., *J.*, *dissenting opinion*:

1. REMEDIAL LAW; CRIMINAL PROCEDURE; BAIL; FOR BAIL PURPOSES, THE TERM "PUNISHABLE" SHOULD REFER ONLY TO THE PRESCRIBED PENALTY; THERE IS NO LEGAL BASIS TO DISTINGUISH IMPOSABLE OR PRESCRIBED PENALTY AND PENALTY ACTUALLY IMPOSED.— Section 13, paragraph 4, Article III of the 1987 Constitution provides that all persons, except those charged with offenses **punishable** by *reclusion perpetua* when evidence of guilt is strong, shall, before conviction, be bailable by sufficient sureties, or be released from recognizance as may be provided by law. Likewise, Rule 114, Section 7 of the Revised Rules of Criminal Procedure, as amended, provides that no person charged with a capital offense or an offense punishable by *reclusion perpetua* or life imprisonment when evidence of guilt shall be admitted to bail regardless of the stage of the

prosecution. We find no legal basis for making a distinction between imposable or prescribed penalty and penalty actually imposed and concluding that the maximum period mentioned in Article 48 cannot be considered for bail purposes before conviction. The term "punishable" in the Constitution and the Rules clearly refers only to the prescribed penalty. *Ubi lex non distinguit nec nos distinguire debemus.* When the law does not distinguish, we must not distinguish. Further, it is a cardinal rule in statutory construction that when the law is clear and free from any doubt or ambiguity, there is no room for construction or interpretation. There is only room for application.

2. ID.; ID.; ID.; AN ACCUSED CHARGED OF MALVERSATION OF PUBLIC FUNDS THRU FALSIFICATION OF PUBLIC DOCUMENTS INVOLVING AN AMOUNT THAT EXCEEDS ₱22,000 IS NOT ENTITLED TO BAIL AS A MATTER OF RIGHT SINCE IT IS A CRIME WHOSE PENALTY IS *RECLUSION PERPETUA*.— The question of actual imposable penalty of malversation thru falsification of public documents has been settled by this Court *in People v. Pantaleon, Jr.*, where we ruled: x x x The Sandiganbayan, therefore, correctly imposed on the appellants the penalties of ***reclusion perpetua*** and **perpetual special disqualification** for each count of malversation of public funds through falsification of public documents, and the **payment of fines** of ₱166,242.72, ₱154,634.27, and ₱90,464.21, respectively, representing the amounts malversed. **The Indeterminate Sentence Law finds no application since *reclusion perpetua* is an indivisible penalty to which the Indeterminate Sentence Law does not apply.** In the light of all the foregoing, we hold that Valdez is not entitled to bail as a matter of right since she is charged with a crime whose penalty is *reclusion perpetua*. The DOJ's 2000 Bail Bond Guide likewise sets no bail for the said offense where the amount involved exceeds ₱22,000.00. While not controlling, in view of the constitutional prohibition against excessive bail, the said guidelines should have been considered by the Sandiganbayan.

3. ID.; ID.; ID.; THE GRANT OF BAIL TO AN ACCUSED CHARGED OF AN OFFENSE WITH A PENALTY OF *RECLUSION PERPETUA* IS DISCRETIONARY UPON THE COURT AFTER DETERMINING WHETHER OR

NOT THE EVIDENCE OF GUILT IS STRONG; A HEARING IS MANDATORY BEFORE THE GRANT OF BAIL AND THE PROSECUTION MUST BE GIVEN A CHANCE TO SHOW STRENGTH OF ITS EVIDENCE.— The Sandiganbayan thus gravely erred in setting aside the "No Bail" recommendation of the Special Prosecutor and fixing the amount of bail as prayed for by Valdez. It is settled that the grant of bail to an accused charged with an offense that carriers with it the penalty of *reclusion perpetua* is discretionary on the part of the trial court, *i.e*., accused is still entitled to bail but no longer as a matter of right. Indeed, the determination of whether or not the evidence of guilt is strong is a matter of judicial discretion. This discretion, by the nature of things, may rightly be exercised only after the evidence is submitted to the court of the hearing. The Prosecution must be given a chance to show strength of its evidence; otherwise, a violation of due process occurs. As the rule now stands, a hearing upon notice is mandatory before the grant of bail, whether bail is a matter of right or discretion.

LEONEN, *J.*, *dissenting opinion*:

1. CRIMINAL LAW; MALVERSATION OF PUBLIC FUNDS THROUGH FALSIFICATION OF PUBLIC DOCUMENTS; CONSIDERED AN ORDINARY COMPLEX CRIME UNDER ARTICLE 48 OF THE REVISED PENAL CODE AND TREATED AS ONE CRIME SUBJECT TO A SINGLE CRIMINAL LIABILITY.— Malversation of Public Funds through Falsification of Public Documents, however, is considered an ordinary complex crime under Article 48 of the Revised Penal Code. x x x Respondent was charged with Malversation of Public Funds *through* Falsification of Public Documents, not Malversation of Public Funds *and* Falsification of Public Documents. While it is true that "the information should charge each element of the complex offense with the same precision as if the two (2) constituent offenses were the subject of separate prosecutions[,]" the singularity of the criminal intent must be taken into account in order to determine its penalty. Respondent was charged with a single complex crime, not two separate crimes. The crime carries only *one* imposable penalty. The determination of an accused's liability in a complex crime is not new. In *Intestate Estate of Manolita Gonzales*

Vda. De Carungcong v. People, et al., this court has stated that the complex crime of Estafa through Falsification of Public Documents is treated as *one* crime subject to a *single* criminal liability: In considering whether the accused is liable for the complex crime of estafa through falsification of public documents, it would be wrong to consider the component crimes separately from each other. **While there may be two component crimes** (estafa and falsification of documents), both felonies are animated by and result from one and the same criminal intent for which **there is only one criminal liability**. That is the concept of a complex crime. In other words, while there are two crimes, **they are treated only as one, subject to a single criminal liability**. x x x Thus, while a complex crime constitutes two or more offenses whose elements must be pleaded and proved, it is considered by law as a single crime committed through a single criminal intent and punishable by a single penalty. In determining whether a complex crime is bailable as a matter of right or of discretion, what is considered is not the penalties of the two or more separate offenses that compose the complex crime, but the single penalty imposed by law for the complex crime.

2. ID.; ID.; MALVERSATION OF PUBLIC FUNDS THROUGH FALSIFICATION OF PUBLIC DOCUMENTS INVOLVING AN AMOUNT THAT EXCEEDS ₱22,000 IS AN OFFENSE BAILABLE ONLY AS A MATTER OF DISCRETION; IT IS A CRIME AT PAR WITH PLUNDER AND GRAFT AND CORRUPTION SINCE IT INVOLVES A PUBLIC OFFICER'S BETRAYAL OF PUBLIC TRUST.— The only allowable range for Malversation through Falsification as charged in the Information is *reclusion perpetua*. There is nothing inequitable in considering Malversation through Falsification of Public Documents of public funds exceeding ₱22,000.00 as an offense bailable only as a matter of discretion. Malversation of Public Funds, by itself, may be bailable as a matter of right since the prescribed penalty under the law is *reclusion temporal* in its maximum period to *reclusion perpetua.* However, the law raises the prescribed penalty to that of the more serious crime in its maximum period if it is committed through Falsification. The conversion of the offense to a complex crime serves to underscore the gravity of the offense. Like Plunder under Republic Act No. 7080 and Graft and Corruption under Republic Act No. 3019, it is generally committed by

public officers. "Public office is a public trust." Public officers are sworn to perform their duties with the highest fidelity. Malversation through Falsification, therefore, is a crime at par with Plunder and Graft and Corruption since it involves a public officer's betrayal of public trust. As an offense considered a violation of a constitutionally enshrined policy, it should be imposable with the highest penalty provided by law.

3. REMEDIAL LAW; CRIMINAL PROCEDURE; BAIL; WHEN THE PRESCRIBED PENALTY IS *RECLUSION PERPETUA,* BAIL IS GRANTED ONLY UPON A SHOWING THAT EVIDENCE OF GUILT IS NOT STRONG; THE COURT MAY EXERCISE JUDICIAL DISCRETION ONLY IN THE MATTER OF DETERMINING WHETHER OR NOT THE EVIDENCE OF GUILT IS STRONG.— Prescribed penalty, not imposable penalty, is what is considered for bail. x x x This is precisely what the Constitution provides. When the prescribed penalty is *reclusion perpetua*, bail is granted only after a showing that evidence of guilt is not strong. Thus in Article III, Section 13 of the Constitution: SECTION 13. All persons, except those charged with offenses punishable by reclusion perpetua when evidence of guilt is strong, shall, before conviction, be bailable by sufficient sureties, or be released on recognizance as may be provided by law. The right to bail shall not be impaired even when the privilege of the writ of habeas corpus is suspended. Excessive bail shall not be required. The purpose of bail is to ensure the accused's presence at trial. The underlying theory of denying bail in capital offenses is not only to prevent the risk of flight by the accused, but also to protect the community from potential danger due to the heinousness of the crime charged and to avoid delays in the service of punishment. Regardless of these presumptions, determination of bail by the sovereign has already been fixed by the text of the Constitution. It is conclusive on courts. It cannot be reconsidered. The test of the Constitution reduces judicial discretion to a single variable: whether the evidence of guilt is strong.

4. ID.; ID.; ID.; FOR BAIL PURPOSES, WHEN THE ACCUSED IS CHARGED WITH A COMPLEX CRIME, THE PENALTY IS WHAT IS STATED IN THE REVISED PENAL CODE OR IN SPECIAL PENAL LAWS IN RELATION TO ARTICLE 48 OF THE REVISED PENAL

CODE.— Bail under the Constitution considers the offense *charged in the information*, not the offense of which the accused will eventually be convicted. "Punishable" within the context of the Constitution means the penalty prescribed by law for the offense charged. When an accused is charged with a complex crime, the penalty is what is stated in the Revised Penal Code or in special penal laws *in relation* to Article 48 of the Revised Penal Code. A complex crime is a single offense comprised of two or more offenses but with a *single* penalty. While the prosecution must prove all the elements charged, it must only prove a single criminal intent. The splitting of the penalties according to its separate component crimes undermines the singularity of the criminal intent, which makes it a complex crime.

APPEARANCES OF COUNSEL

The Solicitor General for petitioner.
Christian Rhee Delfin B. Orencia for private respondent.

D E C I S I O N

PERALTA, *J.*:

This special civil action for *certiorari* under Rule 65 of the Rules of Court (*Rules*) seeks to nullify and set aside the October 10, 2014 Resolution[1] of public respondent Sandiganbayan Fifth Division, the dispositive portion of which states:

WHEREFORE, the (i) *Motion to Set Aside No Bail Recommendation and to Fix the Amount of Bail* and the (ii) *Urgent Supplemental Motion to the Motion to Set Aside No Bail Recommendation and to Fix the Amount of Bail with Additional Prayer to Recall/List Warrant of Arrest* filed by accused Luzviminda S. Valdez, are **GRANTED**.

Let the Order of Arrest issued in Criminal Case Nos. SB-14-CRM-0321, 0322 and 0324 adopting the "no bail" recommendation of the Office of the Ombudsman be **RECALLED**. Instead, let an

[1] Penned by Associate Justice Ma. Theresa Dolores C. Gomez-Estoesta, with Associate Justices Roland B. Jurado and Alexander G. Gesmundo, concurring; *rollo*, pp. 30-40.

Order of arrest in said cases be issued anew, this time, fixing the bail for each offense charged in the amount of Two Hundred Thousand Pesos (₱200,000.00).

SO ORDERED.[2]

The case stemmed from the Joint Affidavit[3] executed by Sheila S. Velmonte-Portal and Mylene T. Romero, both State Auditors of the Commission on Audit Region VI in Pavia, Iloilo, who conducted a post-audit of the disbursement vouchers (D.V.) of the Bacolod City Government. Among the subjects thereof were the reimbursements of expenses of private respondent Luzviminda S. Valdez (Valdez), a former mayor of Bacolod City, particularly:

1. D.V. No. 6 dated January 8, 2004 amounting to ₱80,000.00;
2. D.V. No. 220 dated March 24, 2004 amounting to ₱68,000.00;
3. D.V. No. 278 dated April 13, 2004 amounting to ₱19,350.00; and
4. D.V. No. 325 dated April 30, 2004 amounting to ₱111,800.00 for Cash Slip No. 193402.[4]

Based on the verification conducted in the establishments that issued the official receipts, it was alleged that the cash slips were altered/falsified to enable Valdez to claim/receive reimbursement from the Government the total amount of ₱279,150.00 instead of only ₱4,843.25; thus, an aggregate overclaim of ₱274,306.75.

The Public Assistance and Corruption Prevention Office (PACPO), Office of the Ombudsman – Visayas received the joint affidavit, which was thereafter resolved adverse to Valdez.

Consequently, Valdez was charged with eight cases four of which (SB-14-CRM-0317 to 0320) were for Violation of Section 3 (e) of Republic Act No. 3019, while the remaining

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[2] *Id*. at 40.

[3] *Id*. at 41-43.

[4] *Id*. at 41.

half (SB-14-CRM-0321 to 0324) were for the complex crime of Malversation of Public Funds thru Falsification of Official/ Public Documents under Articles 217[5] and 171,[6] in relation to

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[5] Art. 217. *Malversation of Public Funds or Property; Presumption of Malversation.* – Any public officer who, by reason of the duties of his office, is accountable for public funds or property, shall appropriate the same or shall take or misappropriate or shall consent, through abandonment or negligence, shall permit any other person to take such public funds, or property, wholly or partially, or shall otherwise be guilty of the misappropriation or malversation of such funds or property, shall suffer:

1. The penalty of *prision correccional* in its medium and maximum periods, if the amount involved in the misappropriation or malversation does not exceed two hundred pesos.

2. The penalty of *prision mayor* in its minimum and medium periods, if the amount involved is more than two hundred pesos but does not exceed six thousand pesos.

3. The penalty of *prision mayor* in its maximum period to *reclusion temporal* in its minimum period, if the amount involved is more than six thousand pesos but is less than twelve thousand pesos.

4. The penalty of *reclusion temporal,* in its medium and maximum periods, if the amount involved is more than twelve thousand pesos but is less than twenty-two thousand pesos. If the amount exceeds the latter, the penalty shall be *reclusion temporal* in its maximum period to *reclusion perpetua.*

In all cases, persons guilty of malversation shall also suffer the penalty of perpetual special disqualification and a fine equal to the amount of the funds malversed or equal to the total value of the property embezzled.

The failure of a public officer to have duly forthcoming any public funds or property with which he is chargeable, upon demand by any duly authorized officer, shall be *prima facie* evidence that he has put such missing funds or property to personal use. (As amended by RA 1060)

[6] Art. 171. *Falsification by Public Officer, Employee or Notary or Ecclesiastic Minister.* – The penalty of *prision mayor* and a fine not to exceed ₱5,000 pesos shall be imposed upon any public officer, employee, or notary who, taking advantage of his official position, shall falsify a document by committing any of the following acts:

1. Counterfeiting or imitating any handwriting, signature or rubric;
2. Causing it to appear that persons have participated in any act or proceeding when they did not in fact so participate;
3. Attributing to persons who have participated in any act or proceeding statements other than those in fact made by them;

Article 48[7] of the Revised Penal Code (RPC). All the cases were raffled before public respondent.

Since the Ombudsman recommended "no bail" in SB-14-CRM-0321, 0322, and 0324, Valdez, who is still at-large, caused the filing of a Motion to Set Aside No Bail Recommendation and to Fix the Amount of Bail.[8] She argued that the three cases are bailable as a matter of right because no aggravating or modifying circumstance was alleged; the maximum of the indeterminate sentence shall be taken from the medium period that ranged from 18 years, 8 months and 1 day to 20 years; and applying Article 48 of the RPC, the imposable penalty is 20 years, which is the maximum of the medium period.

Petitioner countered in its Comment/Opposition[9] that the Indeterminate Sentence Law (ISL) is inapplicable as the attending circumstances are immaterial because the charge constituting the complex crime have the corresponding penalty of *reclusion perpetua*. Since the offense is punishable by *reclusion perpetua,*

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4. Making untruthful statements in a narration of facts;
5. Altering true dates;
6. Making any alteration or intercalation in a genuine document which changes its meaning;
7. Issuing in an authenticated form a document purporting to be a copy of an original document when no such original exists, or including in such a copy a statement contrary to, or different from, that of the genuine original; or
8. Intercalating any instrument or note relative to the issuance thereof in a protocol, registry, or official book.

The same penalty shall be imposed upon any ecclesiastical minister who shall commit any of the offenses enumerated in the preceding paragraphs of this article, with respect to any record or document of such character that its falsification may affect the civil status of persons.

[7] Art. 48. *Penalty for complex crimes.* – When a single act constitutes two or more grave or less grave felonies, or when an offense is a necessary means for committing the other, the penalty for the most serious crime shall be imposed, the same to be applied in its maximum period.

[8] *Rollo*, pp. 44-51.

[9] *Id*. at 52-56.

bail is discretionary. Instead of a motion to fix bail, a summary hearing to determine if the evidence of guilt is strong is, therefore, necessary conformably with Section 13, Article III of the 1987 Constitution and Section 4, Rule 114 of the Rules.

Due to the issuance and release of a warrant of arrest, Valdez subsequently filed an Urgent Supplemental Motion to the Motion to Set Aside No Bail Recommendation and to Fix the Amount of Bail with Additional Prayer to Recall/Lift Warrant of Arrest.[10] Petitioner filed a Comment/Opposition thereto.[11] Later, the parties filed their respective Memorandum of Authorities.[12]

As aforesaid, on October 10, 2014, public respondent granted the motions of Valdez. It recalled the arrest order issued in Criminal Case Nos. SB-14-CRM-0321, 0322 and 0324. In lieu thereof, a new arrest order was issued, fixing the bail for each offense charged in said cases in the amount of Two Hundred Thousand Pesos (₱200,000.00). Without filing a motion for reconsideration, petitioner elevated the matter before Us to resolve the lone issue of whether an accused indicted for the complex crime of Malversation of Public Funds thru Falsification of Official/Public Documents involving an amount that exceeds ₱22,000.00 is entitled to bail as a matter of right.

The Court shall first tackle Valdez's procedural objection. She avers that the petition must be dismissed outright on the ground that it was filed without first filing a motion for reconsideration before public respondent, and that, even if there are exceptions to the general rule, this case does not fall under any of them.

We disagree.

The general rule is that a motion for reconsideration is a condition *sine qua non* before a petition for *certiorari* may lie, its purpose being to grant an opportunity for the court *a quo*

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[10] *Id*. at 57-59.

[11] *Id*. at 60-63.

[12] *Id*. at 64-74.

to correct any error attributed to it by a re-examination of the legal and factual circumstances of the case.

However, the rule is not absolute and jurisprudence has laid down the following exceptions when the filing of a petition for *certiorari* is proper notwithstanding the failure to file a motion for reconsideration:

(a) where the order is a patent nullity, as where the court *a quo* has no jurisdiction;
(b) where the questions raised in the *certiorari* proceedings have been duly raised and passed upon by the lower court, or are the same as those raised and passed upon in the lower court;
(c) where there is an urgent necessity for the resolution of the question and any further delay would prejudice the interests of the Government or of the petitioner or the subject matter of the petition is perishable;
(d) where, under the circumstances, a motion for reconsideration would be useless;
(e) where petitioner was deprived of due process and there is extreme urgency for relief;
(f) where, in a criminal case, relief from an order of arrest is urgent and the granting of such relief by the trial court is improbable;
(g) where the proceedings in the lower court are a nullity for lack of due process;
(h) where the proceeding was *ex parte* or in which the petitioner had no opportunity to object; and,
(i) where the issue raised is one purely of law or public interest is involved.[13]

The issue being raised here is one purely of law and all the argument, *pros* and *cons* were already raised in and passed upon by public respondent; thus, filing a motion for reconsideration would be an exercise in futility. Likewise, as petitioner claims, the resolution of the question raised in this case is of urgent necessity considering its implications on similar cases filed and pending before the Sandiganbayan. As it appears, there have been conflicting views on the matter such that the different

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[13] *Republic v. Lazo,* G.R. No. 195594, September 29, 2014, 737 SCRA 1, 18-19.

divisions of the anti-graft court issue varying resolutions. Undeniably, the issue is of extreme importance affecting public interest. It involves not just the right of the State to prosecute criminal offenders but, more importantly, the constitutional right of the accused to bail.

Now, on the main issue:

The controversy is, in fact, not one of first impression. *Mañalac, Jr. v. People*[14] already resolved that an accused charged with Malversation of Public Funds thru Falsification of Official/ Public Documents where the amount involved exceeds ₱22,000.00 is not entitled to bail as a matter of right because it has an actual imposable penalty of *reclusion perpetua.*

In Mañalac, Jr., the defendants argued that they should be allowed to post bail since *reclusion perpetua* is not the prescribed penalty for the offense but merely describes the penalty actually imposed on account of the fraud involved. It was also posited that Article 48 of the RPC applies "only after the accused has been convicted in a full-blown trial such that the court is mandated to impose the penalty of the most serious crime," and that the reason for the imposition of the penalty of the most serious offense is "only for the purpose of determining the correct penalty upon the application of the Indeterminate Sentence Law." This Court, through the Third Division, however, denied the petition and resolved in the affirmative the issue of whether the constitutional right to bail of an accused is restricted in cases whose imposable penalty ranges from *reclusion temporal* maximum to *reclusion perpetua*. Citing *People v. Pantaleon, Jr., et al.,*[15] in relation to Section 13, Article III of the Constitution and Section 7, Rule 114 of the Rules, it was held that Manalac, Jr. is not entitled to bail as a matter of right since he is charged with a crime whose penalty is *reclusion perpetua*.

To recall, the amounts involved in *Pantaleon, Jr.* were manifestly in excess of ₱22,000.00. We opined that the

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[14] G.R. Nos. 206194-206207, July 3, 2013, Third Division Resolution.

[15] 600 Phil. 186 (2009).

Sandiganbayan correctly imposed the penalty of *reclusion perpetua* and that the ISL is inapplicable since it is an indivisible penalty. The Court's pronouncement is consistent with the earlier cases of *People v. Conwi, Jr.*,[16] *People v. Enfermo*,[17] and *People v. Pajaro, et al.*[18] as well as with the fairly recent case of *Zafra v. People*.[19]

The rulings in *Pantaleon, Jr.* and analogous cases are in keeping with the provisions of the RPC. Specifically, Article 48 of which states that in complex crimes, "the penalty for the most serious crime shall be imposed, the same to be applied in its maximum period." Thus, in Malversation of Public Funds thru Falsification of Official/Public Documents, the prescribed penalties for malversation and falsification should be taken into account. Under the RPC, the penalty for malversation of public funds or property if the amount involved exceeds ₱22,000.00 shall be *reclusion temporal* in its maximum period to *reclusion perpetua*, aside from perpetual special disqualification and a fine equal to the amount of the funds malversed or equal to the total value of the property embezzled.[20] On the other hand, the penalty of *prision mayor* and a fine not to exceed ₱5,000.00 shall be imposed for falsification committed by a public officer.[21] Considering that malversation is the more serious offense, the ***imposable*** penalty for Malversation of Public Funds thru Falsification of Official/Public Documents if the amount involved exceeds ₱22,000.00 is *reclusion perpetua*, it being the maximum period of the ***prescribed*** penalty of "*reclusion temporal* in its maximum period to *reclusion perpetua*."

For purposes of bail application, however, the ruling in *Mañalac, Jr.* should be revisited on the ground that *Pantaleon,*

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[16] 223 Phil. 23 (1985).

[17] 513 Phil. 1 (2005).

[18] 577 Phil. 441 (2008).

[19] G.R. No. 176317, July 23, 2014, 730 SCRA 438.

[20] REVISED PENAL CODE, Art. 217.

[21] REVISED PENAL CODE, Art. 171.

Jr. (as well as *Conwi, Jr.*, *Enfermo*, *Pajaro, et al.*, and *Zafra*) was disposed in the context of a judgment of conviction rendered by the lower court and affirmed on appeal by this Court. As will be shown below, the appropriate rule is to grant bail as a matter of right to an accused who is charged with a complex crime of Malversation of Public Funds thru Falsification of Official/Public Documents involving an amount that exceeds ₱22,000.00.

Section 13, Article III of the 1987 Constitution states:

> SECTION 13. All persons, except those charged with offenses ***punishable*** by *reclusion perpetua* when evidence of guilt is strong, shall, before conviction, be bailable by sufficient sureties, or be released on recognizance as may be provided by law. The right to bail shall not be impaired even when the privilege of the writ of *habeas corpus* is suspended. Excessive bail shall not be required.[22]

Pursuant thereto, Sections 4 and 7, Rule 114 of the Revised Rules of Criminal Procedure provide:

> **SEC. 4.** ***Bail, a matter of right; exception***. **–** All persons in custody shall be admitted to bail as a matter of right, with sufficient sureties, or released on recognizance as prescribed by law or this Rule (a) before or after conviction by the Metropolitan Trial Court, Municipal Trial Court, Municipal Trial Court in Cities, or Municipal Circuit Trial Court, and (b) before conviction by the Regional Trial Court of an offense not ***punishable*** by death, *reclusion perpetua,* or life imprisonment. (4a)
>
> **SEC. 7**. ***Capital offense of an offense punishable by reclusion perpetua or life imprisonment, not bailable.*** **–** No person charged with a capital offense, or an offense ***punishable*** by *reclusion perpetua* or life imprisonment, shall be admitted to bail when evidence of guilt is strong, regardless of the stage of the criminal prosecution. (7a)[23]

The pivotal question is: How should We construe the term *"punishable"* under the provisions above-quoted?

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[22] Emphasis supplied.

[23] Emphasis supplied.

In Our mind, the term *"punishable"* should refer to ***prescribed***, not ***imposable***, penalty. *People v. Temporada*,[24] which was even cited by petitioner, perceptibly distinguished these two concepts:

> The RPC provides for an initial penalty as a general prescription for the felonies defined therein which consists of a range of period of time. This is what is referred to as the "**prescribed penalty**." For instance, under Article 249 of the RPC, the prescribed penalty for homicide is *reclusión temporal* which ranges from 12 years and 1 day to 20 years of imprisonment. Further, the Code provides for attending or modifying circumstances which when present in the commission of a felony affects the computation of the penalty to be imposed on a convict. This penalty, as thus modified, is referred to as the "**imposable penalty**." In the case of homicide which is committed with one ordinary aggravating circumstance and no mitigating circumstances, the imposable penalty under the RPC shall be the prescribed penalty in its maximum period. From this imposable penalty, the court chooses a single fixed penalty (also called a straight penalty) which is the "**penalty actually imposed**" on a convict, *i.e.*, the prison term he has to serve.[25]

Petitioner contends that the ***imposable*** penalty is the one provided by the RPC before conviction to determine whether the charge is bailable or not, while the ***penalty actually imposed*** pertains to the prison sentence upon conviction.[26] Hence, it is maintained that the penalty imposable for the offense charged against private respondent is *reclusion perpetua*, which makes Criminal Case Nos. SB-14-CRM-0321, 0322 and 0324 non-bailable.

The argument is erroneous.

Following *Temporada*, for the complex crime of Malversation of Public Funds thru Falsification of Official/Public Documents involving an amount that exceeds ₱22,000.00, the **"prescribed penalty"** is *reclusion temporal* in its maximum period to *reclusion*

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[24] 594 Phil. 680, 717-718 (2008).

[25] *Id*.

[26] *Rollo*, p. 19.

perpetua. After trial, should the commission of such crime be proven by the prosecution beyond reasonable doubt, the **"imposable penalty"** is *reclusion perpetua* in view of the RPC mandate that the prescribed penalty of *reclusion temporal* maximum to *reclusion perpetua* shall be applied in its maximum.[27] The falsification, which is the means used to commit the crime of malversation, is in the nature of a generic aggravating circumstance that effectively directs the imposition of the prescribed penalty in its maximum period.[28] The phrases *"shall be applied"* and *"shall impose*," found in Articles 63 and 64, respectively, of the RPC, are of similar import as the phrase *"shall be imposed"* found in Article 48. Both Articles 63 and 64 refer to the penalty to be imposed after considering the aggravating or mitigating circumstance/s. Finally, the **"penalty actually imposed"** is still *reclusion perpetua*, considering that the ISL finds no application as the penalty is indivisible.[29]

The October 10, 2014 Resolution of public respondent is spot on had it not confused ***imposable*** penalty with ***prescribed*** penalty. Nonetheless, reading through the text of the assailed Resolution reveals that the anti-graft court actually meant ***prescribed*** penalty whenever it referred to ***imposable*** penalty. Therefore, in essence, the ruling is correct. Respondent court held:

> If the complex crime of Malversation thru Falsification be imposed in its maximum period, there is no doubt that, *in case of conviction*, the penalty to be imposed is *reclusion perpetua*. The cases, however, are still at their inception. Criminal proceedings are yet to ensue. This is not the proper time, therefore, to call for the application of

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[27] The duration of *reclusion temporal* in its maximum period to *reclusion perpetua* is 17 years, 4 months and 1 day to *reclusion perpetua*: The minimum period is 17 years, 4 months and 1 day to 18 years and 8 months; the medium period is 18 years, 8 months and 1 day to 20 years; and the maximum period is *reclusion perpetua*. (See *Zafra v. People*, *supra* note 19, at 456).

[28] See REVISED PENAL CODE, Art. 64 (3).

[29] The ISL is not applicable since the proper imposable penalty to be imposed upon the accused is already *reclusion perpetua*. (See *Zafra v. People*, *supra* note 19, at 458).

the penalty contemplated under Article 48 by imposing the same in its maximum period.

For purposes of determining whether a person can be admitted to bail as a matter of right, it is the **imposable penalty** prescribed by law for the crime charged which should be considered and, not the penalty to be actually imposed. Illustrative cases such as *Catiis v. Court of Appeals, et al.* and *People v. Hu Ruey Chun* evidently confirm this to be so.

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In both cases, therefore, it is the ***penalty imposable*** for the offense charged that was considered for purposes of bail.

A circumspect reading of substantive law validates this view.

Section 13, Article III of the Constitution provides that:

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On the other hand, Section 4, Rule 114 of the Revised Rules of Court, as amended, provides:

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Notably, the word used is [*"punishable,"*] which practically bears the same meaning as *"imposable."* It is only logical that the reference has a direct correlation with the time frame *"before conviction"* since trial is yet to begin; hence, it can only be the penalty imposable of the offense charged that can be considered for purposes of bail.

In these cases, the offenses charged are the complex crimes of Malversation of Public Funds thru Falsification of Official/Public Documents. In determining the penalty imposable, it is the penalty for the most serious crime which is considered. Between Malversation and Falsification, it is Malversation which provides the graver penalty. As thus provided under Article 217 of the Revised Penal Code, *"[i]f the amount exceeds the latter, the penalty shall be reclusion temporal in its maximum period to reclusion perpetua."*

The penalty, however, cannot be immediately applied in its maximum period, or *reclusion perpetua*, since this will already consider the application of the penalty in the event of a conviction.

A clear perusal of Article 48 of the Revised Penal Code states:

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The word used is *"imposed,"* not *imposable*. Thus, the reference can only point to the time when a judgment of conviction is impending. If and when *"the penalty for the most serious crime shall be* ***imposed****, the same to be applied in its maximum period,"* is thus applied in the proper application of the penalty to be imposed on the accused. Certainly, this cannot be considered for purposes of bail.[30]

Indeed, the trial is yet to proceed and the prosecution must still prove the guilt of the accused beyond reasonable doubt. It is not amiss to point that in charging a complex crime, the information should allege each element of the complex offense with the same precision as if the two (2) constituent offenses were the subject of separate prosecutions.[31] Where a complex crime is charged and the evidence fails to support the charge as to one of the component offenses, the defendant can be convicted of the offense proven.[32]

At this point, there is no certainty that Valdez would be found guilty of Malversation of Public Funds thru Falsification of Official/Public Documents involving an amount that exceeds ₱22,000.00. Falsification, like an aggravating circumstance, must be alleged and proved during the trial. For purposes of bail proceedings, it would be premature to rule that the supposed crime committed is a complex crime since it is only when the trial has terminated that falsification could be appreciated as a means of committing malversation. Further, it is possible that only the elements of one of the constituent offenses, *i.e.,* either malversation or falsification, or worse, none of them, would be proven after full-blown trial.

It would be the height of absurdity to deny Valdez the right to bail and grant her the same only after trial if it turns out that there is no complex crime committed. Likewise, it is unjust for Us to give a stamp of approval in depriving the accused person's

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[30] *Rollo*, pp. 34-37.

[31] See *People v. Bulalayao*, G.R. No. 103497, February 23, 1994, 230 SCRA 232, 240.

[32] *People v. Bulalayao*, *supra*.

constitutional right to bail for allegedly committing a complex crime that is not even considered as inherently grievous, odious and hateful. To note, Article 48 of the RPC on complex crimes does not change the nature of the constituent offenses; it only requires the imposition of the maximum period of the penalty prescribed by law. When committed through falsification of official/public documents, the RPC does not intend to classify malversation as a capital offense. Otherwise, the complex crime of Malversation of Public Funds thru Falsification of Official/ Public Documents involving an amount that exceeds ₱22,000.00 should have been expressly included in Republic Act No. 7659.[33] If truly a non-bailable offense, the law should have already considered it as a special complex crime like robbery with rape, robbery with homicide, rape with homicide, and kidnapping with murder or homicide, which have prescribed penalty of *reclusion perpetua*.

Just to stress, the inequity of denying bail as a matter of right to an accused charged with Malversation of Public Funds thru Falsification of Official/Public Documents involving an amount that exceeds ₱22,000.00 is palpable when compared with an accused indicted for plunder, which is a heinous crime punishable under R.A. No. 7080,[34] as amended by R.A. No. 7659[35] and R.A. No. 9346.[36] Observe that bail is not a matter of right in plunder committed through malversation of public funds, but the aggregate amount or total value of ill-gotten wealth

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[33] AN ACT TO IMPOSE THE DEATH PENALTY ON CERTAIN HEINOUS CRIMES, AMENDING FOR THAT PURPOSE THE REVISED PENAL CODE, AS AMENDED, OTHER SPECIAL PENAL LAWS, AND FOR OTHER PURPOSES, dated December 13, 1993.

[34] AN ACT DEFINING AND PENALIZING THE CRIME OF PLUNDER, dated July 12, 1991.

[35] ACT TO IMPOSE THE DEATH PENALTY ON CERTAIN HEINOUS CRIMES, AMENDING FOR THAT PURPOSE THE REVISED PENAL CODE, AS AMENDED, OTHER SPECIAL PENAL LAWS, AND FOR OTHER PURPOSES, dated December 13, 1993.

[36] AN ACT PROHIBITING THE IMPOSITION OF DEATH PENALTY IN THE PHILIPPINES, dated June 24, 2006.

amassed, accumulated or acquired must be at least Fifty Million Pesos (₱50,000,000.00). In contrast, an accused who is alleged to have committed malversation of public funds thru falsification of official/public documents, which is not a capital offense, is no longer entitled to bail as a matter of right if the amount exceeds ₱22,000.00, or as low as ₱22,000.01. Such distinction is glaringly unfair and could not have been contemplated by the law.

The foregoing interpretation is more favorable to Valdez as an accused following the rule of lenity:

> Intimately related to the *in dubio pro reo* principle is the rule of lenity. The rule applies when the court is faced with two possible interpretations of a penal statute, one that is prejudicial to the accused and another that is favorable to him. The rule calls for the adoption of an interpretation which is more lenient to the accused.[37]

The time-honored principle is that penal statutes are construed strictly against the State and liberally in favor of the accused.[38] When there is doubt on the interpretation of criminal laws, all must be resolved in favor of the accused.[39] Since penal laws should not be applied mechanically, the Court must determine whether their application is consistent with the purpose and reason of the law.[40]

For having ruled that an accused charged with the complex crime of Malversation of Public Funds thru Falsification of Official/Public Documents that involves an amount in excess of ₱22,000.00 is entitled to bail as a matter of right, a summary

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[37] *Intestate Estate of Manolita Gonzales Vda. de Carungcong v. People*, *et al.*, 626 Phil. 177, 200 (2010).

[38] *Tan v. Philippine Commercial International Bank*, 575 Phil. 485, 497 (2008); *People v. Temporada, supra* note 24, at 735; *Maj. Gen. Garcia (Ret.) v. The Executive Secretary, et al.*, 692 Phil. 114, 142 (2012); and *Renato M. David v. Editha A. Agbay*, G.R. No. 199113, March 18, 2015.

[39] *Villareal v. People*, 680 Phil. 527, 600 (2012).

[40] *Tan v. Philippine Commercial International Bank, supra* note 38, at 497.

hearing on bail application is, therefore, unnecessary. Consistent with *Miranda v. Tuliao,*[41] an affirmative relief may be obtained from the court despite the accused being still at-large. Except in petition for bail, custody of the law is not required for the adjudication of reliefs sought by the defendant (such as a motion to set aside no bail recommendation and to fix the amount of bail in this case) where the mere application therefor constitutes a waiver of the defense of lack of jurisdiction over the person of the accused.[42]

WHEREFORE, premises considered, the petition is **DENIED** for lack of merit. Private respondent Luzviminda S. Valdez is entitled to bail, as a matter of right, in Criminal Case Nos. SB-14-CRM-0321, 0322 and 0324. Public respondent Sandiganbayan Fifth Division should be guided by the latest Bailbond Guide. In any case, the amount should correspond to the medium penalty multiplied by Ten Thousand Pesos (₱10,000.00) for every year of imprisonment.

SO ORDERED.

Carpio, Velasco, Jr., Leonardo-de Castro, Bersamin, del Castillo, Perez, Mendoza, Reyes, and *Jardeleza, JJ.,* concur.

Sereno, C.J., and *Perlas-Bernabe, J.*, join the dissent of *J.* Villarama, Jr.

Villarama, Jr. and *Leonen, JJ.,* see dissenting opinions.

Brion, J., on official leave.

DISSENTING OPINION

VILLARAMA, JR., *J.*:

Before us is a petition for certiorari under Rule 65 filed by the People of the Philippines, represented by the Office of the

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[41] 520 Phil. 907 (206).

[42] See *Renato M. David v. Editha A. Agbay,* G.R. No. 199113, March 18, 2015, citing *Miranda v. Tuliao*, 520 Phil. 907, 919 (2006).

Special Prosecutor, Office of the Ombudsman (OMB), assailing the Resolution[1] dated Octorber 10, 2014 of the Sandiganbayan's Fifth Division in Criminal Cae Nos. SB-14-CRM-0321, SB-14-CRM-0322 and SB-14-CRM-0324 entitled "*People of the Philippines, plaintiff, versus Luzviminda S. Valdez, accused*."

Respondent Luzviminda S. Valdez (Valdez) is a former Mayor of Bacolod City. During a post-audit of disbursement vouchers of the City Government of Bacolod, the Commission on Audit found that the Cask Slips used for the reimsbursement of expenses of Valdez under the Disbursement Voucher Nos. 6, 220, 278 and 325 totalling ₱279,150.00 were falsified and that the actual amount due to her was only ₱4,843.25.[2]

Subsequently, Valdez was indicted for three (3) counts of Malversation of Public Funds thru Falsification of Public Documents under Article 217, in relation to Article 171, paragraph 6, of the Revised Penal Code, as amended. An Order of Arrest was issued by the Sandiganbayan. However, Valdez remains at large and yet caused the filing of a Motion to Set Aside No Bail Recommendation and To Fix the Amount on Bail,[3] arguing that since there are no aggravating or mitigating circumstances alleged in the Informations, the maximum of the indeterminate sentence shall be taken from the medium period, or from 18 years, 8 months and 1 day to 20 years, an imposable penalty which is bailable. She further emphasized that it is oppressive especially for the woman accused, to be jailed at this stage while she is presumed innocent.

In its Comment/Opposition,[4] the Office of the Special Prosecutor argued that the Indeterminate Sentence Law cannot be invoked by Valdez because *reclusion perpetua* is an indivisible

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[1] *Rollo,* pp. 30-40. Penned by Associate Justice Ma. Theresa Dolores C. Gomez-Estoesta with Associate Justices Roland B. Jurado and Alexander G. Gesmundo concurring.

[2] *Id*. at 41-43.

[3] *Id*. at 44-51.

[4] *Id*. at 52-56.

penalty. It further asserted that since bail is discretionary in this case, the court cannot dispense with the requirement of a hearing.

Valdez also filed an Urgent Supplemental Motion[5] with the additional prayer for the recall/lifting of the warrants of arrest pending resolution of her motion to set aside the "No Bail" recommendation of the OMB and to fix the amount of bail.

On October 10, 2014, the Sandiganbayan issued the assailed Resolution granting Valdez's motion, as follows:

> WHEREFORE, the (1) *Motion to Set Aside No Bail Recommendation and to Fix the Amount of Bail* and the (ii) *Urgent Supplemental Motion to the Motion to Set Aside No Bail Recommendation and to Fix the Amount of Bail with Additional Prayer to Recall/Li[f]t Warrant of Arrest* filed by accused Luzvimi[n]da S. Valdez, are **GRANTED.**
>
> Let the Order of Arrest issued in Criminal Case Nos. SB-14-CRM-0321, 0322 and 0324 adopting the "no bail" recommendation of the Office of the Ombudsman be **RECALLED.** Instead, let an Order of arrest in said cases be issued anew, this time, fixing the bail for each offense charged in the amount of Two Hundred Thousand Pesos (₱200,00.00).
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> SO ORDERED.[6]

In ruling that Valdez is entitled to bail, the Sandiganbayan explained that in determining whether a person can be admitted to bail as a matter of right, it is the *imposable penalty* prescribed by law for the crime charged which should be considered and not the penalty to be actually imposed. Thus, it held that the penalty imposable for malversation cannot be immediately applied in its maximum period (*reclusion perpetua)* when the case is still at its inception since this will already consider the application of the penalty in the event of conviction.

Hence, this petition raising the sole issue of whether malversation thru falsification of public documents is a bailable offense.

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[5] *Id*. at 57-59.

[6] *Id*. at 40.

First, we address the procedural flaw pointed out by Valdez as to the failure of the Office of the Special Prosecutor to comply with the requirement of a motion for reconsideration prior to the filing of the present petition.

The well-established rule is that a motion for reconsideration is an indispensable condition before an aggrieved party can resort to the special civil action for certiorari under Rule 65 of the 1997 Rules of Civil Procedure, as amended.[7] However, the rule is not absolute and admits of exceptions entrenched in our jurispurdence:

> The general rule is that a motion for reconsideration is a condition *sine qua non* before a petition for *certiorari* may lie, its purpose being to grant an opportunity for the court *a quo* to correct any error attributed to it by re-examination of the legal and factual circumstances of the case. There are, however, recognized exceptions permitting a resort to the special civil action for *certiorari* without first filing a motion for reconsideration. In the case of *Domdom v. Sandiganbayan*, it was written:
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> > The rule is, however, circumscribed by well-defined exceptions, such as where the order is a patent nullity because the court *a quo* had no jurisdiction; **where the questions raised in the *certiorari* proceeding have been duly raised and passed upon by the lower court, or are the same as those raised and passed upon in the lower court**; where there is an urgent necessity for the resolution of the question, and any further delay would prejudice the interests of the Government or of the petitioner, or the subject mater of the action is perishable; where, under the circumstances, a motion for reconsideration would be useless; where the petitioner was deprived of due process and there is extreme urgency of relief; where, in a criminal case, relief from an order of arrest is urgent and the grant of such relief by the trial court is improbable; where the proceedings in the lower court are a nullity for lack of due process; where the proceedings were *ex parte* or in which the petitoner had no opportunity to object; and **where the issue**

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[7] *Republic of the Philippines v. Pantranco North Express, Inc.,* 682 Phil. 186, 193 (2012), citing *Ag v. Mejia,* 555 Phil. 348, 353 (2007).

raised is one purely of law or where public interest is involved.
x x x[8] (Emphasis supplied; emphasis in the orginal omitted)

Here, we recognize the presence of two exceptions, as underscored above. Records confirm that the Sandiganbayan has categorically ruled that Valdez is entitled to bail as a matter of right and forthwith recalled the order of arrest it had issued. Also, the petition undeniably raised a lone question of law: whether an accused charged with malversation thru falsification of public documents may apply for bail. Petitioner is thus allowed by the Rules to file the present certiorari petition even if it had not first moved for reconsideration of the assailed resolution.

The Sandiganbayan set aside the "No Bail" recommendation under the informations filed by the OMB based on its own interpretation of Article 48 that the "maximum period" of the most serious crime, which is *reclusion perpetua* for the more serious charge of Malversation, cannot be considered for purpose of bail because the law speaks of "penalty imposable" and not penalty actually imposed. Acknowledging a contrary position to the 2000 Bail Bond Guide issued by the Department of Justice where no bail is indicated for the complex crime of Malversation thru Falsification of Public Documents when the amount malversed is ₱22,000.00 or higher as alleged in the informations, the Sandiganbayan opined that this interpretation is more favorable to the accused.

We disagree.

Section 13, paragraph 4, Article III of the 1987 Constitution provides that all persons, except those charged with offenses **punishable** by *reclusion perpetua* when evidence of guilt is strong, shall, before conviction, be bailable by sufficient sureties, or be released from recognizance as may be provided by law. Likewise, Rule 114, Section 7 of the Revised Rules of Criminal Procedure, as amended, provides that no person charged with

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[8] *Pineda v. Court of Appeals (Former Ninth Division),* G.R. No. 181643, November 17, 2010, 635 SCRA 274, 281-282, cited in *Medado v. Heirs of the Late Antonio Consing,* 681 Phil. 536, 548-549 (2012).

a capital offense or an offense punishable by *reclusion perpetua* or life imprisonment when evidence of guilt is strong shall be admitted to bail regardless of the stage of the prosecution.

We find no legal basis for making a distinction between imposable or prescribed penalty and penalty actually imposed and concluding that the maximum period mentioned in Article 48 cannot be considered for bail purposes before conviction. The term "punishable" in the Constitution and the Rules clearly refers only to the prescribed penalty. *Ubi lex non distinguit nec nos distinguire debemus.* When the law does not distinguish, we must not distinguish.[9] Further, it is a cardinal rule in statutory construction that when the law is clear and free from any doubt or ambiguity, there is no room for construction or interpretation. There is only room for application.[10]

The question of actual imposable penalty of malversation thru falsification of public documents has been settled by this Court in *People v. Pantaleon, Jr.,*[11] where we ruled:

> Article 217, paragraph 4 of the Revised Penal Code imposes the penalty of *reclusion temporal* in its maximum period to *reclusion perpetua* when the amount malversed is greater than ₱22,000.00. This Article also imposes the penalty of perpetual special disqualification and a fine equal to the amount of the funds malversed or equal to the total value of the property embezzled. Falsification by a public officer or employee under Article 171, on the other hand, is punished by *prision mayor* and a fine not to exceed ₱5,000.00.
>
> Since appellant committed a complex crime, the penalty for the most serious crime shall be imposed in its maximum period, pursuant to Article 48 of the Revised Penal Code. This provision states:
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> ART. 48. *Penalty for complex crimes.*— When a single act constitutes two or more grave or less grave felonies, or when

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[9] *Amores v. House of Representatives Electoral Tribunal,* 636 Phil. 600, 609 (2010).

[10] *Id*. at 608, citing *Twin Ace Holdings Corporation v. Rufina and Company,* 523 Phil. 766, 777 (2006).

[11] 600 Phil. 186 (2009). See also *Manalac, Jr. v. People of the Philippines,* G.R. Nos. 206194-206207, July 3, 2013 (Unsigned Resolution).

an offense is a necessary means for committing the other, the penalty for the most serious crime shall be imposed, the same to be applied in its maximum period.

The Sandiganbayan, therefore, correctly imposed on the appellants the penalties of ***reclusion perpetua*** and **perpetual special disqualification** for each count of malversation of public funds through falsification of public documents, and the **payment of fines** of ₱166,242.72, ₱154,634.27, and ₱90,464.21, respectively, representing the amounts malversed. **The Indeterminate Sentence Law finds no application since *reclusion perpetua* is an indivisible penalty to which the Indeterminate Sentence Law does not apply.**[12] (Additional emphasis supplied)

In the light of all the foregoing, we hold that Valdez is not entitled to bail as a matter of right since she is charged with a crime whose penalty is *reclusion perpetua.* The DOJ's 2000 Bail Bond Guide likewise sets no bail for the said offense where the amount involved exceeds ₱22,000.00. While not controlling, in view of the constitutional prohibition against excessive bail, the said guidelines should have been considered by the Sandiganbayan.[13]

The Sandiganbayan thus gravely erred in setting aside the "No Bail" recommendation of the Special Prosecutor and fixing the amount of bail as prayed for by Valdez. It is settled that the grant of bail to an accused charged with an offense that carries with it the penalty of *reclusion perpetua* is discretionary on the part of the trial court, *i.e.,* accused is still entitled to bail but no longer as a matter of right.[14] Indeed, the determination of whether or not the evidence of guilt is strong is a matter of judicial discretion. This discretion, by the nature of things, may rightly be exercised only after the evidence is submitted to the court at the hearing.[15] The Prosecution must be given a chance to show strength of its evidence; otherwise, a violation of due

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[12] *Id.* at 228.

[13] See A.M. No. 12-11-2-SC promulgated on March 18, 2014.

[14] *Andres v. Beltran,* 415 Phil. 598, 603 (2001).

[15] *Ocampo v. Bernabe,* 77 Phil. 55, 58 (1946).

process occurs.[16] As the rule now stands, a hearing upon notice is mandatory before the grant of bail, whether bail is a matter of right or discretion.[17]

I therefore **VOTE**:

1. To **GRANT** the petition; and

2. To **ANNUL and SET ASIDE** the Resolution dated October 10, 2014 of the Sandiganbayan's Fifth Division in Criminal Case Nos. SB-14- CRM-0321, SB-14-CRM-0322 and SB-14-CRM-0324.

DISSENTING OPINION

LEONEN, *J.*:

I concur with the opinion of Justice Martin S. Villarama, Jr. and, in addition to the points raised, add a few more of my own.

I

Respondent Luzviminda S. Valdez was charged with four (4) counts of Malversation of Public Funds through Falsification of Public Documents.[1] Malversation of Public Funds is punished under Article 217[2] of the Revised Penal Code while Falsification

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[16] *Gacal v. Infante,* 674 Phil. 324, 340 (2011).

[17] *Id*. at 338.

[1] *Ponencia*, p. 2.

[2] REV. PEN. CODE, Art. 217, as amended by Rep. Act No. 1060 (1954), Sec. 1, provides:

> ARTICLE 217. Malversation of Public Funds or Property — Presumption of Malversation. — Any public officer who, by reason of the duties of his office, is accountable for public funds or property, shall appropriate the same, or shall take or misappropriate or shall consent, or through abandonment or negligence, shall permit any other person to take such public funds or property, wholly or partially, or shall otherwise be guilty of the misappropriation or malversation of such funds or property, shall suffer:
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> . . . .

of Public Documents is punished under Article 171[3] of the Revised Penal Code. The penalty for falsification under the law is *prision mayor* and a fine not to exceed ₱5,000. Since the amount allegedly malversed exceeds ₱22,000.00,[4] the appropriate penalty under the law for malversation is *reclusion temporal* in its maximum period to *reclusion perpetua.*

Malversation of Public Funds through Falsification of Public Documents, however, is considered an ordinary complex crime under Article 48 of the Revised Penal Code.[5] Article 48 states:

ARTICLE 48. Penalty for Complex Crimes. — When a single act constitutes two or more crimes, or when an offense is a necessary means for committing the other, the penalty for the most serious crime shall be imposed, the same to be applied in its maximum period.

Justice Villarama is of the opinion that the crime is bailable as a matter of discretion, considering that Article 48 raises the imposable penalty to that of the most serious crime in its maximum period.[6] The ponencia, however, disagrees and argues that Article 48 states the penalty *to be actually imposed*, or the penalty after a trial on the merits is conducted.[7] In the ponente's view, the crime should be bailable as a matter of right.[8]

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4. The penalty of *reclusion temporal* in its medium and maximum periods, if the amount involved is more than 12,000 pesos but is less than 22,000 pesos. If the amount exceeds the latter, the penalty shall be *reclusion temporal* in its maximum period to *reclusion perpetua*.

[3] REV. PEN. CODE, Art. 171 provides:

ARTICLE 171. Falsification by Public Officer, Employee or Notary or Ecclesiastic Minister. — The penalty of *prision mayor* and a fine not to exceed 5,000 pesos shall be imposed upon any public officer, employee, or notary who, taking advantage of his official position, shall falsify a document by committing any of the following acts:

. . . . . .

[4] *Ponencia*, p. 2. The amount allegedly malversed was ₱274,306.75.

[5] See *People v. Pantaleon, Jr., et al.,* 600 Phil. 186 (2009) [Per *J.* Brion, Second Division].

[6] *J.* Villarama, Jr., Dissenting Opinion on this case, p. 5.

[7] *Ponencia*, pp. 8-11.

[8] *Id.* at 10-11.

Respondent was charged with Malversation of Public Funds *through* Falsification of Public Documents, not Malversation of Public Funds *and* Falsification of Public Documents. While it is true that "the information should charge each element of the complex offense with the same precision as if the two (2) constituent offenses were the subject of separate prosecutions[,]"[9] the singularity of the criminal intent must be taken into account in order to determine its penalty. Respondent was charged with a single complex crime, not two separate crimes. The crime carries only *one* imposable penalty.

The determination of an accused's liability in a complex crime is not new. In *Intestate Estate of Manolita Gonzales Vda. De Carungcong v. People, et al.*,[10] this court has stated that the complex crime of Estafa through Falsification of Public Documents is treated as *one* crime subject to a single criminal liability:

> In considering whether the accused is liable for the complex crime of estafa through falsification of public documents, it would be wrong to consider the component crimes separately from each other. **While there may be two component crimes** (estafa and falsification of documents), both felonies are animated by and result from one and the same criminal intent for which **there is only one criminal liability**. That is the concept of a complex crime. In other words, while there are two crimes, **they are treated only as one, subject to a single criminal liability**.
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> As opposed to a simple crime where only one juridical right or interest is violated (*e.g.*, homicide which violates the right to life, theft which violates the right to property), a complex crime constitutes a violation of diverse juridical rights or interests by means of diverse acts, each of which is a simple crime in itself. Since only a single criminal intent underlies the diverse acts, however, the component crimes are considered as elements of a single crime, the complex crime. This is the correct interpretation of a complex crime as treated under Article 48 of the Revised Penal Code.

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[9] *People v. Bulalayao*, G.R. No. 103497, February 23, 1994, 230 SCRA 232, 240 [Per *J.* Padilla, Second Division]. This case was also cited in the *ponencia* (*Ponencia*, p. 10).

[10] 626 Phil. 177 (2010) [Per *J.* Corona, Third Division].

In the case of a complex crime, therefore, there is a formal (or ideal) plurality of crimes where the same criminal intent results in two or more component crimes constituting a complex crime for which there is only one criminal liability. (The complex crime of estafa through falsification of public document falls under this category.) This is different from a material (or real) plurality of crimes where different criminal intents result in two or more crimes, for each of which the accused incurs criminal liability. The latter category is covered neither by the concept of complex crimes nor by Article 48.

Under Article 48 of the Revised Penal Code, the formal plurality of crimes (*concursus delictuorum or concurso de delitos*) gives rise to a single criminal liability and requires the imposition of a single penalty:

> Although [a] complex crime quantitatively consists of two or more crimes, **it is only one crime in law** on which a single penalty is imposed and the two or more crimes constituting the same are more conveniently termed as component crimes.
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> x x x x x x x x x
>
> In [a] complex crime, although two or more crimes are actually committed, they constitute only one crime in the eyes of the law as well as in the conscience of the offender. The offender has only one criminal intent. Even in the case where an offense is a necessary means for committing the other, the evil intent of the offender is only one.

For this reason, while a conviction for estafa through falsification of public document requires that the elements of both estafa and falsification exist, it does not mean that the criminal liability for estafa may be determined and considered independently of that for falsification. **The two crimes of estafa and falsification of public documents are not separate crimes but component crimes of the single complex crime of estafa and falsification of public documents**.

Therefore, it would be incorrect to claim that, to be criminally liable for the complex crime of estafa through falsification of public document, the liability for estafa should be considered separately from the liability for falsification of public document. Such approach would disregard the nature of a complex crime and contradict the letter and spirit of Article 48 of the Revised Penal Code. It would

wrongly disregard the distinction between formal plurality and material plurality, as it improperly treats the plurality of crimes in the complex crime of estafa through falsification of public document as a mere material plurality where the felonies are considered as separate crimes to be punished individually.[11] (Emphasis in the original)

Thus, while a complex crime constitutes two or more offenses whose elements must be pleaded and proved, it is considered by law as a single crime committed through a single criminal intent and punishable by a single penalty. In determining whether a complex crime is bailable as a matter of right or of discretion, what is considered is not the penalties of the two or more separate offenses that compose the complex crime, but the single penalty imposed by law for the complex crime.

II

Our esteemed colleague Justice Diosdado M. Peralta now proposes that it is time to digress from settled canonical interpretations of the classification of the availability of bail for public officers charged with Malversation through Falsification. He now proposes that we change the long-standing interpretation of Article III, Section 13[12] of the Constitution in relation to Article 48 of the Revised Penal Code. I regret that I could not bring myself to agree with the proposed approach.

III

The ponencia starts with creating a distinction between the concept of "prescribed" and "imposable" penalty. In the ponente's

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[11] *Id.* at 206-208, citing FLORENZ REGALADO, CRIMINAL LAW CONSPECTUS 172, 176 (3rd ed., 2007), III RAMON AQUINO AND CAROLINA GRIÑO AQUINO, THE REVISED PENAL CODE 662 (1997), and LUIS B. REYES, REVISED PENAL CODE, Book I, 650 (15th ed. rev., 2001).

[12] CONST., Art. III, Sec. 13 provides:

SECTION 13. All persons, except those charged with offenses punishable by *reclusion perpetua* when evidence of guilt is strong, shall, before conviction, be bailable by sufficient sureties, or be released on recognizance as may be provided by law. The right to bail shall not be impaired even when the privilege of the writ of *habeas corpus* is suspended. Excessive bail shall not be required.

view, "prescribed" penalty is the penalty provided by law for the crime charged. The "imposable" penalty is the penalty that will be declared after trial.[13] *Prescribed penalty* refers to the crime as charged, the statute that punishes the offense, and the penalty in the statute. *Imposable penalty* considers in addition the totality of the evidence presented.

Prescribed penalty, not imposable penalty, is what is considered for bail.

To this extent, I agree with both Justice Villarama and the ponencia.

This is precisely what the Constitution provides. When the prescribed penalty is *reclusion perpetua*, bail is granted only after a showing that evidence of guilt is not strong.

Thus in Article III, Section 13 of the Constitution:

> SECTION 13. All persons, except those charged with offenses punishable by reclusion perpetua when evidence of guilt is strong, shall, before conviction, be bailable by sufficient sureties, or be released on recognizance as may be provided by law. The right to bail shall not be impaired even when the privilege of the writ of habeas corpus is suspended. Excessive bail shall not be required.

The purpose of bail is to ensure the accused's presence at trial.[14] The underlying theory of denying bail in capital offenses is not only to prevent the risk of flight by the accused, but also to protect the community from potential danger due to the heinousness of the crime charged and to avoid delays in the service of punishment.[15] Regardless of these presumptions, determination of bail by the sovereign has already been fixed by the text of the Constitution. It is conclusive on courts. It

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[13] *Ponencia*, pp. 8-11.

[14] See *Basco v. Judge Rapatalo,* 336 Phil. 214, 219 (1997) [Per *J.* Romero, Second Division], citing ROLANDO V. DEL CARMEN, CRIMINAL PROCEDURE, LAW AND PRACTICE 31 (3rd ed., 1995).

[15] See *Leviste v. Court of Appeals, et al.,* 629 Phil. 587, 594 (2010) [Per *J.* Corona, Third Division].

cannot be reconsidered. The test of the Constitution reduces judicial discretion to a single variable: whether the evidence of guilt is strong.

IV

The ponencia posits that the penalty for the complex crime of Malversation through Falsification is *reclusion temporal* in its maximum period to *reclusion perpetua*. It then concludes that because it starts with *reclusion temporal*, necessarily, bail automatically is a matter of right.[16]

This would have been accurate except that Article 48 is as much a part of the Revised Penal Code as any other provision. The better interpretative approach is to allow all provisions to work together. Parsing pieces of legislation while backgrounding relevant provisions invites too much judicial discretion at the cost of undermining the results of legitimate constitutional processes in our political departments.

Article 48 provides:

ARTICLE 48. Penalty for Complex Crimes. — When a single act constitutes two or more crimes, or when an offense is a necessary means for committing the other, the penalty for the most serious crime shall be imposed, the same to be applied in its maximum period.

There is no doubt as to the prescribed penalty. It is "the penalty for the most serious crime" and "the same to be applied in its maximum period."

What may understandably cause the apparent ambiguity is the phrase "shall be imposed" in this provision.

The ponencia interprets this to mean that the penalty mentioned in Article 48 is *post hoc,* i.e., after trial.[17] Justice Villarama reads this as *ex ante,* i.e., it is the penalty for the crime as charged.[18]

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[16] See *ponencia*, pp. 8-10.

[17] *Ponencia*, p. 10.

[18] *J. Villarama, Jr., Dissenting Opinion on this case, p. 5.*

The trial court, in determining whether a complex crime is bailable as a matter of right or a matter of discretion, examines the penalty to be imposed in the complex crime charged. The court does not have the luxury of deciding which among the two component crimes the accused would be most guilty of. It considers the complex crime as two separate component crimes punishable by a single penalty. Respondent was charged with one complex crime of Malversation of Public Funds through Falsification of Public Documents. It is illogical to determine bail on the basis only of the single simple crime of Malversation or on the single simple crime of Falsification.

Article 48 is not only the penal provision that provides the penalty that "shall be imposed." Several offenses containing this phrase are listed in the Revised Penal Code, among them being: Violation of Domicile, Inciting to Sedition, Falsification, Perjury, Grave Scandal, Indirect Bribery, Infanticide, and Estafa:

ARTICLE 128. Violation of Domicile. — The penalty of *prisión correccional* in its minimum period shall be imposed upon any public officer or employee who, not being authorized by judicial order, shall enter any dwelling against the will of the owner thereof, search papers or other effects found therein without the previous consent of such owner, or, having surreptitiously entered said dwelling, and being required to leave the premises, shall refuse to do so.

. . . . . .

ARTICLE 142. Inciting to Sedition. — The penalty of prisión correccional in its maximum period and a fine not exceeding 2,000 pesos shall be imposed upon any person who, without taking any direct part in the crime of sedition, should incite others to the accomplishment of any of the acts which constitute sedition, by means of speeches, proclamations, writings, emblems, cartoons, banners, or other representations tending to the same end.

. . . . . .

ARTICLE 171. Falsification by Public Officer, Employee or Notary or Ecclesiastic Minister. — The penalty of prisión mayor and a fine not to exceed 5,000 pesos shall be imposed upon any public officer, employee, or notary who, taking advantage of his official position, shall falsify a document by committing any of the following acts:

. . . . . .

ARTICLE 183. False Testimony in Other Cases and Perjury in Solemn Affirmation. — The penalty of arresto mayor in its maximum period to prisión correccional in its minimum period shall be imposed upon any person who, knowingly making untruthful statements and not being included in the provisions of the next preceding articles, shall testify under oath, or make an affidavit, upon any material matter before a competent person authorized to administer an oath in cases in which the law so requires.

Any person who, in case of a solemn affirmation made in lieu of an oath, shall commit any of the falsehoods mentioned in this and the three preceding articles of this section, shall suffer the respective penalties provided therein.

. . . . . .

ARTICLE 200. Grave Scandal. — The penalties of arresto mayor and public censure shall be imposed upon any person who shall offend against decency or good customs by any highly scandalous conduct not expressly falling within any other article of this Code.

. . . . . .

ARTICLE 211. Indirect Bribery. — The penalties of arresto mayor, suspension in its minimum and medium periods, and public censure shall be imposed upon any public officer who shall accept gifts offered to him by reason of his office.

. . . . . .

ARTICLE 255. Infanticide. — The penalty provided for parricide in Article 246 and for murder in Article 248 shall be imposed upon any person who shall kill any child less than three days of age.

. . . . . .

ARTICLE 315. Swindling (Estafa). — Any person who shall defraud another by any of the means mentioned herein below shall be punished by:

1st. The penalty of prisión correccional in its maximum period to prisión mayor in its minimum period, if the amount of the fraud is over 12,000 pesos but does not exceed 22,000 pesos, and if such amount exceeds the latter sum, the penalty provided in this paragraph shall be imposed in its maximum period, adding one year for each

additional 10,000 pesos; but the total penalty which may be imposed shall not exceed twenty years. In such cases, and in connection with the accessory penalties which may be imposed and for the purpose of the other provisions of this Code, the penalty shall be termed prisión mayor or reclusión temporal, as the case may be.

Even if these offenses state the penalty that "shall be imposed," there is no confusion as to what the prescribed penalties of these offenses are: the prescribed penalty is what is stated in the law.

Bail under the Constitution considers the offense *charged in the information*, not the offense of which the accused will eventually be convicted. "Punishable" within the context of the Constitution means the penalty prescribed by law for the offense charged. When an accused is charged with a complex crime, the penalty is what is stated in the Revised Penal Code or in special penal laws *in relation* to Article 48 of the Revised Penal Code. A complex crime is a single offense comprised of two or more offenses but with a *single* penalty. While the prosecution must prove all the elements charged, it must only prove a single criminal intent. The splitting of the penalties according to its separate component crimes undermines the singularity of the criminal intent, which makes it a complex crime.

V

Finally, we must remember that there are two (2) aspects in criminal trial. First, there is the determination by the judge as to whether all the elements of the offense as well as the accused's alleged participation can be inferred or proven beyond reasonable doubt by the admissible evidence presented. This is the objective part of trial. Thereafter, and second, the judge determines the proper penalty from a range provided by law. This sentencing part involves a higher degree of discretion. The first part looks at the acts. The second looks at the offender and his or her circumstances.

The only allowable range for Malversation through Falsification as charged in the Information is *reclusion perpetua.*

There is nothing inequitable in considering Malversation through Falsification of Public Documents of public funds exceeding ₱22,000.00 as an offense bailable only as a matter of discretion.

Malversation of Public Funds, by itself, may be bailable as a matter of right since the prescribed penalty under the law is *reclusion temporal* in its maximum period to *reclusion perpetua.* However, the law raises the prescribed penalty to that of the more serious crime in its maximum period if it is committed through Falsification. The conversion of the offense to a complex crime serves to underscore the gravity of the offense.

Like Plunder under Republic Act No. 7080[19] and Graft and Corruption under Republic Act No. 3019,[20] it is generally committed by public officers.[21] "Public office is a public trust."[22] Public officers are sworn to perform their duties with the highest fidelity. Malversation through Falsification, therefore, is a crime at par with Plunder and Graft and Corruption since it involves a public officer's betrayal of public trust. As an offense considered a violation of a constitutionally enshrined policy, it should be imposable with the highest penalty provided by law.

ACCORDINGLY, I join the opinion of Justice Martin S. Villarama, Jr. and vote to **GRANT** the Petition.

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[19] An Act Defining and Penalizing the Crime of Plunder, July 12, 1991.

[20] Anti-Graft and Corrupt Practices Act, August 17, 1960.

[21] See *People v. Pajaro, et al.,* 577 Phil. 441, 453-454 (2008) [Per *J.* Ynares-Santiago, Third Division].

Malversation may be committed by private individuals if the private individual conspires with a public officer to commit the crime.

[22] CONST., Art. XI, Sec. 1.

EN BANC

[G.R. No. 218787. December 8, 2015]

LEO Y. QUERUBIN, MARIA CORAZON M. AKOL, and AUGUSTO C. LAGMAN, *petitioners, vs.* **COMMISSION ON ELECTIONS EN BANC, represented by Chairperson J. ANDRES D. BAUTISTA, and JOINT VENTURE OF SMARTMATIC-TIM CORPORATION, TOTAL INFORMATION MANAGEMENT CORPORATION, SMARTMATIC INTERNATIONAL HOLDING B.V. and JARLTECH INTERNATIONAL CORPORATION, represented by partner with biggest equity share, SMARTMATIC-TIM CORPORATION, its general manager ALASTAIR JOSEPH JAMES WELLS, Smartmatic Chairman LORD MALLOCH-BROWN, Smartmatic-Asia Pacific President CESAR FLORES, and any or all persons acting for and on behalf of the Joint Venture,** *respondents.*

SYLLABUS

1. REMEDIAL LAW; SPECIAL CIVIL ACTIONS; RULE 64 OF THE RULES OF COURT IS NOT THE PROPER REMEDY TO ASSAIL THE COMELEC'S DECISION IN THE EXERCISE OF ITS ADMINISTRATIVE POWERS.— The rule cited by petitioners is an application of the constitutional mandate requiring that, unless otherwise provided by law, the rulings of the constitutional commissions shall be subject to review only by the Supreme Court on certiorari. A reproduction of Article IX-A, Section 7 of the 1987 Constitution is in order: Section 7. Each Commission shall decide by a majority vote of all its Members, any case or matter brought before it within sixty days from the date of its submission for decision or resolution. A case or matter is deemed submitted for decision or resolution upon the filing of the last pleading, brief, or memorandum required by the rules of the Commission or by the Commission itself. **Unless otherwise provided by this Constitution or by law, any decision, order, or ruling of each Commission may be brought to the Supreme Court**

on *certiorari* by the aggrieved party within thirty days from receipt of a copy thereof. Though the provision appears unambiguous and unequivocal, the Court has consistently held that the phrase "decision, order, or ruling" of constitutional commissions, the COMELEC included, that may be brought directly to the Supreme Court on certiorari is not all-encompassing, and that it only relates to those rendered in the commissions' exercise of **adjudicatory or quasi-judicial powers**. In the case of the COMELEC, this would limit the provision's coverage to the decisions, orders, or rulings issued pursuant to its authority to be the sole judge of generally all controversies and contests relating to the elections, returns, and qualifications of elective offices. Consequently, Rule 64, which complemented the procedural requirement under Article IX-A, Section 7, should likewise be read in the same sense––that of excluding from its coverage decisions, rulings, and orders rendered by the COMELEC in the exercise of its **administrative** functions.

2. ID.; ID.; ID.; WHEN THE ASSAILED COMELEC'S DECISION IS RENDERED IN THE EXERCISE OF ITS ADMINISTRATIVE POWER, THE PROPER REMEDY IS A PETITION FOR *CERTIORARI* UNDER RULE 65; IN VIEW OF A MERITORIOUS CASE FOR THE RELAXATION OF THE RULES, THE COURT TREATS THE INSTANT RECOURSE AS ONE FILED UNDER RULE 65.— [R]ecall that the instant petition revolves around the issue on whether or not Smartmatic JV is eligible to participate in the bidding process for the COMELEC's procurement of 23,000 units of optical mark readers. The case does not stem from an election controversy involving the election, qualification, or the returns of an elective office. Rather, it pertains to the propriety of the polling commission's conduct of the procurement process, and its initial finding that Smartmatic JV is eligible to participate therein. It springs from the COMELEC's compliance with the Constitutional directive to enforce and administer all laws and regulations relative to the conduct of an election. Specifically, it arose from the electoral commission's exercise of Sec. 12 of RA 8436, otherwise known as the Automated Elections Law, as amended by RA 9369, which authorized the COMELEC "**to procure, in accordance with existing laws, by purchase, lease, rent or other forms of acquisition, supplies, equipment, materials, software,**

facilities, and other services, from local or foreign sources free from taxes and import duties, subject to accounting and auditing rules and regulation." The subject matter of Smartmatic JV's protest, therefore, does not qualify as one necessitating the COMELEC's exercise of its adjudicatory or quasi-judicial powers that could properly be the subject of a Rule 64 petition, but is, in fact, administrative in nature. Petitioners should then have sought redress *via* a petition for the issuance of the extraordinary writ of certiorari under Rule 65 to assail the COMELEC *en banc's* June 29, 2015 Decision granting the protest. As a caveat, however, the writ will only lie upon showing that the COMELEC acted capriciously or whimsically, with grave abuse of discretion amounting to lack or excess of jurisdiction in issuing the Decision, such as where the power is exercised in an arbitrary or despotic manner by reason of passion or personal hostility. The abuse of discretion must be so patent and gross as to amount to an evasion of positive duty or to a virtual refusal to perform the duty enjoined or to act at all in contemplation of law. Mere abuse of discretion will not suffice. It goes without saying that petitioners' action, having been lodged through an improper petition, is susceptible to outright dismissal. As the Court held in *Pates v. COMELEC*, a Rule 64 petition cannot simply be equated to Rule 65 even if it expressly refers to the latter rule. The clear distinction between the instant petition and *Pates*, however, is that in *Pates,* therein petitioner failed to present an exceptional circumstance or any compelling reason that would have warranted the liberal application of the Rules of Court. In stark contrast, herein petitioners, as will later on be discussed, were able to establish a meritorious case for the relaxation of the rules, relieving them from the rigid application of procedural requirements. We therefore treat the instant recourse as one filed not merely in relation to, but under Rule 65.

3. POLITICAL LAW; ELECTIONS; AUTOMATED ELECTIONS LAW (R.A. 8436) *VIS-À-VIS* GOVERNMENT PROCUREMENT ACT (R.A. 9184); THE PROPER REMEDY TO ASSAIL THE COMELEC RULINGS IN PROTEST OVER THE CONDUCT OF ITS PROCUREMENT OF ELECTION PARAPHERNALIA IS THROUGH A RULE 65 PETITION FOR CERTIORARI WITH THE REGIONAL TRIAL COURT.— [T]he COMELEC *en banc* was not resolving an election controversy when it resolved the protest, but was merely

performing its function to procure the necessary election paraphernalia for the conduct of the 2016 National and Local Elections. This power finds statutory basis in Sec. 12 of RA 8436 x x x[.] In *Pabillo v. COMELEC*, the Court held that the "existing laws" adverted to in the provision is none other than RA 9184. The law is designed to govern all cases of procurement of the national government, its departments, bureaus, offices and agencies, including state universities and colleges, government-owned and/or-controlled corporations, government financial institutions and local government units. It mandates that as a general rule, all government procurement must undergo competitive bidding and for purposes of conducting the bidding process, the procuring entity convenes a BAC. The BAC is tasked to oversee the entire procuring process, from advertisement of the project to its eventual award. It is the first to rule on objections or complaints relating to the conduct of the bidding process, subject to review by the head of the procuring entity via protest. x x x Thus, under Sec. 58, the proper remedy to question the ruling of the head of the procuring entity is through a Rule 65 petition for certiorari with the Regional Trial Court (RTC). The term "procuring entity" is defined under the RA 9184 as "**any branch, department, office, agency, or instrumentality of the government, including state universities and colleges, government-owned and/or - controlled corporations, government financial institutions, and local government units procuring Goods, Consulting Services and Infrastructure Projects**." This statutory definition makes no distinction as to whether or not the procuring entity is a constitutional commission under Article IX of the Constitution. It is broad enough to include the COMELEC within the contemplation of the term. Hence, under the law, grievances relating to the COMELEC rulings in protests over the conduct of its project procurement should then be addressed to the RTC. The mandatory recourse to the RTC in the appeal process applicable to COMELEC procurement project is not a novel development introduced by RA 9184. Even prior to the advent of the government procurement law, the requirement already finds jurisprudential support in *Filipinas Engineering and Machine Shop v. Ferrer*[.] x x x Additionally, even if the Court treats the protest proceeding as part of the procuring agency's adjudicatory function, the Court notes that Sec. 58 of RA 9184 would nevertheless apply, and the RTC would

still have jurisdiction, pursuant to the proviso "unless otherwise provided by law" as appearing in Article IX-A, Section 7 of the Constitution. In this case, the pertinent law provides that insofar as rulings of the COMELEC in procurement protests are concerned, said rulings can be challenged through a Rule 65 certiorari with the RTC.

4. ID.; ID.; ID.; ID.; ONLY THE LOSING BIDDERS HAVE THE PERSONALITY TO CHALLENGE THE COMELEC'S RULING IN PROTEST RELATING TO ITS PROJECT PROCUREMENT; NON-PARTICIPANTS IN THE PROCUREMENT PROJECT CANNOT SEEK RECOURSE TO FILE A PETITION FOR CERTIORARI.— [T]he application of Sec. 58 of RA 9184 has to be qualified. It cannot, in all instances, be the proper remedy to question the rulings of the heads of procuring entities in procurement protests. As in the prior case of *Roque v. COMELEC*, which similarly dealt with COMELEC procurement of OMRs the Court held that only a losing bidder would be aggrieved by, and *ergo* would have the personality to challenge, the head of the procuring entity's ruling in the protest. x x x Evidently, the remedy of certiorari filed before the RTC under Sec. 58 of RA 9184 is intended as a continuation of the motion for reconsideration filed before the BAC, and of the subsequent protest filed with the head of the procuring entity. This is confirmed by the condition *sine qua non* completion of the process under Rule XVII, Secs. 55-57 of the GPRA IRR before recourse to the trial courts become available. It is obvious under Sec. 55.1 of Rule XVII that only a **failed bidder** can turn the cogs of the protest mechanism by first moving for reconsideration of the assailed BAC ruling. The **party concerned**, the bidder adversely affected by the resolution of the motion, shall then have seven (7) days to file a protest with the head of the procuring entity. The pre-requisite that a protestant should likewise be a bidder is emphasized by Sec. 55.4 which requires that the "**name of the bidder**" and the "**office address of the bidder**" be indicated in its position paper. Accordingly, **only the bidder against whom the head of the procuring entity ruled, if it would challenge the ruling any further, is required to resort to filing a petition for certiorari before the trial courts under Sec. 58**. E[r]go, there is neither rhyme nor reason for petitioners herein, who are non-participants in the procurement project, to comply with the rules on protest under RA 9184, part and

parcel of which is the exclusivity of the jurisdiction of the RTC under Sec. 58 thereof.

5. REMEDIAL LAW; HIERARCHY OF COURTS; THE PRINCIPLE DICTATES THAT RECOURSE MUST FIRST BE MADE TO THE LOWER-RANKED COURT EXERCISING CONCURRENT JURISDICTION WITH A HIGHER COURT; EXCEPTIONS.— Notwithstanding the non-exclusivity of the original jurisdiction over applications for the issuance of writs of certiorari, however, the doctrine of hierarchy of courts dictates that recourse must first be made to the lower-ranked court exercising concurrent jurisdiction with a higher court. The rationale behind the principle is explained in *Bañez, Jr. v. Concepcion* in the following wise: The Court must enjoin the observance of the policy on the hierarchy of courts, and now affirms that the policy is not to be ignored without serious consequences. The strictness of the policy is designed to shield the Court from having to deal with causes that are also well within the competence of the lower courts, and thus leave time to the Court to deal with the more fundamental and more essential tasks that the Constitution has assigned to it. The Court may act on petitions for the extraordinary writs of certiorari, prohibition and mandamus only when absolutely necessary or when serious and important reasons exist to justify an exception to the policy. Petitioners do not have the absolute and unrestrained freedom of choice of the court to which an application for certiorari will be directed. Indeed, referral to the Supreme Court as the court of last resort will simply be empty rhetoric if party-litigants are able to flout judicial hierarchy at will. The Court reserves the direct invocation of its jurisdiction only when there are special and important reasons clearly and especially set out in the petition that would justify the same. In the leading case of *The Diocese of Bacolod v. Comelec*, the Court enumerated the specific instances when direct resort to this Court is allowed, to wit: (a) When there are genuine issues of constitutionality that must be addressed at the most immediate time; **(b) When the issues involved are of transcendental importance;** (c) Cases of first impression; (d) When the constitutional issues raised are best decided by this Court; **(e) When the time element presented in this case cannot be ignored; (f) When the petition reviews the act of a constitutional organ;** (g) When there is no other plain, speedy, and adequate remedy in the ordinary course of

law; (h) When public welfare and the advancement of public policy so dictates, or when demanded by the broader interest of justice; (i) When the orders complained of are patent nullities; and (j) When appeal is considered as clearly an inappropriate remedy.

6. ID.; ID.; ID.; ID.; EXCEPTIONS, APPLIED IN CASE AT BAR; THERE EXIST COMPELLING REASONS TO JUSTIFY THE DIRECT RESORT TO THE SUPREME COURT.— The Court finds the second and fifth, and sixth grounds applicable in the case at bar. Much has already been said of the "compelling significance and the transcending public importance" of the primordial issue underpinning petitions that assail election automation contracts: the success—and the far-reaching grim implications of the failure—of the nationwide automation project. So it is that the Court, in the growing number of cases concerning government procurement of election paraphernalia and services, has consistently exhibited leniency and dispensed of procedural requirements for petitioners to successfully lodge certiorari petitions. Technicalities should not stand in the way of resolving the substantive issues petitioners raised herein. x x x As regards the fifth ground, the time element, it is sufficient to state that with the 2016 polls visible in the horizon, the post-haste resolution of this case becomes all the more imperative. It would be the height of absurdity to require petitioners to undergo scrutiny through the lens of the RTC first, considering that the acquisition of 23,000 OMRs would, at the minimum, affect the clustering of precincts. Without the finalized list of clustered precincts, the polling place for the registered voters could not yet be ascertained. Needless to state, this would impede the preparations for the conduct of the polls and its unmitigated effects could very well lead to mass disenfranchisement of voters. Lastly, the sixth ground is indubitably applicable. The rulings of the COMELEC, as a constitutional body, can immediately be reviewed by the Court on proper petition. As quoted in *The Diocese of Bacolod v. COMELEC*, citing *Albano v. Arranz*, "**it is easy to realize the chaos that would ensue if the Court of First Instance of each and every province were [to] arrogate itself the power to disregard, suspend, or contradict any order of the Commission on Elections: that constitutional body would be speedily reduced to impotence**." In sum, there exist ample compelling reasons to justify the direct resort to

the Court as a departure from the doctrine of hierarchy of courts not in relation to but under Rule 65 of the Rules of Court on certiorari and prohibition, and to brush aside the procedural issues in this case to focus on the substantive issues surrounding the procurement of the 23,000 additional OMRs for the 2016 elections.

7. POLITICAL LAW; ELECTIONS; AUTOMATED ELECTIONS LAW (R.A. 8436) *VIS-À-VIS* GOVERNMENT PROCUREMENT ACT (R.A. 9184); BIDDING REQUIREMENTS FOR PROCUREMENT OF ELECTION PARAPHERNALIA TO BE USED IN 2016 NATIONAL AND LOCAL ELECTIONS; THE SUBMISSION OF THE ARTICLES OF INCORPORATION (AOI) OF THE BIDDER IS NOT AN ELIGIBILITY CRITERION; SUBMISSION OF AN AOI WAS NOT A PRE-QUALIFICATION REQUIREMENT.— It is a basic tenet that except only in cases in which alternative methods of procurement are allowed, all government procurement shall be done by competitive bidding. This is initiated by the BAC, which publishes an Invitation to Bid for contracts under competitive bidding in order to ensure the widest possible dissemination thereof. x x x Based on the rule, the BAC's function in determining the eligibility of a bidder during pre-qualification is ministerial in the sense that it only needs to countercheck the completeness and sufficiency of the documents submitted by a bidder against a checklist of requirements. It cannot, therefore, declare a bidder ineligible for failure to submit a document which, in the first place, is not even required in the bid documents. x x x [Sec. 23 of the GPRA IRR] do not require the submission of an AOI in order for a bidder to be declared eligible. The requirement that bears the most resemblance is the submission by each partner to the venture of a registration certificate issued by the Securities and Exchange Commission[.] x x x It may be that the procuring entity has the option to additionally require the submission of the bidders' respective AOIs in order to substantiate the latter's claim of due registration with the government entities concerned. However, a perusal of the bidding documents would readily reveal that the procuring entity, the COMELEC in this case, did not impose such a requirement. x x x Verily, based on Sec. 23.1(b) of the GPRA IRR, the Instruction to Bidders, the BDS, and the Checklist of Requirements, the non-submission of an AOI is not fatal to a bidder's eligibility to contract the

project at hand. Thus, it cannot be considered as a ground for declaring private respondents ineligible to participate in the bidding process. To hold otherwise would mean allowing the BAC to consider documents beyond the checklist of requirements, in contravention of their non-discretionary duty under Sec. 30(1) of the GPRA IRR.

8. ID.; ID.; ID.; ID.; ID.; NEITHER IS THE AOI A POST QUALIFICATION REQUIREMENT.— Even on post-qualification, the submission of an AOI was not included as an added requirement. x x x Clauses 12 and 13 of the Instruction to Bidders pertain to the eligibility documents, technical documents, and the financial component of a participant's bid. Meanwhile, the Clause 5 adverted to is an enumeration of persons or entities who may participate in the bidding. Nowhere in these clauses does it appear that an AOI is a mandatory requirement even for post-qualification. x x x From the foregoing, the inescapable result is that mere failure to file an AOI cannot automatically result in the bidder concerned being declared ineligible, contrary to petitioners' claim.

9. ID.; ID.; ID.; ID.; SMARTMATIC JV MAY VALIDLY UNDERTAKE THE SUBJECT PROCUREMENT PROJECT; SMTC STILL HAS THE AUTHORITY TO CONDUCT BUSINESS EVEN AFTER THE CONDUCT OF THE 2010 NATIONAL AND LOCAL ELECTIONS.— While it is true that SMTC's AOI made specific mention of the automation of the 2010 National and Local Elections as its primary purpose, it is erroneous to interpret this as meaning that the corporation's authority to transact business will cease thereafter. Indeed, the contractual relation between SMTC and the COMELEC has been the subject of prior controversies that have reached the Court, and We have on these occasions held that even beyond the 2010 election schedule, the parties remain to have subsisting rights and obligations relative to the products and services supplied by SMTC to the COMELEC for the conduct of the 2010 polls. x x x Based on Our ruling in *Capalla*, the cessation of SMTC's business cannot be assumed just because the May 10, 2010 polls have already concluded. For clearly, SMTC's purpose—the "automation of the 2010 national and local elections"—is not limited to the conduct of the election proper, but extends further to the fulfillment of SMTC's contractual obligations that spring forth from the AES Contract

during the lifetime of the agreement (i.e. until the release of the performance security), and even thereafter insofar as the surviving provisions of the contract are concerned. In other words, regardless of whether or not SMTC's performance security has already been released, establishing even just one surviving provision of the AES Contract would be sufficient to prove that SMTC has not yet completed its purpose under its AOI, toppling petitioners' argument like a house of cards. x x x [T]he *vinculum juris* between COMELEC and SMTC remains solid and unsevered despite the 2010 elections' inevitable conclusion. Several contractual provisions contained in the 2009 AES Contract, as observed in a review of our jurisprudence, continue to subsist and remain enforceable up to this date. *Pabillo*, in effect, at least guaranteed that SMTC's purpose under its AOI will not be fulfilled until May 10, 2020. Therefore, petitioners' theory—that SMTC no longer has a valid purpose—is flawed. Otherwise, there would be no way of enforcing the subsisting provisions of the contract and of holding SMTC to its warranties after the conduct of the May 10, 2010 elections.

10. ID.; ID.; ID.; ID.; ID.; THE ISSUE OF WHETHER OR NOT SMTC'S PARTICIPATION IN THE BIDDING PROCESS IS AN AUTHORIZED ACT IS MOOTED BY THE SUBSEQUENT APPROVAL OF THE AMENDMENT TO SMTC'S AOI.— [E]ven though the submission of an AOI was not required for either pre or post-qualification purposes, the COMELEC and BAC, on post-qualification, may still consider the same in determining whether or not the project is in line with the bidder's corporate purpose, and, ultimately, in ascertaining the bidder's eligibility. In the case at bar, We take note that during the opening of the bids on December 4, 2014, Smartmatic JV already informed the BAC that SMTC was already in the process of amending its AOI. The contents of the AOI, at that time, were immaterial since the AOI is not an eligibility requirement that can be considered by the BAC on pre-qualification. By post-qualification, however, the time the BAC can validly consider extraneous documents, SMTC's AOI has already been duly amended, and the amendments approved by the SEC on December 10, 2014, for its updated primary purpose[.] x x x Hence, any doubt on SMTC's authorization to continue its business has already been dispelled by December 10, 2014. It matters not that the amendments to

the AOI took effect only on that day for as long as it preceded post-qualification.

11. COMMERCIAL LAW; CORPORATIONS; *ULTRA VIRES* ACT, DEFINED; TEST TO DETERMINE WHETHER OR NOT AN ACT IS *ULTRA VIRES*.— [A]n *ultra vires* act is defined under BP 68 in the following wise: **Section 45.** *Ultra vires acts of corporations*. – No corporation under this Code shall possess or exercise any corporate powers except those conferred by this Code or by its articles of incorporation and **except such as are necessary or incidental to the exercise of the powers so conferred**. The language of the Code appears to confine the term *ultra vires* to an act outside or beyond express, implied and incidental corporate powers. Nevertheless, the concept can also include those acts that may ostensibly be within such powers but are, by general or special laws, either proscribed or declared illegal. *Ultra vires* acts or acts which are clearly beyond the scope of one's authority are null and void and cannot be given any effect. In determining whether or not a corporation may perform an act, one considers the logical and necessary relation between the act assailed and the corporate purpose expressed by the law or in the charter, for if the act were one which is lawful in itself or not otherwise prohibited and done for the purpose of serving corporate ends or reasonably contributes to the promotion of those ends in a substantial and not merely in a remote and fanciful sense, it may be fairly considered within corporate powers. **The test to be applied is whether the act in question is in direct and immediate furtherance of the corporation's business**, fairly incident to the express powers and reasonably necessary to their exercise. If so, the corporation has the power to do it; otherwise, not.

12. ID.; ID.; ID.; *ULTRA VIRES* ACT, NOT A CASE OF; SMTC'S PARTICIPATION IN THE BIDDING IS NOT AN *ULTRA VIRES* ACT BUT ONE THAT IS INCIDENTAL TO ITS CORPORATE PURPOSE.— [N]otwithstanding the specific mention of the 2010 National and Local Elections in SMTC's primary purpose, it is not, as earlier discussed, precluded from entering into contracts over succeeding ones. Here, SMTC cannot be deemed to be overstepping its limits by participating in the bidding for the 23,000 new optical mark readers for the 2016 polls since upgrading the machines that

the company supplied the COMELEC for the automation of the 2010 elections and offering them for subsequent elections is but a logical consequence of SMTC's course of business, and should, therefore, be considered included in, if not incidental to, its corporate purpose. A restricted interpretation of its purpose would mean limiting SMTC's activity to that of waiting for the expiration of its warranties in 2020. How then can the company be expected to subsist and sustain itself until then if it cannot engage in any other project, even in those similar to what the company already performed? In the final analysis, We see no defect in the AOI that needed to be cured before SMTC could have participated in the bidding as a partner in Smartmatic JV, the automation of the 2016 National and Local Elections being a logical inclusion of SMTC's corporate purpose.

13. ID.; ID.; NATIONALITY OF CORPORATIONS; PETITIONERS FAILED TO PROVE THAT SMTC IS 100% FOREIGN-OWNED.— While petitioners are correct in asserting that Smartmatic JV ought to be at least 60% Filipino-owned to qualify, they did not adduce sufficient evidence to prove that the joint venture did not meet the requirement. Petitioners, having alleged non-compliance, have the correlative burden of proving that Smartmatic JV did not meet the requirement, but aside from their bare allegation that SMTC is 100% foreign-owned, they did not offer any relevant evidence to substantiate their claim. Even the 2013 financial statements submitted to Court fail to impress for they pertain to the financial standing of **Smartmatic Limited**, which is a distinct and separate entity from **SMTC**. It goes without saying that Smarmatic Limited's nationality is irrelevant herein for it is not even a party to this case, and even to the joint venture.

14. ID.; ID.; ID.; SMTC SATISFACTORILY ESTABLISHED THAT IT IS A FILIPINO CORPORATION; CONTROL TEST, APPLIED.— Aside from the sheer weakness of petitioners' claim, SMTC satisfactorily refuted the challenge to its nationality and established that it is, indeed, a Filipino corporation as defined under our laws. As provided in Republic Act No. 7042 (RA 7042), otherwise known as the Foreign Investments Act, a Philippine corporation is defined in the following wise: x x x **a corporation organized under the laws of the Philippines of which at least sixty percent (60%) of the capital stock outstanding and entitled to vote is owned**

and held by citizens of the Philippines; x x x In *Narra Nickel Mining and Development, Corp. v. Redmont Consolidated Mines, Corp.*, the Court held that the "control test" is the prevailing mode of determining whether or not a corporation is Filipino. Under the "control test," shares belonging to corporations or partnerships at least 60% of the capital of which is owned by Filipino citizens shall be considered as of Philippine nationality. It is only when based on the attendant facts and circumstances of the case, there is, in the mind of the Court, doubt in the 60-40 Filipino-equity ownership in the corporation, that it may apply the "grandfather rule." x x x Applying the control test, 60% of SMTC's 226,000,000 shares, that is 135,600,000 shares, must be Filipino-owned. From the above-table, it is clear that SMTC reached this threshold amount to qualify as a Filipino-owned corporation.

15. ID.; ID.; ID.; FAILURE OF THE PETITIONERS TO ADDUCE EVIDENCE TO PROVE THAT THE JOINT VENTURE PARTNERS ARE FOREIGN-OWNED WILL RESULT IN UPHOLDING COMELEC'S FINDINGS THAT SMARTMATIC JV IS ELIGIBLE TO PARTICIPATE IN THE BIDDING PROCESS.— Anent the nationality of the other joint venture partners, the Court defers to the findings of the COMELEC and the BAC, and finds sufficient their declaration that Smartmatic JV is, indeed, eligible to participate in the bidding process, and is in fact the bidder with the lowest calculated responsive bid. If petitioners would insist otherwise by reason of Smartmatic JV's nationality, it becomes incumbent upon them to prove that the aggregate Filipino equity of the joint venture partners—SMTC, Total Information Management Corporation, Smartmatic International Holding B.V., and Jarltech International Corporation—does not comply with the 60% Filipino equity requirement, following the oft-cited doctrine that he who alleges must prove. Regrettably, one fatal flaw in petitioners' posture is that they challenged the nationality of SMTC alone, which, after utilizing the control test, turned out to be a Philippine corporation as defined under RA 7042. There was no iota of evidence presented or, at the very least, even a claim advanced that the remaining partners are foreign-owned. There are, in fact, no other submissions whence this Court can inquire as to the nationalities of the other joint venture partners. Hence, there is no other alternative for this Court other than to adopt the findings of the COMELEC and the

BAC upholding Smartmatic JV's eligibility to participate in the bidding process, subsumed in which is the joint venture and its individual partners' compliance with the nationality requirement.

LEONEN, *J., concurring and dissenting opinion*:

1. REMEDIAL LAW; COURTS; JURISDICTION; TRANSCENDENTAL PUBLIC IMPORTANCE DOCTRINE SHOULD NOT JUSTIFY A BLATANT DISREGARD OF THE PROCEDURAL RULES; THE DECISION OF THE COMELEC EN BANC IN PROCUREMENT OF ELECTION SUPPLIES BY PUBLIC BIDDING MUST BE APPEALED TO THE REGIONAL TRIAL COURT.— I disagree with the ponencia's statement that "the transcending public importance" of the case allows for a procedural shortcut to this court. Transcendental interest is the exception, not the rule. The transcendental doctrine should not justify a "blatant disregard of procedural rules, [especially if] petitioner[s] had other available remedies[.]" x x x Rule 65 in relation to Rule 64 of the Rules of Court provides for resort to this court from the ruling of the COMELEC En Banc only when there is no other "plain, speedy, and adequate remedy in the ordinary course of law" to assail the COMELEC's exercise of a quasi-judicial function. Quasi-judicial power is an administrative agency's power to "adjudicate the rights of persons before it." It involves hearing and determining questions of fact and application of the standards laid down by the law to enforce this same law. The COMELEC Decision dated June 29, 2015 adjudicated the rights of Smartmatic Joint Venture. It was promulgated in pursuit of the COMELEC's role of procuring election-related supplies and enforcing election-related laws [pursuant to] Batas Pambansa Blg. 881[.] x x x Meanwhile, the Implementing Rules and Regulations (Part A) of Republic Act No. 9184 states that "[d]ecisions of the BAC with respect to the conduct of bidding may be protested in writing to the head of the procuring entity[.]" Thus, COMELEC, being the head of the entity for procuring election supplies by public bidding, has quasi-adjudicative powers. To enforce election-related laws, it adjudicates protests relative to the procurement process by applying both the law and the facts of the case. x x x Even assuming that the correct remedy is Rule 65 and not Rule 64

in relation to Rule 65, resort to this court cannot be had if there is another plain, speedy, and adequate remedy. Petitioners' remedy lies with the Regional Trial Court. Section 58 of Republic Act No. 9184 provides that the Regional Trial Court has "jurisdiction over final decisions of the head of the procuring entity[,]" which is COMELEC in this case. x x x Jurisprudence further solidifies this rule. In *Dimson (Manila), Inc., et al. v. Local Water Utilities Administration*, this court held that the Regional Trial Court is the proper venue for Rule 65 petitions pertaining to issues on the procurement and bidding process. Likewise, this court said in *First United Constructors Corporation v. Poro Point Management Corporation (PPMC), et al.* that, notwithstanding the Regional Trial Court's concurrent certiorari jurisdiction with that of this court, this court should still refuse to permit an unrestricted freedom to directly seek this court's intervention when there are other remedies available. In government procurement cases, the decisions of the COMELEC En Banc must be appealed before the Regional Trial Court, which has the power to issue an injunctive writ while the cases are pending before it.

2. POLITICAL LAW; ELECTIONS; AUTOMATED ELECTIONS LAW (R.A. 8436) *VIS-À-VIS* GOVERNMENT PROCUREMENT ACT (R.A. 9184); BIDDING REQUIREMENTS FOR PROCUREMENT OF ELECTION PARAPHERNALIA TO BE USED IN 2016 NATIONAL AND LOCAL ELECTIONS; COMELEC ACTED IN RECKLESS DISREGARD OF ITS OWN BIDDING RULES AND PROCEDURE IN GRANTING SMARTMATIC JOINT VENTURE'S PROTEST.— It appears that in granting private respondent's protest, the COMELEC acted in reckless disregard of its own bidding rules and procedure. For the OMR Project, the COMELEC required the submission of the Articles of Incorporation. This is shown in BAC Bid Bulletin No. 5, which respondents and the ponencia fail to mention. BAC Bid Bulletin No. 5 mandates all bidders in the OMR Project, including every joint venture partner, to submit their Articles of Incorporation[.] x x x When SMTC failed to submit its Articles of Incorporation, the COMELEC should have disqualified Smartmatic Joint Venture. The COMELEC has the power to review a bidder's lack of eligibility at *any stage* of the procurement process. Section 23.7 (Eligibility Requirements for the Procurement of Goods and Infrastructure Projects) of

the Revised Implementing Rules and Regulations of Republic Act No. 9184 and Section 30 of the bidding documents provide for this. x x x [T]his court cannot be estopped by the findings of the BAC or the COMELEC En Banc. When Smartmatic Joint Venture submitted noncompliant legal requirements, there was no basis for the COMELEC to have allowed it to proceed to the next stage of bidding.

3. ID.; ID.; ID.; ID.; ID.; THE COMELEC CANNOT ACCOMMODATE AN INELIGIBLE BIDDER; THE 2009 AUTOMATED ELECTION SYSTEM CONTRACT BETWEEN THE COMELEC AND SMTC CANNOT BE UNDULY STRETCHED TO CONTEMPLATE THE PROCUREMENT PROJECT FOR THE 2016 ELECTIONS. — The COMELEC cannot be made to accommodate an ineligible bidder. While there may be legal ties between the COMELEC and SMTC for some of the post-2010 transactions related to the refurbishment of the precinct count optical scan (PCOS) voting machines, this bond of law ends for the OMR Project. The ponencia cites two cases to show how "the *vinculum juris* between COMELEC and SMTC remains solid and unsevered despite the 2010 elections[.]" In *Archbishop Capalla, et al. v. Commission on Elections*, this court upheld the COMELEC's purchase of the PCOS machines in 2012, which it leased from SMTC for the 2010 elections. This was pursuant to the lease with an option-to-purchase clause in the amended Contract for the Provision of an Automated Election System for the May 10, 2010 Synchronized National and Local Elections (2009 Automated Election System Contract). In *Pabillo, et al. v. Commission on Elections*, the 2009 Automated Election System Contract states that SMTC would make available parts, labor, and technical support and maintenance of the PCOS machines to the COMELEC for the next 10 years (10-year warranty), if the latter decides to exercise its option to purchase the PCOS machines. In contrast, the Terms of Reference of the OMR Project do not speak of the leased and purchased 2010 PCOS machines, but of an OMR+ with new and different specifications, for use specifically in the 2016 elections. The 2009 Automated Election System Contract cannot be unduly stretched to contemplate the OMR Project. SMTC's authority to bid for the 2016 elections was determined on December 4, 2015, the date of submission of its legal documents. Section 25 of Republic Act No. 9184 provides that bid documents "submitted after

the deadline shall not be accepted." Neither may the bid documents be modified after the deadline for submission of bids. The party that sleeps on its rights necessarily suffers the consequences of its own inaction. SMTC, the company that won the bidding for the automation of the 2010 elections, sought to amend its primary corporate purpose only *two weeks after* the Invitation to Bid for the 2016 elections had been released. Being slow to act, SMTC has no one to blame but itself for submitting its amended Articles of Incorporation *six days after deadline*. A seasoned business enterprise such as SMTC is expected to exercise prudence in conducting its corporate affairs.

4. COMMERCIAL LAW; CORPORATIONS; *ULTRA VIRES* ACT; BEING DISQUALIFIED ON THE DATE IT SUBMITTED THE ELIGIBILITY DOCUMENTS, SMTC COMMITTED AN *ULTRA VIRES* ACT WHEN IT PARTICIPATED IN THE BIDDING FOR THE PROCUREMENT PROJECT RELATIVE TO THE 2016 ELECTIONS.— SMTC's transgression is already *fait accompli*, and amending its Articles of Incorporation (by changing its corporate purpose) cannot cure the defect. The Articles of Incorporation is part of the requirements for the issuance of a Certificate of Registration. Thus, for the submitted Certificate of Registration to have been considered valid, the Articles of Incorporation forming part of it should likewise have been valid. The purpose clause in the Articles of Incorporation "confers, as well as limits, the powers which a corporation may exercise." That way, corporate officers shall know the limits of their actions, shareholders shall be informed of the corporation's type of business, and third parties shall know whether the corporation they are transacting with is actually authorized to act or has legal personality to conduct business. This court cannot grant corporate personality where there previously was none. Acts done beyond the express, implied, and incidental powers of the corporation, as provided for in the law or its Articles of Incorporation, are *ultra vires.* According to Section 45 of the Corporation Code, "[n]o corporation under this Code shall possess or exercise any corporate powers except those conferred by this Code or by its articles of incorporation and except such as are necessary or incidental to the exercise of the powers so conferred." It is clear from the provision that the necessary or incidental powers

must relate to the express powers conferred by law or the Articles of Incorporation. "[E]xpress powers cannot be enlarged by implication." If a corporate charter's recital of specific powers is followed by a general language, this general language "is construed and confined within the limitations of the specific power named." SMTC has a specific power: The Articles of Incorporation expressly "accord[s] legal personality to [SMTC] for the automation of the 2010 national and local elections[.]" The ensuing general language (as stated in the secondary purpose) which supposedly allows SMTC to "enter into contracts . . . of every kind and description and for any lawful purpose" cannot be enlarged to contemplate the OMR Project for the 2016 national and local elections. Further, while it is true that Section 42 of the Corporation Code allows corporations to invest its funds in another corporation or business, and that SMTC's secondary purpose also provides for this, one must make a distinction between investment of funds (such as in banks, stocks, or money market placements) and active pursuit of business (i.e., bidding for the lease with option to purchase 23,000 new units of the OMR+ system for the 2016 elections). The corporate charter of SMTC is time-bound, limited, restricted, and specific. Thus, insofar as the 2016 elections are concerned, SMTC was disqualified on the date it submitted the eligibility documents. By participating in the bidding for the OMR Project, SMTC committed an *ultra vires* act.

APPEARANCES OF COUNSEL

Manuelito R. Luna for petitioners.
The Solicitor General for public respondent.
Angara Abello Concepcion Regala & Cruz for respondents Joint Venture Smartmatic-Tim Corp., *et al.*

D E C I S I O N

VELASCO, JR., *J.*:

Nature of the Case

Before the Court is a petition for certiorari or prohibition under Rule 64 of the Rules of Court, with prayer for injunctive relief,

assailing the validity and seeking to restrain the implementation of the Commission of Elections (COMELEC) *en banc's* June 29, 2015 Decision[1] for allegedly being repugnant to the provisions of *Batas Pambansa Blg.* 68 (BP 68), otherwise known as the *Corporation Code of the Philippines*, and Republic Act No. 9184 (RA 9184) or the *Government Procurement Reform Act.*

The Facts

On October 27, 2014, the COMELEC *en banc*, through its Resolution No. 14-0715, released the bidding documents for the "Two-Stage Competitive Bidding for the Lease of Election Management System (EMS) and Precinct-Based Optical Mark Reader (OMR) or Optical Scan (OP-SCAN) System."[2] Specified in the published Invitation to Bid[3] are the details for the lease with option to purchase, through competitive public bidding, of twenty-three thousand (23,000) new units of precinct-based OMRs or OP-SCAN Systems, with a total Approved Budget for Contract of ₱2,503,518,000,[4] to be used in the 2016 National and Local Elections.[5] The COMELEC Bids and Awards

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[1] *Rollo*, pp. 61-72. Rendered by Chairman J. Andres D. Bautista and Commissioners Christian Robert S. Lim, Al A. Parreño, Luie Tito F. Guia, Arthur D. Lim, Ma. Rowena Amelia V. Guanzon and Sheriff M. Abas.

[2] *Id*. at 213-329. The bid documents are divided into eight (8) sections, namely: the Invitation to Bid, Instruction to Bidders, Bid Data Sheet, General Conditions of Contract, Special Conditions of Contract, Schedule of Requirements, Technical Specifications, and Bidding Forms.

[3] *Id*. at 216-218.

[4] *Id*. at 216.

COMPONENT	QUANTITY	UNIT COST	TOTAL
1– Voting Machines	23,000 units	Php 90,000.00	Php 2,070,000,000.00
2– Ballots	16,500,000 pieces	Php 20.00	Php 330,000,000.00
3– Ballot Boxes	20,406 units	Php 3,000.00	Php 61,218,000.00
4– Technical Support	4,550 Technicians (Polling Centers)		Php 42,300,000.00
	150 Technicians (National Technical Support Group)		
APPROVED BUDGET FOR THE CONTRACT (ABC)			**Php 2,503,518,000.00**

[5] *Id*. at 61-62.

Committee (BAC) set the deadline for the submission by interested parties of their eligibility requirements and initial technical proposal on December 4, 2014.[6]

The joint venture of Smartmatic-TIM Corporation (SMTC), Smartmatic International Holding B.V., and Jarltech International Corporation (collectively referred to as "Smartmatic JV") responded to the call and submitted bid for the project on the scheduled date. Indra Sistemas, S.A. (Indra) and MIRU Systems Co. Ltd. likewise signified their interest in the project, but only Indra, aside from Smartmatic JV, submitted its bid.[7]

During the opening of the bids, Smartmatic JV, in a sworn certification, informed the BAC that one of its partner corporations, SMTC, has a pending application with the Securities and Exchange Commission (SEC) to amend its Articles of Incorporation (AOI), attaching therein all pending documents.[8] The amendments adopted as early as November 12, 2014 were approved by the SEC on December 10, 2014.[9] On even date, Smartmatic JV and Indra participated in the end-to-end testing of their initial technical proposals for the procurement project before the BAC.

Upon evaluation of the submittals, the BAC, through its Resolution No. 1 dated December 15, 2014, declared Smartmatic JV and Indra eligible to participate in the second stage of the bidding process.[10] The BAC then issued a Notice requiring them to submit their Final Revised Technical Tenders and Price proposals on February 25, 2015, to which the eligible participants complied. Finding that the joint venture satisfied the requirements in the published Invitation to Bid, Smartmatic JV, on March 26, 2015, was declared to have tendered a complete and responsive

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[6] *Id*. at 217-218.

[7] *Id*. at 621.

[8] *Id*. at 623; *see also* BAC Resolution No. 10, Memorandum of Divida Blaz-Perez, *id*. at 433.

[9] *Id*. at 546.

[10] *Id*. at 623, 437.

Overall Summary of the Financial Proposal.[11] Meanwhile, Indra was disqualified for submitting a non-responsive bid.[12]

Subsequently, for purposes of post-qualification evaluation, the BAC required Smartmatic JV to submit additional documents and a prototype sample of its OMR.[13] The prototype was subjected to testing to gauge its compliance with the requirements outlined in the project's Terms of Reference (TOR).[14]

After the conduct of post-qualification, the BAC, through Resolution No. 9 dated May 5, 2015, disqualified Smartmatic JV on two grounds, viz:[15]

1. Failure to submit valid AOI; and
2. The demo unit failed to meet the technical requirement that the system shall be capable of writing all data/files, audit log, statistics and ballot images simultaneously in at least two (2) data storages.

The ruling prompted Smartmatic JV to move for reconsideration.[16] In denying the motion, the BAC, through Resolution No. 10[17] dated May 15, 2015, declared that Smartmatic JV complied with the requirements of Sec. 23.1(b) of the Revised Implementing Rules and Regulations of RA 9184 (GPRA IRR), including the submission of a valid AOI, but was nevertheless disqualified as it still failed to comply with the technical requirements of the project.[18]

Aggrieved, Smartmatic JV filed a Protest,[19] seeking permission to conduct another technical demonstration of its SAES 1800

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[11] *Id*. at 624.

[12] *Id*. at 624, 441-442.

[13] *Id*. at 624, 447-448.

[14] *Id*. at 900-901.

[15] *Id*. at 62, 449-451.

[16] *Id*. at 452-468.

[17] *Id*. at 424-429.

[18] *Id*. at 428.

[19] *Id*. at 469-506.

plus OMR (OMR+), the OMR Smartmatic JV presented during the public bidding before the COMELEC *en banc*.[20] Accordingly, on June 19, 2015, Smartmatic JV was allowed to prove compliance with the technical specifications for the second time, but this time before the electoral tribunal's Technical Evaluation Committee (TEC).[21] This was followed, on June 23, 2015, by another technical demonstration before the Commission *en banc* at the Advanced Science and Technology Institute (ASTI) at the University of the Philippines, Diliman, Quezon City.[22]

Ruling of the COMELEC *en banc*

Though initially finding that the OMR+'s ability to simultaneously write data in two storage devices could not conclusively be established,[23] the TEC, upon the use of a Digital Storage Oscilloscope (DSO) during the second demonstration,[24] determined that the OMR+ complied with the requirements specified in the TOR.[25] Adopting the findings of the TEC as embodied in its Final Report, the COMELEC *en banc*, on June 29, 2015, promulgated the assailed Decision granting Smartmatic JV's protest. The dispositive portion of the Decision reads:[26]

WHEREFORE, the instant Protest is hereby **GRANTED**. Accordingly, the Commission hereby declares the Joint Venture of Smartmatic-TIM Corporation, Total Information Management Corporation, Smartmatic International Holding B.V., and Jarltech International Corporation, as the bidder with the lowest calculated

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[20] *Id*. at 62-63.

[21] *Id*. at 63.

[22] *Id*. at 64.

[23] *Id*. at 63.

[24] *Id*. at 23. The DOS was used to visualize the electrical signals sent to the memory cards without modifying the OMR+ hardware and software. During the June 23, 2015 demonstration, the DSO displayed waveforms of time dimension and electrical voltage, which were then analyzed by the electronics design engineers of the ASTI.

[25] *Id*. at 23-26.

[26] *Id*. at 26.

responsive bid in connection with the public bidding for the lease with option to purchase of 23,000 new units of precinct-based Optical Mark Reader or Optical Scan System for use in the May 9, 2016 national and local elections. Corollarily, the scheduled opening of financial proposal and eligibility documents for the Second Round of Bidding is hereby **CANCELLED**, with specific instruction for the Bids and Awards Committee to **RETURN** to the prospective bidders their respective payments made for the purchase of Bidding Documents pertaining to the Second Round of Bidding.

Let the Bids and Awards Committee implement this Decision.

SO ORDERED.

The seven-man commission was unanimous in holding that Smartmatic JV's OMR+ sufficiently satisfied the technical requirements itemized in the TOR, reproducing in the assailed Decision, verbatim and with approbation, the entirety of the TEC's Final Report, thusly:[27]

This is to report on the result of the public test conducted on 23 June of the claim of Smartmatic TIM (SMTT) that their proposed SAES 1800 (PCOS+) has the capability to write ballot images, audit logs, and elections results on two separate storage (devices) simultaneously.

Technical discussion, demonstrations, and design reviews were conducted over two day period before the actual demonstration to the Comelec En Banc. These reviews were conducted between SMTT engineers and a team of embedded electronics design engineers from the Advanced Science and Technology Institute of the Department of Science and Technology.

Though these reviews are important to validate the behavior and functionality of the PCOS+, the best way to validate the claim of SMTT is to use a specialized test instrument connected to the actual electrical inputs of both storage cards.

To visualize the electrical signals being sent to the memory cards, an Agilent DSO7054A Digital Storage Oscilloscope (DSO) from ASTI connected to the same data input line on two SD card adapters with a micro SD card inside. This was done to simulate an actual

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[27] *Id*. at 69-71.

SC card and to make the DSO probe connections accessible and secure without modifying anything in the PCOS+ hardware or software. x x x

During normal operation such as on Election day, when the PCOS+ is accepting ballots from voters, the PCOS+ is designated to write data on both SD cards after the ballots has been determined to be valid and the voter choices have been shown to the voter for verification.

The data being written on the storage devices consist mainly of the scanned ballots image of the front and back of the ballot at 200 dots per inch in both the horizontal and vertical dimension with each dot encoded into a 4 bit value corresponding to 16 shades of gray. The other data saved on the storage device consists of the vote interpretation and updates to the audit log. Each time that data is written on the two storage device, the date is encrypted and a verification step is done to check that identical data is written on both devices. The entire write process lasts a few seconds for each ballot.

x x x x x x x x x

The DSO display the time dimension on the horizontal axis and the electrical voltage in the vertical axis, the display is generated left to right over time (earlier events are on the left). The yellow line on top shows the electrical signal on the Data 2 pin of the main storage card and the green line shows the electrical signal on the Data 2 pin of the backup storage card. The orange dashed horizontal and vertical lines are used for measuring the differences in time and voltage.

The vertical dashed line on the left marks the start of the data being written on the main and backup storage card and the vertical dashed line on the right marks the ends of the writing operation for one ballot. The time difference in this case is about 2.616 seconds as shown near the bottom left corner of the display.

The yellow and green vertical lines in between the two vertical dashed lines represent the digital ones and zeros being written on both storage cards. The yellow and green traces are not exactly identical because the main car also contains the operating system of the PCOS+ and additional data operations are being performed on it. Because the time scale is the same on both probes, we conclude that the PCOS+ is writing on both cards simultaneously during this time interval.

Notwithstanding Smartmatic JV's compliance with the technical requirements in the TOR, Commissioner Luie Tito F. Guia (Guia) would nonetheless dissent in part, questioning the sufficiency of the documents submitted by the Smartmatic JV.[28] Taking their cue from Commissioner Guia's dissent, petitioners now assail the June 29, 2015 Decision of the COMELEC through the instant recourse.

The Issues

Petitioners framed the issues in the extant case in the following wise:[29]

A. Procedural Issues

I. WHETHER OR NOT THE PETITION IS THE PROPER REMEDIAL VEHICLE TO ASSAIL THE SUBJECT DECISION OF THE COMELEC EN BANC;

II. WHETHER OR NOT THE SUPREME COURT HAS THE RIGHT AND DUTY TO ENTERTAIN THIS PETITION;

III. WHETHER OR NOT A JUSTICIABLE CASE OR CONTROVERSY EXISTS;

IV. WHETHER OR NOT THE CASE OR CONTROVERSY IS RIPE FOR JUDICIAL ADJUDICATION;

V. WHETHER OR NOT UNDER THE CIRCUMSTANCES, THE RULE ON "HIERARCHY OF COURTS" MAY BE DISPENSED WITH;

VI. WHETHER OR NOT THE PETITIONERS POSSESS *LOCUS STANDI*;

B. Substantive Issues

VII. WHETHER OR NOT THE COMELEC EN BANC ACTED WITH GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION IN GRANTING THE PROTEST AS WELL AS IN DECLARING THE JOINT VENTURE OF SMARTMATIC-TIM CORPORATION,

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[28] *Id*. at 74-76.

[29] *Id*. at 32-34.

TOTAL INFORMATION MANAGEMENT CORPORATION, SMARTMATIC INTERNATIONAL HOLDING B.V. AND JARLTECH INTERNATIONAL CORPORATION AS THE BIDDER WITH THE LOWEST CALCULATED RESPONSIVE BID IN CONNECTION WITH THE PUBLIC BIDDING FOR THE LEASE WITH OPTION TO PURCHASE OF 23,000 NEW UNITS OF PRECINCT-BASED OPTICAL MARK READER OR OPTICAL SCAN SYSTEM FOR USE IN THE MAY 9, 2016 NATIONAL AND LOCAL ELECTIONS

VIII. WHETHER OR NOT A WRIT OF PRELIMINARY INJUNCTION OR TEMPORARY RESTRAINING ORDER SHOULD ISSUE

In challenging the June 29, 2015 Decision, petitioners, filing as taxpayers, alleged that the COMELEC *en banc* acted with grave abuse of discretion amounting to lack or excess of jurisdiction in declaring Smartmatic JV as the bidder with the lowest calculated responsive bid.[30] According to petitioners, Smartmatic JV cannot be declared eligible, even more so as the bidder with the lowest calculated responsive bid, because one of its proponents, SMTC, holding 46.5% of the shares of Smartmatic JV, no longer has a valid corporate purpose as required under Sec. 14 of BP 68, which pertinently reads:

Section 14. *Contents of the articles of incorporation.* – All corporations organized under this code shall file with the Securities and Exchange Commission articles of incorporation in any of the official languages duly signed and acknowledged by all of the incorporators, containing substantially the following matters, except as otherwise prescribed by this Code or by special law:

x x x x x x x x x

2. The **specific purpose or purposes for which the corporation is being incorporated**. Where a corporation has more than one stated purpose, the articles of incorporation shall state which is the primary purpose and which is/are the secondary purpose or purposes: Provided, That a non-stock corporation may not include a purpose which would change or contradict its nature as such x x x.

[30] *Id*. at 34.

As proof, petitioners cite the primary purpose of SMTC as stated in the company's AOI, which was submitted to the COMELEC on December 4, 2014 as part of the joint venture's eligibility documents. To quote SMTC's primary purpose therein:[31]

> To do, perform and comply with all the obligations and responsibilities of, and accord legal personality to, the joint venture of Total Information Management Corporation ("TIM") and Smartmatic International Corporation ("Smartmatic") arising under the Request for Proposal and the Notice of Award issued by the Commission on Elections ("COMELEC") for the **automation of the 2010 national and local elections ("Project")**, including the leasing, selling, importing and/or assembling of automated voting machines, computer software and other computer services and/or otherwise deal in all kinds of services to be used, offered or provided to the COMELEC **for the preparations and the conduct of the Project** including project management services. (emphasis added)

In concurrence with Commissioner Guia's opinion, petitioners argue that the foregoing paragraph readily evinces that SMTC was created solely for the automation of the 2010 National and Local Elections, not for any other election.[32] Having already served its purpose, SMTC no longer has authority to engage in business, so petitioners claim. To allow SMTC then to have a hand in the succeeding elections would be tolerating its performance of an *ultra vires* act.

Petitioners hasten to add that without a valid purpose, the company could not have submitted a valid AOI, a procurement eligibility requirement under Sec. 23.1 (b) of the IRR of RA 9184. For them, the SEC's subsequent approval, on December 10, 2014, of the amendments to SMTC's AOI cannot cure the partner corporation's ineligibility because eligibility is determined at the time of the opening of the bids, which, in this case, was conducted on December 4, 2014.[33]

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[31] *Id*. at 75, 532.

[32] *Id*. at 48.

[33] *Id*. at 46.

Finally, petitioners contend that SMTC misrepresented itself by leading the BAC to believe that it may carry out the project despite its limited corporate purpose, and by claiming that it is a Philippine corporation when it is, allegedly, 100% foreign-owned.[34] They add that misrepresentation is a ground for the procuring agency to consider a bidder ineligible and disqualify it from obtaining an award or contract.[35]

In its Comment,[36] public respondent COMELEC, through the Office of the Solicitor General (OSG), refuted the arguments of petitioners on the main postulation that the sole issue raised before the COMELEC *en banc* was limited to the technical aspect of the project.[37] According to the OSG, the sufficiency of the documents submitted was already decided by the BAC on May 15, 2015 when it partially granted Smartmatic JV's motion for reconsideration through BAC Resolution No. 10. Anent the procedural issues, the OSG, in its bid to have the case dismissed outright, questioned petitioners' *locus standi* and failure to observe the hierarchy of courts.[38]

Meanwhile, private respondents, in their Comment/Opposition,[39] countered that the BAC has thoroughly explained and laid down the factual and legal basis behind its finding on Smartmatic JV's legal capacity to participate as bidder in the project procurement; that the issue on SMTC's AOI has been rendered moot by the SEC's subsequent approval on December 10, 2014 of the AOI's amendment broadening the company's primary purpose;[40] that SMTC's primary purpose, as amended, now reads:[41]

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[34] *Id*. at 46.

[35] *Id*. at 49.

[36] *Id*. at 587-618.

[37] *Id*. at 593-596.

[38] *Id*. at 596-604.

[39] *Id*. at 619-663.

[40] *Id*. at 647.

[41] *Id*. at 549.

To sell, supply, lease, import, export, develop, assemble, repair and deal with automated voting machines, canvassing equipment, computer software, computer equipment and all other goods and supplies, and /or to provide, render and deal in all kinds of services, including project management services for the conduct of elections, whether regular or special, in the Philippine(s) and to provide Information and Communication Technology (ICT) goods and services to private and government entities in the Philippines.

that the alleged defect in SMTC's AOI is of no moment since neither the law nor the bidding documents require a bidder to submit its AOI;[42] that even assuming for the sake of argument that SMTC's primary purpose precludes it from further contracting for the automation of the Philippine elections beyond 2010, its secondary purposes[43] and Sec. 42 of BP 68[44] authorize

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[42] *Id*. at 637-639.

[43] *Id*. at 533-534. Its secondary purposes read: a. to acquire by purchase, lease, contract, concession or otherwise, within the limits allowed by law, any and all real and/or personal properties of every kind and description whatsoever, whether tangible or intangible, which the Corporation may deem necessary or appropriate in connection with the conduct of any business in which the Corporation may lawfully engage, and, within the limits allowed by law, to own, hold, operate, improve, develop, manage, grant, lease, sell, assign, convey, transfer, exchange, or otherwise dispose of the whole or any part thereof;

x x x x x x x x x

h. To carry out any of the above-mentioned purposes as principal, agent, factor, licensee, concessionaire, contractor, or otherwise, either alone or on conjunction with any other person, firm, association, corporation, or entity, whether public or private;

i. To enter into contracts and arrangements of every kind and description for any lawful purpose with any person, firm, association, corporation, municipality, body politic, country, territory, province, state, or government, and to obtain from any government or authority such rights, privileges, contracts and concessionaires which the Corporation may deem desirable.

[44] **Section 42.** *Power to invest corporate funds in another corporation or business or for any other purpose.* – Subject to the provisions of this Code, a private corporation may invest its funds in any other corporation or business or for any purpose other than the primary purpose for which it was organized when approved by a majority of the board of directors or trustees and ratified by the stockholders representing at least two-thirds (2/3) of

the company to do so;[45] and that the COMELEC, in fact, has already dealt with SMTC numerous times after the 2010 elections.[46]

Private respondents would likewise debunk petitioners' allegation that SMTC misrepresented its nationality. They argue that based on its General Information Sheet (GIS), SMTC is a Filipino corporation, not a foreign one as petitioners alleged. Moreover, what is only required under RA 9184 is that the nationality of the joint venture be Filipino, and not necessarily that of its individual proponents.[47] In any event, so private respondents claim, the COMELEC, under the law, is not prohibited from acquiring election equipment from foreign sources, rendering SMTC and even Smartmatic JV's nationality immaterial.[48]

Lastly, private respondents pray for the petition's outright dismissal, following petitioner Akol and Lagman's alleged failure to comply with the rules on verifications, on the submission of certifications against forum-shopping, and on the efficient use of paper.[49]

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the outstanding capital stock, or by at least two thirds (2/3) of the members in the case of non-stock corporations, at a stockholder's or member's meeting duly called for the purpose. Written notice of the proposed investment and the time and place of the meeting shall be addressed to each stockholder or member at his place of residence as shown on the books of the corporation and deposited to the addressee in the post office with postage prepaid, or served personally: Provided, That any dissenting stockholder shall have appraisal right as provided in this Code: Provided, however, That where the investment by the corporation is reasonably necessary to accomplish its primary purpose as stated in the articles of incorporation, the approval of the stockholders or members shall not be necessary.

[45] *Rollo*, pp. 640-646.

[46] *Id.* at 646-647. Contract dated January 14, 2013 for the supply of 82,000 CF Cards Main, Contract dated January 28, 2013 for the supply of 82,000 CF Cards WORM, Contract dated January 18, 2013 for the Electronic Transmission of Election Results of the May 13, 2013 elections, Contract dated May 14, 2013 for the supply of 15,000 MTD Modems, and Contract dated March 22, 2013 for the National Support Center.

[47] *Id*. at 647-648.

[48] *Id*. at 648-652.

[49] *Id*. at 652-657.

The Court's Ruling

The petition lacks merit.

Rule 64 is not applicable in assailing the COMELEC *en banc*'s Decision granting Smartmatic JV's protest

In arguing for the propriety of the remedial vehicle chosen, petitioners claim that under Rule 64, Sec. 2 of the Rules of Court, "**[a] judgment or final order or resolution of the Commission on Elections x x x may be brought by the aggrieved party to the Supreme Court on certiorari under Rule 65**."[50] They postulate that the June 29, 2015 Decision of the COMELEC *en banc* declaring Smartmatic JV as the eligible bidder with the lowest calculated responsive bid is a "judgment" within the contemplation of the rule, and is, therefore, a proper subject of a Rule 64 petition.

The argument fails to persuade.

a. Rule 64 does not cover rulings of the COMELEC in the exercise of its administrative powers

The rule cited by petitioners is an application of the constitutional mandate requiring that, unless otherwise provided by law, the rulings of the constitutional commissions shall be subject to review only by the Supreme Court on certiorari. A reproduction of Article IX-A, Section 7 of the 1987 Constitution is in order:

Section 7. Each Commission shall decide by a majority vote of all its Members, any case or matter brought before it within sixty days from the date of its submission for decision or resolution. A case or matter is deemed submitted for decision or resolution upon the filing of the last pleading, brief, or memorandum required by the rules of the Commission or by the Commission itself. **Unless otherwise provided by this Constitution or by law, any decision, order, or ruling of each Commission may be brought to the Supreme Court**

[50] *Id*. at 34.

on *certiorari* by the aggrieved party within thirty days from receipt of a copy thereof. (emphasis added)

Though the provision appears unambiguous and unequivocal, the Court has consistently held that the phrase "decision, order, or ruling" of constitutional commissions, the COMELEC included, that may be brought directly to the Supreme Court on certiorari is not all-encompassing, and that it only relates to those rendered in the commissions' exercise of **adjudicatory or quasi-judicial powers**.[51] In the case of the COMELEC, this would limit the provision's coverage to the decisions, orders, or rulings issued pursuant to its authority to be the sole judge of generally all controversies and contests relating to the elections, returns, and qualifications of elective offices.[52]

Consequently, Rule 64, which complemented the procedural requirement under Article IX-A, Section 7, should likewise be read in the same sense—that of excluding from its coverage decisions, rulings, and orders rendered by the COMELEC in the exercise of its **administrative** functions. In such instances, a Rule 65 petition for certiorari is the proper remedy. As held in *Macabago v. COMELEC*:[53]

[A] judgment or final order or resolution of the COMELEC may be brought by the aggrieved party to this Court on certiorari under Rule 65, as amended, except as therein provided. We ruled in *Elpidio M. Salva, et al. vs. Hon. Roberto L. Makalintal, et al.* (340 SCRA 506 (2000)) that Rule 64 of the Rules applies only to judgments or final orders of the COMELEC in the exercise of its quasi-judicial functions. The rule does not apply to interlocutory orders of the COMELEC in the exercise of its quasi-judicial functions or to its administrative orders. In this case, the assailed order of the COMELEC declaring private respondents petition to be one for annulment of the elections or for a declaration of a failure of elections in the municipality and ordering the production of the original copies of

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[51] *Garces v. Court of Appeals*, G.R. No. 114795, July 17, 1996, 259 SCRA 99, 107.

[52] *Bedol v. Comelec*, G.R. No. 179830, December 3, 2009, 606 SCRA 554.

[53] G.R. No. 152163, November 18, 2002, 392 SCRA 178.

the VRRs for the technical examination is administrative in nature. Rule 64, a procedural device for the review of final orders, resolutions or decision of the COMELEC, does not foreclose recourse to this Court under Rule 65 from administrative orders of said Commission issued in the exercise of its administrative function.

As applied herein, recall that the instant petition revolves around the issue on whether or not Smartmatic JV is eligible to participate in the bidding process for the COMELEC's procurement of 23,000 units of optical mark readers. The case does not stem from an election controversy involving the election, qualification, or the returns of an elective office. Rather, it pertains to the propriety of the polling commission's conduct of the procurement process, and its initial finding that Smartmatic JV is eligible to participate therein. It springs from the COMELEC's compliance with the Constitutional directive to enforce and administer all laws and regulations relative to the conduct of an election.[54] Specifically, it arose from the electoral commission's exercise of Sec. 12 of RA 8436, otherwise known as the Automated Elections Law, as amended by RA 9369,[55] which authorized the COMELEC "**to procure, in accordance with existing laws, by purchase, lease, rent or other forms of acquisition, supplies, equipment, materials, software, facilities, and other services, from local or foreign sources free from taxes and import duties, subject to accounting and auditing rules and regulation**."

The subject matter of Smartmatic JV's protest, therefore, does not qualify as one necessitating the COMELEC's exercise of its adjudicatory or quasi-judicial powers that could properly be the subject of a Rule 64 petition, but is, in fact, administrative

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[54] CONSTITUTION, Art. IX-C, Sec. 2(1).

[55] An Act Amending Republic Act No. 8436, Entitled "An Act Authorizing the Commission on Elections to Use an Automated Election System in the May 11, 1998 National or Local Elections and in Subsequent National and Local Electoral Exercises, To Encourage Transparency, Credibility, Fairness and Accuracy of Elections, Amending for the Purpose Batas Pampansa Blg. 881, As Amended, Republic Act No. 7166 and Other Related Elections Laws, Providing Funds Therefor and for Other Purposes."

in nature. Petitioners should then have sought redress *via* a petition for the issuance of the extraordinary writ of certiorari under Rule 65 to assail the COMELEC *en banc's* June 29, 2015 Decision granting the protest. As a caveat, however, the writ will only lie upon showing that the COMELEC acted capriciously or whimsically, with grave abuse of discretion amounting to lack or excess of jurisdiction in issuing the Decision, such as where the power is exercised in an arbitrary or despotic manner by reason of passion or personal hostility. The abuse of discretion must be so patent and gross as to amount to an evasion of positive duty or to a virtual refusal to perform the duty enjoined or to act at all in contemplation of law.[56] Mere abuse of discretion will not suffice.

It goes without saying that petitioners' action, having been lodged through an improper petition, is susceptible to outright dismissal. As the Court held in *Pates v. COMELEC*,[57] a Rule 64 petition cannot simply be equated to Rule 65 even if it expressly refers to the latter rule.[58] The clear distinction between the instant petition and *Pates*, however, is that in *Pates,* therein petitioner failed to present an exceptional circumstance or any compelling reason that would have warranted the liberal application of the Rules of Court. In stark contrast, herein petitioners, as will later on be discussed, were able to establish a meritorious case for the relaxation of the rules, relieving them from the rigid application of procedural requirements. We therefore treat the instant recourse as one filed not merely in relation to, but under Rule 65.

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[56] *Duco v. Comelec*, G.R. No. 183366, August 19, 2009, 596 SCRA 572.

[57] G.R. No. 184915, June 30, 2009, 591 SCRA 481.

[58] *Pates v. Comelec*, *id*. They exist as separate rules for substantive reasons as discussed below. Procedurally, the most patent difference between the two – *i.e.,* the exception that Section 2, Rule 64 refers to – is Section 3 which provides for a special period for the filing of petitions for *certiorari* from decisions or rulings of the COMELEC *en banc*. The period is 30 days from notice of the decision or ruling (instead of the 60 days that Rule 65 provides), with the intervening period used for the filing of any motion for reconsideration deductible from the originally-granted 30 days (instead of the fresh period of 60 days that Rule 65 provides).

This brings us now to the question on where the petition ought to have been filed.

b. Jurisdiction of the RTC over rulings of the head of the procuring entity relating to procurement protests

Guilty of reiteration, the COMELEC *en banc* was not resolving an election controversy when it resolved the protest, but was merely performing its function to procure the necessary election paraphernalia for the conduct of the 2016 National and Local Elections. This power finds statutory basis in Sec. 12 of RA 8436,[59] as amended, which reads:

SEC.12. *Procurement of Equipment and Materials*. – To achieve the purpose of this Act, **the Commission is authorized to procure, in accordance with existing laws, by purchase, lease, rent or other forms of acquisition, supplies, equipment, materials, software, facilities, and other service, from local or foreign sources** free from taxes and import duties, subject to accounting and auditing rules and regulation. With respect to the May 10, 2010 election and succeeding electoral exercises, the system procured must have demonstrated capability and been successfully used in a prior electoral exercise here or board. Participation in the 2007 pilot exercise shall not be conclusive of the system's fitness.

In determining the amount of any bid from a technology, software or equipment supplier, the cost to the government of its deployment and implementation shall be added to the bid price as integral thereto. The value of any alternative use to which such technology, software or equipment can be put for public use shall not be deducted from the original face value of the said bid. (emphasis added)

In *Pabillo v. COMELEC*,[60] the Court held that the "existing laws" adverted to in the provision is none other than RA 9184. The law is designed to govern all cases of procurement of the national government, its departments, bureaus, offices and agencies, including state universities and colleges, government-

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[59] Formerly Section 8 of RA 8436, the provision was renumbered to Section 12 by RA 9369 .

[60] G.R. Nos. 216098 & 216562, April 21, 2015.

owned and/or-controlled corporations, government financial institutions and local government units.[61] It mandates that as a general rule, all government procurement must undergo competitive bidding[62] and for purposes of conducting the bidding process, the procuring entity convenes a BAC.

The BAC is tasked to oversee the entire procuring process, from advertisement of the project to its eventual award.[63] It is the first to rule on objections or complaints relating to the conduct of the bidding process, subject to review by the head of the procuring entity via protest. As outlined in RA 9184, the protest mechanism in procurement processes is as follows:

ARTICLE XVII
PROTEST MECHANISM

Section 55. *Protests on Decisions of the BAC.*– Decisions of the BAC in all stages of procurement may be **protested to the head of the procuring entity** and shall be in writing. Decisions of the BAC may be protested by filing a verified position paper and paying a non-refundable protest fee. The amount of the protest fee and the periods during which the protests may be filed and resolved shall be specified in the IRR.

Section 56. *Resolution of Protests.* – The protest shall be resolved strictly on the basis of records of the BAC. Up to a certain amount to be specified in the IRR, the decisions of the Head of the Procuring Entity shall be final.

Section 57. *Non-interruption of the Bidding Process.*– In no case shall any protest taken from any decision treated in this Article stay or delay the bidding process. Protests must first be resolved before any award is made.

Section 58. *Resort to Regular Courts; Certiorari.*– Court action may be resorted to only after the protests contemplated in this Article shall have been completed. **Cases that are filed in violation of the process specified in this Article shall be dismissed for lack of**

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[61] RA 9184, Sec. 3.

[62] *Id*., Sec. 10.

[63] *Id*., Sec. 12.

jurisdiction. The regional trial court shall have jurisdiction over final decision of the head of the procuring entity. Court actions shall be governed by **Rule 65** of the 1997 Rules of Civil Procedure.

This provision is without prejudice to any law conferring on the Supreme court the sole jurisdiction to issue temporary restraining orders and injunctions relating to Infrastructure Projects of Government. (emphasis added)

Thus, under Sec. 58, the proper remedy to question the ruling of the head of the procuring entity is through a Rule 65 petition for certiorari with the Regional Trial Court (RTC). The term "procuring entity" is defined under the RA 9184 as "**any branch, department, office, agency, or instrumentality of the government, including state universities and colleges, government-owned and/or — controlled corporations, government financial institutions, and local government units procuring Goods, Consulting Services and Infrastructure Projects**."[64] This statutory definition makes no distinction as to whether or not the procuring entity is a constitutional commission under Article IX of the Constitution. It is broad enough to include the COMELEC within the contemplation of the term. Hence, under the law, grievances relating to the COMELEC rulings in protests over the conduct of its project procurement should then be addressed to the RTC.

The mandatory recourse to the RTC in the appeal process applicable to COMELEC procurement project is not a novel development introduced by RA 9184. Even prior to the advent of the government procurement law, the requirement already finds jurisprudential support in *Filipinas Engineering and Machine Shop v. Ferrer*,[65] wherein the Court expounded this way:

[I]t has been consistently held that it is the Supreme Court, not the Court of First Instance, which has exclusive jurisdiction to review on certiorari final decisions, orders or rulings of the COMELEC relative to the conduct of elections and enforcement of election laws.

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[64] *Id*., Sec. 5(o).

[65] No. L-31455, February 28, 1985, 135 SCRA 25.

We are however, far from convince[d] that an order of the COMELEC awarding a contract to a private party, as a result of its choice among various proposals submitted in response to its invitation to bid comes within the purview of a "final order" which is exclusively and directly appealable to this court on certiorari. What is contemplated by the term "final orders, rulings and decisions" of the COMELEC reviewable by certiorari by the Supreme Court as provided by law are those rendered in actions or proceedings before the COMELEC and taken cognizance of by the said body in the exercise of its adjudicatory or quasi-judicial powers.

x x x x x x x x x

[T]he order of the Commission granting the award to a bidder is not an order rendered in a legal controversy before it wherein the parties filed their respective pleadings and presented evidence after which the questioned order was issued; and that this order of the commission was issued pursuant to its authority to enter into contracts in relation to election purposes. In short, **the COMELEC resolution awarding the contract in favor of Acme was not issued pursuant to its quasi-judicial functions but merely as an incident of its inherent administrative functions over the conduct of elections, and hence, the said resolution may not be deemed as a "final order" reviewable by certiorari by the Supreme Court.** Being non-judicial in character, no contempt may be imposed by the COMELEC from said order, and no direct and exclusive appeal by certiorari to this Tribunal lie from such order. **Any question arising from said order may be well taken in an ordinary civil action before the trial courts.** (emphasis added)

Additionally, even if the Court treats the protest proceeding as part of the procuring agency's adjudicatory function, the Court notes that Sec. 58 of RA 9184 would nevertheless apply, and the RTC would still have jurisdiction, pursuant to the proviso "unless otherwise provided by law" as appearing in Article IX-A, Section 7 of the Constitution. In this case, the pertinent law provides that insofar as rulings of the COMELEC in procurement protests are concerned, said rulings can be challenged through a Rule 65 certiorari with the RTC.

c. The protest mechanism under RA 9184 can only be availed of by a losing bidder

Nevertheless, the application of Sec. 58 of RA 9184 has to be qualified. It cannot, in all instances, be the proper remedy to question the rulings of the heads of procuring entities in procurement protests. As in the prior case of *Roque v. COMELEC*,[66] which similarly dealt with COMELEC procurement of OMRs the Court held that only a losing bidder would be aggrieved by, and *ergo* would have the personality to challenge, the head of the procuring entity's ruling in the protest. This is bolstered by the GPRA IRR, which fleshed out the provisions of RA 9184 thusly:

RULE XVII – PROTEST MECHANISM

Section 55. Protests on Decisions of the BAC

55.1. Decisions of the BAC at any stage of the procurement process may be questioned by filing a request for reconsideration within the three (3) calendar days upon receipt of written notice or upon verbal notification. The BAC shall decide on the request for reconsideration within seven (7) calendar days from receipt thereof.

If a failed bidder signifies his intent to file a request for reconsideration, the BAC shall keep the bid envelopes of the said failed bidder unopened and/or duly sealed until such time that the request for reconsideration has been resolved.

55.2. In the event that the request for reconsideration is denied, decisions of the BAC may be protested in writing to the Head of the Procuring Entity: Provided, however, That a prior request for reconsideration should have been filed by the party concerned in accordance with the preceding Section, and the same has been resolved.

55.3. **The protest must be filed within seven (7) calendar days from receipt by the party concerned of the resolution of the BAC** denying its request for reconsideration. A protest may be made by filing a verified position paper with the Head of the Procuring Entity concerned, accompanied by the payment of a non-refundable protest fee. The non-refundable protest fee shall be in an amount equivalent to no less than one percent (1%) of the ABC.

55.4. The verified position paper shall contain the following information:

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[66] G.R. No. 188456, September 10, 2009, 599 SCRA 69.

a) The name of bidder;
b) The office address of the bidder;
c) The name of project/contract;
d) The implementing office/agency or procuring entity;
e) A brief statement of facts;
f) The issue to be resolved; and
g) Such other matters and information pertinent and relevant to the proper resolution of the protest.

The position paper is verified by an affidavit that the affiant has read and understood the contents thereof and that the allegations therein are true and correct of his personal knowledge or based on authentic records. An unverified position paper shall be considered unsigned, produces no legal effect, and results to the outright dismissal of the protest.

x x x x x x x x x

Section 58. Resort to Regular Courts; Certiorari

58.1. **Court action may be resorted to only after the protests contemplated in this Rule shall have been completed**, i.e., resolved by the Head of the Procuring Entity with finality. The regional trial court shall have jurisdiction over final decisions of the Head of the Procuring Entity. Court actions shall be governed by Rule 65 of the 1997 Rules of Civil Procedure. (emphasis added)

Evidently, the remedy of certiorari filed before the RTC under Sec. 58 of RA 9184 is intended as a continuation of the motion for reconsideration filed before the BAC, and of the subsequent protest filed with the head of the procuring entity. This is confirmed by the condition *sine qua non* completion of the process under Rule XVII, Secs. 55-57 of the GPRA IRR before recourse to the trial courts become available.

It is obvious under Sec. 55.1 of Rule XVII that only a **failed bidder** can turn the cogs of the protest mechanism by first moving for reconsideration of the assailed BAC ruling. The **party concerned**, the bidder adversely affected by the resolution of the motion, shall then have seven (7) days to file a protest with the head of the procuring entity. The pre-requisite that a protestant should likewise be a bidder is emphasized by Sec. 55.4 which requires that the "**name of the bidder**" and the "**office address**

of the bidder" be indicated in its position paper. Accordingly, **only the bidder against whom the head of the procuring entity ruled, if it would challenge the ruling any further, is required to resort to filing a petition for certiorari before the trial courts under Sec. 58**. Ego, there is neither rhyme nor reason for petitioners herein, who are non-participants in the procurement project, to comply with the rules on protest under RA 9184, part and parcel of which is the exclusivity of the jurisdiction of the RTC under Sec. 58 thereof. Stated in the alternative, there is no legislative enactment requiring petitioners to seek recourse first with the RTC to question the COMELEC *en banc*'s June 29, 2015 Decision. Thus, if circumstances so warrant, direct resort to the Court will be allowed.

d. Hierarchy of courts and the exceptions to the doctrine

The expanded concept of judicial power under Article VIII, Section 1 of the Constitution[67] includes the duty of the judiciary not only "to settle actual controversies involving rights which are legally demandable and enforceable" but also, as an instrument of checks and balances, "to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government."[68] Under Rule 65 of the Rules of Court, the special civil actions for certiorari and prohibition are the available remedies for determining and correcting such grave abuses of discretion.

The power is wielded not by the Court alone, but concurrently with the Court of Appeals and the Regional Trial Courts, as

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[67] Section 1. The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.

Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.

[68] See also *Araullo v. Aquino III*, G.R. Nos. 209287, *etc*., July 1, 2014.

provided by law. With respect to the Court of Appeals, Section 9 (1) of Batas Pambansa Blg. 129 (BP 129) gives the appellate court original jurisdiction to issue, among others, a writ of certiorari, whether or not in aid of its appellate jurisdiction. For the RTCs, the power to issue a writ of certiorari, in the exercise of their original jurisdiction, is provided under Section 21 of BP 129.[69] Additionally, the Court has already held that the CTA, by constitutional mandate, is likewise vested with jurisdiction to issue writs of certiorari.[70] So too has the Sandiganbayan been vested with certiorari powers in aid of its appellate jurisdiction.[71]

Notwithstanding the non-exclusivity of the original jurisdiction over applications for the issuance of writs of certiorari, however, the doctrine of hierarchy of courts dictates that recourse must first be made to the lower-ranked court exercising concurrent jurisdiction with a higher court.[72] The rationale behind the principle is explained in *Bañez, Jr. v. Concepcion*[73] in the following wise:

> The Court must enjoin the observance of the policy on the hierarchy of courts, and now affirms that the policy is not to be ignored without serious consequences. The strictness of the policy is designed to shield the Court from having to deal with causes that are also well within the competence of the lower courts, and thus leave time to the Court to deal with the more fundamental and more essential tasks that the Constitution has assigned to it. The Court may act on petitions for the extraordinary writs of certiorari, prohibition and mandamus only when absolutely necessary or when serious and important reasons exist to justify an exception to the policy.

Petitioners do not have the absolute and unrestrained freedom of choice of the court to which an application for certiorari

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[69] *City of Manila v. Grecia-Cuerdo*, G.R. No. 175723, February 4, 2014.

[70] *Id*.

[71] PD 1606, Sec. 4(c), as amended by RA 8249, Sec. 4.

[72] *Bonifacio v. Gimenez*, G.R. No. 184800, May 5, 2010.

[73] G.R. No. 159508, August 29, 2012, 679 SCRA 237.

will be directed.[74] Indeed, referral to the Supreme Court as the court of last resort will simply be empty rhetoric if party-litigants are able to flout judicial hierarchy at will. The Court reserves the direct invocation of its jurisdiction only when there are special and important reasons clearly and especially set out in the petition that would justify the same.[75]

In the leading case of *The Diocese of Bacolod v. Comelec*,[76] the Court enumerated the specific instances when direct resort to this Court is allowed, to wit:

(a) When there are genuine issues of constitutionality that must be addressed at the most immediate time;
(b) When the issues involved are of transcendental importance;
(c) Cases of first impression;
(d) When the constitutional issues raised are best decided by this Court;
(e) When the time element presented in this case cannot be ignored;
(f) When the petition reviews the act of a constitutional organ;
(g) When there is no other plain, speedy, and adequate remedy in the ordinary course of law;
(h) When public welfare and the advancement of public policy so dictates, or when demanded by the broader interest of justice;
(i) When the orders complained of are patent nullities; and
(j) When appeal is considered as clearly an inappropriate remedy.

The Court finds the second and fifth, and sixth grounds applicable in the case at bar. Much has already been said of the "compelling significance and the transcending public importance" of the primordial issue underpinning petitions that

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[74] *Macapagal v. People*, G.R. No. 193217, February 26, 2014.

[75] *Id*.

[76] G.R. No. 205728, January 21, 2015.

assail election automation contracts: the success—and the far-reaching grim implications of the failure—of the nationwide automation project.[77] So it is that the Court, in the growing number of cases concerning government procurement of election paraphernalia and services, has consistently exhibited leniency and dispensed of procedural requirements for petitioners to successfully lodge certiorari petitions.[78] Technicalities should not stand in the way of resolving the substantive issues petitioners raised herein. On this same ground of transcendental importance, the Court may opt to treat the instant petition as one for certiorari under, not merely in relation to, Rule 65.

As regards the fifth ground, the time element, it is sufficient to state that with the 2016 polls visible in the horizon, the post-haste resolution of this case becomes all the more imperative. It would be the height of absurdity to require petitioners to undergo scrutiny through the lens of the RTC first, considering that the acquisition of 23,000 OMRs would, at the minimum, affect the clustering of precincts. Without the finalized list of clustered precincts, the polling place for the registered voters could not yet be ascertained. Needless to state, this would impede the preparations for the conduct of the polls and its unmitigated effects could very well lead to mass disenfranchisement of voters.

Lastly, the sixth ground is indubitably applicable. The rulings of the COMELEC, as a constitutional body, can immediately be reviewed by the Court on proper petition. As quoted in *The Diocese of Bacolod v. COMELEC*,[79] citing *Albano v. Arranz*,[80] "**it is easy to realize the chaos that would ensue if the Court of First Instance of each and every province were [to] arrogate itself the power to disregard, suspend, or contradict any order of the Commission on Elections: that constitutional body would be speedily reduced to impotence**."

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[77] *Roque v. COMELEC, supra* note 66; citing *Marabur v. Comelec*, G.R. No. 169513, February 26, 2007, 516 SCRA 696.

[78] *Id.*; *Pabillo v. COMELEC*, G.R. Nos. 216098 & 216562, April 21, 2015; *Capalla v. COMELEC*, G.R. No. 201112, June 13, 2012.

[79] G.R. No. 205728, January 21, 2015.

[80] No. L-19260, January 31, 1962, 4 SCRA 386.

In sum, there exist ample compelling reasons to justify the direct resort to the Court as a departure from the doctrine of hierarchy of courts not in relation to but under Rule 65 of the Rules of Court on certiorari and prohibition, and to brush aside the procedural issues in this case to focus on the substantive issues surrounding the procurement of the 23,000 additional OMRs for the 2016 elections.

The submission of an AOI is not an eligibility criterion

It bears stressing on the outset that no issue has been brought forth questioning the technical capability of Smartmatic JV's OMR+. Instead, the pivotal point to be resolved herein is whether or not the COMELEC acted with grave abuse of discretion in declaring Smartmatic JV eligible in spite of the alleged nullity of, or defect in, SMTC's AOI.

Petitioner would first insist that the submission of an AOI is an eligibility requirement that Smartmatic JV cannot be deemed to have complied with. In addressing this assertion, a discussion of the qualification process is apropos.

a. The submission of an AOI was not a pre-qualification requirement

It is a basic tenet that except only in cases in which alternative methods of procurement are allowed, all government procurement shall be done by competitive bidding. This is initiated by the BAC, which publishes an Invitation to Bid for contracts under competitive bidding in order to ensure the widest possible dissemination thereof.[81]

Answering the invitation, interested participants submit their bids using the forms specified in the bidding documents in two (2) separate sealed bid envelopes submitted simultaneously. The first contains the technical component of the bid, including the eligibility requirements under Section 23.1 of GPRA IRR, while the second contains the financial component of the bid.[82]

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[81] *Commission on Audit v. Linkworth International*, G.R. No. 182559, March 13, 2009, 518 SCRA 501.

[82] Sec. 25.1, RA 9184 IRR.

The BAC then sets out to determine the eligibility of the prospective bidders based on their compliance with the eligibility requirements set forth in the Invitation to Bid and their submission of the legal, technical and financial documents required under RA 9184 and the GPRA IRR.[83] The first screening is done via the pre-qualification stage as governed by Sec. 30.1 of RA 9184's IRR, which pertinently reads:

> Section 30. Preliminary Examination of Bids
>
> 30.1. The BAC shall open the first bid envelopes of prospective bidders in public to determine each bidder's compliance with the documents required to be submitted for eligibility and for the technical requirements, as prescribed in this IRR. For this purpose, **the BAC shall check the submitted documents of each bidder against a checklist of required documents** to ascertain if they are all present, using a **nondiscretionary "pass/fail" criterion**, as stated in the Instructions to Bidders. If a bidder submits the required document, it shall be rated "passed" for that particular requirement. In this regard, bids that fail to include any requirement or are incomplete or patently insufficient shall be considered as "failed." Otherwise, the BAC shall rate the said first bid envelope as "passed." (emphasis added)

For the procurement of highly technical goods wherein the two-stage bidding process is employed, such as the subject of procurement in this case, the same procedure for pre-qualification outlined above is followed in the first stage, except that the technical specifications are only in the form of performance criteria, and that the technical proposals will not yet include price tenders.[84]

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[83] *Commission on Audit v. Linkworth International*, supra note 81.

[84] Revised Implementing Rules and Regulations, RA 9184, Sec. 30.3. — For the procurement of goods where, due to the nature of the requirements of the project, the required technical specifications/requirements of the contract cannot be precisely defined in advance of bidding, or where the problem of technically unequal bids is likely to occur, a two (2)-stage bidding procedure may be employed. In these cases, the procuring entity concerned shall prepare the Bidding Documents, including the technical specification in the form of performance criteria only. Under this procedure, prospective bidders shall be requested at the first stage to submit their respective eligibility requirements if needed, and initial technical proposals only (no price tenders). The concerned BAC shall then evaluate the technical

Based on the rule, the BAC's function in determining the eligibility of a bidder during pre-qualification is ministerial in the sense that it only needs to countercheck the completeness and sufficiency of the documents submitted by a bidder against a checklist of requirements. It cannot, therefore, declare a bidder ineligible for failure to submit a document which, in the first place, is not even required in the bid documents.

Citing Sec. 23.1 (b) of the GPRA IRR, petitioners contend that an AOI is one of such mandatory documentary requirements and that the failure of a bidder to furnish the BAC a valid one would automatically render the bidder ineligible.

We are not convinced.

Sec. 23 of the adverted GPRA IRR reads:

Section 23. Eligibility Requirements for the Procurement of Goods and Infrastructure Projects

23.1. For purposes of determining the eligibility of bidders using the criteria stated in Section 23.5 of this IRR, only the following documents shall be required by the BAC, using the forms prescribed in the Bidding Documents:

a) Class "A" Documents

Legal Documents

i) Registration certificate from SEC, Department of Trade and Industry (DTI) for sole proprietorship, or CDA for

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merits of the proposals received from eligible bidders *vis-à-vis* the required performance standards. A meeting/discussion shall then be held by the BAC with those eligible bidders whose technical tenders meet the minimum required standards stipulated in the Bidding Documents for purposes of drawing up the final revised technical specifications/requirements of the contract. Once the final revised technical specifications are completed and duly approved by the concerned BAC, copies of the same shall be issued to all the bidders identified in the first stage who shall then be required to submit their revised technical tenders, including their price proposals in two (2) separate sealed envelopes in accordance with this IRR, at a specified deadline, after which time no more bids shall be received. The concerned BAC shall then proceed in accordance with the procedure prescribed in this IRR.

cooperatives, or any proof of such registration as stated in the Bidding Documents.

ii) Mayor's permit issued by the city or municipality where the principal place of business of the prospective bidder is located.

iii) Tax clearance per Executive Order 398, Series of 2005, as finally reviewed and approved by the BIR.

Technical Documents

iv) Statement of the prospective bidder of all its ongoing government and private contracts, including contracts awarded but not yet started, if any, whether similar or not similar in nature and complexity to the contract to be bid; and Statement identifying the bidder's single largest completed contract similar to the contract to be bid, except under conditions provided for in Section 23.5.1.3 of this IRR, within the relevant period as provided in the Bidding Documents in the case of goods. All of the above statements shall include all information required in the PBDs prescribed by the GPPB.

v) In the case of procurement of infrastructure projects, a valid Philippine Contractors Accreditation Board (PCAB) license and registration for the type and cost of the contract to be bid. Financial Documents

vi) The prospective bidder's audited financial statements, showing, among others, the prospective bidder's total and current assets and liabilities, stamped "received" by the BIR or its duly accredited and authorized institutions, for the preceding calendar year which should not be earlier than two (2) years from the date of bid submission.

vii) The prospective bidder's computation for its Net Financial Contracting Capacity (NFCC).

b) Class "B" Document

Valid joint venture agreement (JVA), in case the joint venture is already in existence. In the absence of a JVA, duly notarized statements from all the potential joint venture partners stating that they will enter into and abide by the provisions of the JVA in the instance that the bid is successful shall be included in the bid. Failure to enter into a joint venture in the event of a contract award shall be ground for the forfeiture of the bid

> security. **Each partner of the joint venture shall submit the legal eligibility documents.** The submission of technical and financial eligibility documents by any of the joint venture partners constitutes compliance. (emphasis added)

Clearly, the quoted provisions, as couched, do not require the submission of an AOI in order for a bidder to be declared eligible. The requirement that bears the most resemblance is the submission by each partner to the venture of a registration certificate issued by the Securities and Exchange Commission, but compliance therewith was never disputed by the petitioners. Moreover, it was never alleged that Smartmatic JV was remiss in submitting a copy of its joint venture agreement pursuant to Sec. 23.1(b), which petitioners specifically invoked.

It may be that the procuring entity has the option to additionally require the submission of the bidders' respective AOIs in order to substantiate the latter's claim of due registration with the government entities concerned. However, a perusal of the bidding documents would readily reveal that the procuring entity, the COMELEC in this case, did not impose such a requirement. As can be gleaned in the Instruction to Bidders,[85] only the following documents were required for purposes of determining a bidder's eligibility:

> **12. Documents Comprising the Bid: Eligibility and Technical Components**
>
> 12.1. Unless otherwise indicated in the BDS, the first envelope shall contain the following eligibility and technical documents:
>
> (a) Eligibility Documents –
>
> Class "A" Documents:
>
> (i) Registration certificate from the Securities and Exchange Commission (SEC), Department of Trade and Industry (DTI) for sole proprietorships, and Cooperative Development Authority (CDA) for cooperatives, or any proof of such registration as stated in the BDS;

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[85] *Rollo*, pp. 231-233.

(ii) Mayor's permit issued by the city or municipality where the principal place of business of the prospective bidder is located;

(iii) Statement of all its ongoing and completed government and private contracts within the period stated in the BDS, including contracts awarded but not yet started, if any. The statement shall include, for each contract, the following:

(iii.1) name of the contract;

(iii.2) date of the contract;

(iii.3) kinds of Goods;

(iii.4) amount of contract and value of outstanding contracts;

(iii.5) date of delivery; and

(iii.6) end user's acceptance or official receipt(s) issued for the contract, if completed.

(iv) Audited financial statements, stamped "received" by the Bureau of Internal Revenue (BIR) or its duly accredited and authorized institutions, for the preceding calendar year, which should not be earlier than two (2) years from the bid submission;

(v) NFCC computation or CLC in accordance with ITB Clause 5.5; and

(vi) Tax clearance per Executive Order 398, Series of 2005, as finally reviewed and approved by the BIR.(Updated pursuant to GPPB Resolution No. 21-2013 dated July 30, 2013)

Class "B" Document:

(vii) If applicable, the JVA in case the joint venture is already in existence, or duly notarized statements from all the potential joint venture partners stating that they will enter into and abide by the provisions of the JVA in the instance that the bid is successful;

(viii) Social Security Clearance (SSS);

(ix) Department of Labor and Employment Clearance (DOLE);

(x) Court Clearance (Regional Trial Court) (emphasis omitted)

The non-requirement of an AOI is further made evident by the Bid Data Sheet (BDS)[86] which provides a "**complete list**"[87] of eligibility proposal documents to be submitted during the first stage of the bidding process. As outlined in the BDS:[88]

TAB	CLASS "A" DOCUMENTS
I. LEGAL DOCUMENTS:(In case of a Joint Venture, each member of the JV shall submit the required Documents mentioned in Tabs "A", "B", "C" and "I")	
A.	**Registration Certificate Form**
	Securities and Exchange Commission from the Securities and Exchange Commission (SEC) for Corporation or Partnership; or its equivalent documents in case of foreign bidder.
	Department of Trade and Industry (DTI) for sole proprietorship; or its equivalent documents in case of foreign bidder.
	Cooperative Development Authority, for Cooperatives or its equivalent documents in case of foreign bidder.
B.	Mayor's Permit issued by the city or municipality where the principal place of business of the prospective bidder is located or its equivalent document in case of a foreign corporation.
C.	Tax Clearance per Executive Order 398, Series of 2005, as finally reviewed and approved by the BIR.
II. TECHNICAL DOCUMENTS	
D.	Statement of all ongoing and completed government and private contracts, within the last six (6) years from the date of submission and receipt of bids, including contracts awarded but not yet started, if any, using the prescribed form. Please refer to Section VIII. Bidding Forms.
E.	Statement of at least one similar completed largest contract within six (6) years from the date of the opening

[86] *Id*. at 254-264.

[87] *Id*. at 258.

[88] *Id*. at 258-259.

	bids equivalent to at least 50% of the ABC, using the prescribed form. Please refer to Section VIII. Bidding Forms.
F.	Bid security in the form, amount and validity in accordance with ITB Clause 18.
III. FINANCIAL DOCUMENTS	
G.	Audited financial statements, stamped received by the Bureau of Internal Revenue (BIR) or its duly accredited and authorized institutions, for the preceding calendar year, which should not be earlier than two (2) years from bid submission; or equivalent documents in case of foreign bidder, provided that the same is in accordance with International Financial Reporting Standards.
H.	NFCC Computation in accordance with ITB clause 5.
TAB	**CLASS "B" ELIGIBILITY REQUIREMENTS**
I.	Valid Joint Venture Agreement (JVA), in case the Joint Venture is already in existence at the time of the submission and opening of bids, OR duly notarized statements from all potential joint venture partners stating that they will enter into and abide by the provisions of the JVA if the bid is successful;
IV. OTHER DOCUMENTS	
J.	Conformity with the Schedule of Requirements and Initial Technical Proposal (approved TOR), as enumerated and specified in Sections VI and VII of the Bidding Documents, using the prescribed form.
K.	Certification from the Election Authority or Election Management Body that the system has demonstrated capability and has been successfully used in a prior electoral exercise here or abroad.
L.	Omnibus Sworn Statement using the prescribed form in Section VIII.

Even the furnished Schedule of Requirements[89] does not mandate the submission of an AOI:[90]

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[89] *Id*. at 325-329.

[90] *Id*. at 326-328.

REQUIREMENTS	CORPORATION/ SP/PARTNERSHIP		JOINT VENTURE	
	PASSED	FAILED	PASSED	FAILED
x x x				
ELIGIBILITY DOCUMENTS				
1. LEGAL DOCUMENTS				
I. Class "A" Documents				
a. Original/Certified true copy of Registration Certificate from the Securities and Exchange Commission (SEC), Department of Trade and Industry (DTI) for sole proprietorship, or Cooperative Development Authority (CDA) for Cooperatives or any proof of such registration as stated in the BDS;(In case of a JV, this requirement must be complied with by all the JV partners)				
b. Original/Certified true copy of valid and current Mayor's/ Business Permit/License issued by the city or municipality where the principal place of business of the prospective bidder is located; (In case of a JV, this requirement must be complied with by all the JV partners)				
c. Original/Certified true copy of valid Tax Clearance per Executive Order 398, Series of 2005(In case of a JV, this requirement must be complied with by all the JV partners)				
2. TECHNICAL DOCUMENTS				
d. Sworn Statement of all its on-going and completed government and private contracts within the last six (6) years prior to the deadline for the submission				

and opening of bids, including contracts awarded but not yet started, if any. The statement shall include, for each of the contract, the following: x x x				
e. Sworn Statement of the bidder's single largest contract completed within six (6) YEARS prior to the deadline for the submission and opening of bids, with a value of FIFTY (50%) percent of the ABC.				
f. The bid security (Payable to COMELEC) shall be in the following amount: x x x				
3. FINANCIAL DOCUMENTS				
g. Audited Financial Statements (AFS), stamped "received" by the Bureau of Internal Revenue (BIR) or its duly accredited and authorized institutions, for the preceding calendar year x x x				
h. NFCC computation which shall be based only on the current assets and current liabilities submitted to the BIR, through Electronic Filing and Payment System (EFPS)				
4. OTHERS				
i. Conformity with Section VI: Schedule of Requirements of the Bidding Documents				
j. Conformity with Section VII. Technical Specifications of the Bidding Documents. If proposal is the same with the initial technical requirements, just put "COMPLY"				
k. Certification from the Election Authority or Election management Body that the system has				

demonstrated capability and has been successfully used in a prior electoral exercise here or abroad.				
l. OMNIBUS AFFIDAVIT in accordance with Section 25.2 (a)(iv) of the IRR of RA 9184 and using the form prescribed in Section VIII of the Philippine bidding Documents. Shall include: x x x				

Verily, based on Sec. 23.1(b) of the GPRA IRR, the Instruction to Bidders, the BDS, and the Checklist of Requirements, the non-submission of an AOI is not fatal to a bidder's eligibility to contract the project at hand. Thus, it cannot be considered as a ground for declaring private respondents ineligible to participate in the bidding process. To hold otherwise would mean allowing the BAC to consider documents beyond the checklist of requirements, in contravention of their non-discretionary duty under Sec. 30(1) of the GPRA IRR.

b. Neither is the AOI a post-qualification requirement

After the preliminary examination stage, the BAC opens, examines, evaluates and ranks all bids and prepares the Abstract of Bids which contains, among others, the names of the bidders and their corresponding calculated bid prices arranged from lowest to highest. The objective of the bid evaluation is to identify the bid with the lowest calculated price or the Lowest Calculated Bid. The Lowest Calculated Bid shall then be subject to post-qualification to determine its responsiveness to the eligibility and bid requirements.[91]

During post-qualification, the procuring entity verifies, validates, and ascertains all statements made and documents submitted by the bidder with the lowest calculated or highest rated bid using a non-discretionary criteria as stated in the bidding

[91] *Commission on Audit v. Linkworth International*, *supra* note 81.

documents.[92] If, after post-qualification, the Lowest Calculated Bid is determined to be post-qualified, it shall be considered the Lowest Calculated Responsive Bid and the contract shall be awarded to the bidder.[93]

To recall, the BAC, on December 15, 2014, declared that only Smartmatic JV and Indra were eligible to participate in the second stage of the bidding process. Of the two, only Smartmatic JV submitted a complete and responsive Overall Summary of the Financial Proposal and was thus subjected to post-qualification evaluation. Initially, the BAC post-disqualified Smartmatic JV for allegedly failing to submit a valid AOI. It is this preliminary finding that petitioners want reinstated.

We disagree.

Even on post-qualification, the submission of an AOI was not included as an added requirement. The Instruction to Bidders pertinently provides:[94]

29. Post-Qualification

29.1. The Procuring Entity shall determine to its satisfaction whether the Bidder that is evaluated as having submitted the Lowest Calculated Bid (LCB) complies with and is responsive to all the requirements and conditions specified in ITB Clauses 5, 12 and 13.

x x x x x x x x x

29.3. The determination shall be **based upon an examination of the documentary evidence of the Bidder's qualifications submitted pursuant to ITB Clauses 12 and 13**, **as well as other information as the Procuring Entity deems necessary and appropriate**, using a non-discretionary "pass/fail" criterion. (emphasis added)

Clauses 12 and 13 of the Instruction to Bidders pertain to the eligibility documents, technical documents, and the financial component of a participant's bid.[95] Meanwhile, the Clause 5

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[92] Sec. 34.3, Revised Implementing Rules and Regulations, R.A. No. 9184.

[93] *Commission on Audit v. Linkworth International*, *supra* note 81.

[94] *Rollo*, pp. 247-248.

[95] *Id*. at 231-234.

adverted to is an enumeration of persons or entities who may participate in the bidding.[96] Nowhere in these clauses does it appear that an AOI is a mandatory requirement even for post-qualification. Even the BAC's March 27, 2015 Notice addressed to Smartmatic JV supports this finding:[97]

> x x x [F]or purposes of post-qualification proceedings, please submit copies of the following documents to the Bid and Awards Committee (BAC), through the BAC Secretariat, as stated in Clause 29.2 (a) of Section III, Bid Data Sheet of the Bidding Documents, within three (3) calendar days from receipt of this Notice:
>
> a) Latest Income and Business Tax Returns. x x x
>
> b) Certificate of PhilGEPS Registration.
>
> c) ISO 9001:2008 Certification of the Optical Mark/reader or Optical Scan manufacturer for OMR.
>
> In addition, the following certifications must be submitted:
>
> a) That all system requirements for customization as stated in the Terms of Reference and RA 9369 shall be fully complied with, subject to the application of applicable penalties for non-compliance; and
>
> b) That it shall not demand for additional payment from COMELEC to procure additional OMR system requirements during Project Implementation for items that it may have overlooked in its Bid Proposal.
>
> The bidder is also required to submit the machines, including the software and hardware, back-up power supply and other equipment and peripherals necessary for the conduct of the testing during post-qualification, including the prototype sample of the ballot box based on what is required in the Terms of Reference (TOR) for the OMR on April 6, 2015 as per instruction from the Technical Working Group (TWG).

From the foregoing, the inescapable result is that mere failure to file an AOI cannot automatically result in the bidder concerned being declared ineligible, contrary to petitioners' claim.

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[96] *Id*. at 225-226.

[97] *Id*. at 447-448.

Smartmatic JV may validly undertake the project sought to be procured

a. SMTC still has the authority to conduct business even after the conduct of the 2010 national and local elections

A thorough reading of petitioners' contention, however, would show that it is not only assailing Smartmatic JV's ineligibility based on the alleged incompleteness of its documentary requirements(i.e. for non-submission of a valid AOI), but also because they considered the subject of the procurement beyond the ambit of SMTCs corporate purpose. Petitioners postulate that SMTC's authority to conduct business ceased upon fulfillment of its primary purpose stated in its AOI– that of automating the 2010 National and Local Elections, and this allegedly rendered SMTC's subsequent involvement in the subject procurement project an *ultra vires* act.

Petitioners' myopic interpretation of SMTC's purpose is incorrect.

While it is true that SMTC's AOI made specific mention of the automation of the 2010 National and Local Elections as its primary purpose, it is erroneous to interpret this as meaning that the corporation's authority to transact business will cease thereafter. Indeed, the contractual relation between SMTC and the COMELEC has been the subject of prior controversies that have reached the Court, and We have on these occasions held that even beyond the 2010 election schedule, the parties remain to have subsisting rights and obligations relative to the products and services supplied by SMTC to the COMELEC for the conduct of the 2010 polls.

For instance, the Court, in the landmark case of *Capalla v. COMELEC (Capalla)*,[98] upheld the validity of the March 30, 2012 Deed of Sale by and between SMTC and COMELEC when

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[98] G.R. Nos. 201112, *etc*., October 23, 2012.

the latter exercised the option to purchase (OTP) clause embodied in their 2009 Automated Election System Contract (AES Contract). Even though the original deadline for the option was only until December 31, 2010, We ruled that the parties to the AES Contract, pursuant to Art. 19 thereof,[99] can still validly extend the same by mutual agreement. The Court ratiocinated that Art. 19 of the AES Contract may still be invoked even after December 31, 2010, for the agreement subsisted in view of the COMELEC's failure to return SMTC's performance security, a condition for the contract's termination. As provided under Art. 2 of the AES Contract:[100]

Article 2
EFFECTIVITY

2.1. This Contract shall take effect upon the fulfillment of all of the following conditions:

(a) Submission by the PROVIDER of the Performance Security;
(b) Signing of this Contract in seven (7) copies by the parties; and
(c) Receipt by the PROVIDER of the Notice to Proceed.

2.2. The Term of this Contract begins from the date of effectivity **until the release of the Performance Security,without prejudice to the surviving provisions of this Contract,** including the warranty provision as prescribed in Article 8.3 and the period of the option to purchase. (emphasis supplied)

Based on Our ruling in *Capalla*, the cessation of SMTC's business cannot be assumed just because the May 10, 2010 polls have already concluded. For clearly, SMTC's purpose—the "automation of the 2010 national and local elections"—is not limited to the conduct of the election proper, but extends further to the fulfillment of SMTC's contractual obligations

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[99] "This contract and its Annexes may be amended by mutual agreement of the parties. All such amendments shall be in writing and signed by the duly authorized representatives of both parties." As cited in *Capalla v. COMELEC*, *id.*

[100] *Id*.

that spring forth from the AES Contract during the lifetime of the agreement (i.e. until the release of the performance security), and even thereafter insofar as the surviving provisions of the contract are concerned. In other words, regardless of whether or not SMTC's performance security has already been released, establishing even just one surviving provision of the AES Contract would be sufficient to prove that SMTC has not yet completed its purpose under its AOI, toppling petitioners' argument like a house of cards.

Unfortunately for petitioners, one such surviving provision has already been duly noted by the Court in the recent case of *Pabillo v. COMELEC (Pabillo)*.[101] In *Pabillo*, the Court cited Art. 8.8 of the AES Contract, which significantly reads:

> 8.8 If COMELEC opts to purchase the PCOS and Consolidation and Canvassing System (CCS), the following warranty provisions indicated in the RFP shall form part of the purchase contract:
>
> 1) For PCOS, **SMARTMATIC shall warrant the availability of parts, labor and technical support and maintenance to COMELEC for ten (10) years, if purchased (Item 18, Part V of the RFP), beginning May 10, 2010.** Any purchase of parts, labor and technical support and maintenance not covered under Article 4.3 above shall be subject to the prevailing market prices at the time and at such terms and conditions as may be agreed upon. (emphasis added)

Pertinently, We have interpreted the foregoing contractual provision in *Pabillo* in the following wise:[102]

> **Smartmatic-TIM warrants that its parts, labor and technical support and maintenance will be available to the COMELEC,** if it so decides to purchase such parts, labor and technical support and maintenance services,**within the warranty period stated, i.e., ten (10) years for the PCOS, reckoned from May 10, 2010, or until May 10, 2020**. Article 8.8 skews from the ordinary concept of warranty since it is a mere warranty on availability, which entails a subsequent purchase contract, founded upon a new consideration,

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[101] *Supra* note 60.

[102] *Id.*

the costs of which (unlike in the first warranty) are still to be paid. With Article 8.8 in place, **the COMELEC is assured that it would always have access to a capable parts/service provider in Smartmatic-TIM, during the 10-year warranty period therefor**, on account of the peculiar nature of the purchased goods. (emphasis added)

Indubitably, the *vinculum juris* between COMELEC and SMTC remains solid and unsevered despite the 2010 elections' inevitable conclusion. Several contractual provisions contained in the 2009 AES Contract, as observed in a review of our jurisprudence, continue to subsist and remain enforceable up to this date. *Pabillo*, in effect, at least guaranteed that SMTC's purpose under its AOI will not be fulfilled until May 10, 2020. Therefore, petitioners' theory—that SMTC no longer has a valid purpose—is flawed. Otherwise, there would be no way of enforcing the subsisting provisions of the contract and of holding SMTC to its warranties after the conduct of the May 10, 2010 elections.

Having resolved the continuity of SMTC's business, We now proceed to determine whether its participation in the bidding process is an authorized or an *ultra vires* act.

b. The issue is mooted by the subsequent approval of the amendment to SMTC's AOI

Commissioner Guia, in his dissent, opines that a bidder should be authorized to participate in the bidding as early as the time the pre-qualification was conducted, which in this case was held on December 4, 2014. Thus, the December 10, 2014 approval of SMTC's amended AOI, to Commissioner Guia's mind, cannot cure the alleged vice attending SMTC's submission of its bid, as a partner in Smartmatic JV, for a project that it was, at that time, unauthorized to undertake.

The argument fails to persuade.

As earlier discussed, the function of the BAC, in making an initial assessment as to the eligibility of the bidders during pre-qualification, is ministerial and nondiscretionary. It merely

counterchecks the documents submitted by the bidder against the checklist of requirements included in the bid documents disseminated by the procuring agency. It cannot consider documents not listed in the checklist for purposes of ascertaining a bidder's eligibility during pre-qualification.

The only time the procuring agency can go beyond the checklist is during post-qualification wherein it is allowed to check to its satisfaction the veracity of the information submitted to it by the bidder. To recall, Sec. 29.3 of the Invitation to Bid provides that on post-qualification, the procuring entity may utilize any "**other information as [it] may deem necessary and appropriate**" in order to test the accuracy of the information provided in the bidder's eligibility documents and bid proposal. In the end, notwithstanding the dispensability of the AOI insofar as compliance with documentary requirements is concerned, the procuring entity may nevertheless consider the same in ultimately determining a bidder's eligibility.

Stated in the alternative, the procuring entity, for purposes of post-qualification, cannot be faulted for, as it is not precluded from, considering information volunteered by the bidder with the highest bid. Bearing in mind the non-discretionary function of the BAC during pre-qualification, it is then understandable that it is only on post-qualification, when it is allowed to consider other documents, during which an extensive inquiry will be made to detect any defect in the bidder's capacity to contract. Hence, even though the submission of an AOI was not required for either pre or post-qualification purposes, the COMELEC and BAC, on post-qualification, may still consider the same in determining whether or not the project is in line with the bidder's corporate purpose, and, ultimately, in ascertaining the bidder's eligibility.

In the case at bar, We take note that during the opening of the bids on December 4, 2014, Smartmatic JV already informed the BAC that SMTC was already in the process of amending its AOI. The contents of the AOI, at that time, were immaterial since the AOI is not an eligibility requirement that can be considered by the BAC on pre-qualification. By post-qualification,

however, the time the BAC can validly consider extraneous documents, SMTC's AOI has already been duly amended, and the amendments approved by the SEC on December 10, 2014, for its updated primary purpose to read:[103]

> To sell, supply, lease, import, export, develop, assemble, repair and deal with automated voting machines, canvassing equipment, computer software, computer equipment and all other goods and supplies, and /or to provide, render and deal in all kinds of services, including project management services for the conduct of elections, whether regular or special, in the Philippine(s) and to provide Information and Communication Technology (ICT) goods and services to private and government entities in the Philippines.

Hence, any doubt on SMTC's authorization to continue its business has already been dispelled by December 10, 2014. It matters not that the amendments to the AOI took effect only on that day[104] for as long as it preceded post-qualification.

c. SMTC's participation in the bidding is not an ultra vires act but one that is incidental to its corporate purpose

In any event, there is merit in private respondents' argument that SMTC's participation in the bidding is not beyond its declared corporate purpose; that, in the first place, there was no impediment in SMTC's AOI that could have prevented Smartmatic JV from participating in the project.

To elucidate, an *ultra vires* act is defined under BP 68 in the following wise:

> **Section 45.** *Ultra vires acts of corporations.* – No corporation under this Code shall possess or exercise any corporate powers except those conferred by this Code or by its articles of incorporation and

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[103] *Rollo*, p. 549.

[104] **Section 16.** *Amendment of Articles of Incorporation.* – x x x The amendments shall take effect upon their approval by the Securities and Exchange Commission or from the date of filing with the said Commission if not acted upon within six (6) months from the date of filing for a cause not attributable to the corporation.

except such as are necessary or incidental to the exercise of the powers so conferred. (emphasis added)

The language of the Code appears to confine the term *ultra vires* to an act outside or beyond express, implied and incidental corporate powers. Nevertheless, the concept can also include those acts that may ostensibly be within such powers but are, by general or special laws, either proscribed or declared illegal.[105] *Ultra vires* acts or acts which are clearly beyond the scope of one's authority are null and void and cannot be given any effect.[106]

In determining whether or not a corporation may perform an act, one considers the logical and necessary relation between the act assailed and the corporate purpose expressed by the law or in the charter, for if the act were one which is lawful in itself or not otherwise prohibited and done for the purpose of serving corporate ends or reasonably contributes to the promotion of those ends in a substantial and not merely in a remote and fanciful sense, it may be fairly considered within corporate powers.[107] **The test to be applied is whether the act in question is in direct and immediate furtherance of the corporation's business**, fairly incident to the express powers and reasonably necessary to their exercise. If so, the corporation has the power to do it; otherwise, not.[108]

In the case at bar, notwithstanding the specific mention of the 2010 National and Local Elections in SMTC's primary purpose, it is not, as earlier discussed, precluded from entering into contracts over succeeding ones. Here, SMTC cannot be

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[105] Concurring opinion of Justice Vitug <http://www.lawphil.net/judjuris/juri2000/feb2000/gr_137686_2000.html>.

[106] *Gancayco v. City Government of Quezon City*, G.R. Nos. 177807 & 177933, October 11, 2011, 658 SCRA 853.

[107] <http://sc.judiciary.gov.ph/jurisprudence/2000/feb2000/137686_Concur.htm>.

[108] Concurring opinion of Justice Vitug in <http://www.lawphil.net/judjuris/juri2000/feb2000/gr_137686_2000.html>; *see also* <http://www.lawphil.net/judjuris/juri1962/may1962/gr_l-15092_1962.html>.

deemed to be overstepping its limits by participating in the bidding for the 23,000 new optical mark readers for the 2016 polls since upgrading the machines that the company supplied the COMELEC for the automation of the 2010 elections and offering them for subsequent elections is but a logical consequence of SMTC's course of business, and should, therefore, be considered included in, if not incidental to, its corporate purpose. A restricted interpretation of its purpose would mean limiting SMTC's activity to that of waiting for the expiration of its warranties in 2020. How then can the company be expected to subsist and sustain itself until then if it cannot engage in any other project, even in those similar to what the company already performed?

In the final analysis, We see no defect in the AOI that needed to be cured before SMTC could have participated in the bidding as a partner in Smartmatic JV, the automation of the 2016 National and Local Elections being a logical inclusion of SMTC's corporate purpose.

Smartmatic JV cannot be declared ineligible for SMTC's nationality

In a desperate last ditch effort to have Smartmatic JV declared ineligible to participate in the procurement project, petitioners question the nationality of SMTC. They direct the Court's attention to the 2013 Annual Report and Consolidated Financial Statements[109] of Smartmatic Limited to prove that SMTC is 100% foreign owned. They then contend that SMTC is the biggest shareholder in the bidding joint venture at 46.5% share, making the joint venture less than 60% Filipino-owned and, hence, ineligible.

The argument is specious.

Clause 5 of the Instruction to Bidders provides that the following may participate in the bidding process:[110]

5.1. Unless otherwise provided in the BDS, the following persons shall be eligible to participate in the bidding:

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[109] *Rollo*, pp. 79-128.

[110] *Id*. at 225-226.

x x x x x x x x x

(e) Unless otherwise provided in the BDS, persons/entities forming themselves into a JV, i.e., group of two (2) or more persons/entities that intend to be jointly and severally responsible or liable for a peculiar contract: **Provided, however, that Filipino ownership or interest of the joint venture concerned shall be at least sixty percent (60%)**.

While petitioners are correct in asserting that Smartmatic JV ought to be at least 60% Filipino-owned to qualify, they did not adduce sufficient evidence to prove that the joint venture did not meet the requirement. Petitioners, having alleged non-compliance, have the correlative burden of proving that Smartmatic JV did not meet the requirement, but aside from their bare allegation that SMTC is 100% foreign-owned, they did not offer any relevant evidence to substantiate their claim. Even the 2013 financial statements submitted to Court fail to impress for they pertain to the financial standing of **Smartmatic Limited**,[111] which is a distinct and separate entity from **SMTC**. It goes without saying that Smarmatic Limited's nationality is irrelevant herein for it is not even a party to this case, and even to the joint venture.

Aside from the sheer weakness of petitioners' claim, SMTC satisfactorily refuted the challenge to its nationality and established that it is, indeed, a Filipino corporation as defined under our laws. As provided in Republic Act No. 7042 (RA 7042), otherwise known as the Foreign Investments Act, a Philippine corporation is defined in the following wise:

Section 3. ***Definitions.*** – As used in this Act:

a) The term "Philippine national" shall mean a citizen of the Philippines or a domestic partnership or association wholly owned by citizens of the Philippines**; or a corporation organized under the laws of the Philippines of which at least sixty percent (60%) of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines**; or a trustee of funds for

[111] Smartmatic International's United Kingdom office.

pension or other employee retirement or separation benefits, where the trustee is a Philippine national and at least sixty (60%) of the fund will accrue to the benefit of the Philippine nationals: Provided, That where a corporation and its non-Filipino stockholders own stocks in a Securities and Exchange Commission (SEC) registered enterprise, at least sixty percent (60%) of the capital stocks outstanding and entitled to vote of both corporations must be owned and held by citizens of the Philippines and at least sixty percent (60%) of the members of the Board of Directors of both corporations must be citizens of the Philippines, in order that the corporations shall be considered a Philippine national.

In *Narra Nickel Mining and Development, Corp. v. Redmont Consolidated Mines, Corp.*,[112] the Court held that the "control test" is the prevailing mode of determining whether or not a corporation is Filipino. Under the "control test," shares belonging to corporations or partnerships at least 60% of the capital of which is owned by Filipino citizens shall be considered as of Philippine nationality.[113] It is only when based on the attendant facts and circumstances of the case, there is, in the mind of the Court, doubt in the 60-40 Filipino-equity ownership in the corporation, that it may apply the "grandfather rule."[114]

Perusing SMTC's GIS[115] proves useful in applying the control test. Upon examination, SMTC's GIS reveals that it has an authorized capital stock of ₱226,000,000.00, comprised of ₱226,000,000 common stocks[116] at ₱1.00 par value, of which 100% is subscribed and paid.[117] The GIS further provides information on the stockholders as follows:[118]

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[112] G.R. No. 195580, April 21, 2014.

[113] *Id.*; citing DOJ Opinion No. 20 s. 2005.

[114] *Id.*

[115] *Rollo*, pp. 567-573.

[116] Common stocks are voting shares.

[117] *Rollo*, p. 568.

[118] *Id*. at 570.

NAME NATIONALITY AND CURRENT RESIDENTIAL ADDRESS	SHARES SUBSCRIBED				AMOUNT PAID
	TYPE	NUMBER	AMOUNT	% OF OWNERSHIP	
1920 Business Inc. Filipino King's Court 2, 2129 Don Chino Roces Ave., Makati, Metro Manila	Common	135,599,997	135,599,997.00	60%	677,999,997.00
	"A"				
	TOTAL	135,599,997	135,599,997.00		
Smartmatic International, Corp. Barbadian 4 Stafford House, Garisson St., Michael, Barbados	Common	90,399,998	90,399,998.00	40%	451,999,998.00
	"B"				
	TOTAL	90,399,998	90,399,998.00		
Juan C. Villa, Jr. Filipino No. 74, Jalan Setiabakti, Damansara Heights, Kuala Lumpur	Common	1	1.00	0%	1.00
	"B"				
	TOTAL	1	1.00		
Jacinto R. Perez, Jr. Filipino 1211 Consuelo St., Singalong, Manila	Common		1.00		1.00
	"A"	1			
	TOTAL	1	1.00		
Alastair Joseph James Wells British 1405 Spanish Bay, Bonifacio Ridge, 1st Avenue, Bonifacio Global City, Taguig	Common	1	1.00	0%	1.00
	"B"				
	TOTAL	1	1.00		
Marian Ivy F. Reyes-Fajardo Filipino 71-B Tindalo St., Monte Vista, Subdivision, Marikina	Common	1	1.00	0%	1.00
	"A"				
	Total	1	1.00		
Salvador P. Aque Filipino 2250 P. Burgos, Pasay City	Common			0%	1.00
	"A"	1	1.00		
	Total	1	1.00		

Applying the control test, 60% of SMTC's 226,000,000 shares, that is 135,600,000 shares, must be Filipino-owned. From the above-table, it is clear that SMTC reached this threshold amount

to qualify as a Filipino-owned corporation. To demonstrate, the following are SMTC's Filipino investors:

NAME OF SHAREHOLDER	TYPE OF SHARE	NUMBER OF SHARES
1920 Business Inc.	Common "A"	135,599,997
Juan C. Villa, Jr.	Common "B"	1
Jacinto R. Perez, Jr.	Common "A"	1
Marian Ivy F. Reyes-Fajardo	Common "A"	1
Salvador P. Aque	Common "A"	1
	TOTAL	135,600,001

Indeed, the application of the control test would yield the result that SMTC is a Filipino corporation. There is then no truth to petitioners' claim that SMTC is 100% foreign-owned. Consequently, it becomes unnecessary to confirm this finding through the grandfather rule[119] since the test is only employed when the 60% Filipino ownership in the corporation is in doubt.[120] In this case, not even the slightest doubt is cast since the petition is severely wanting in facts and circumstances that raise legitimate challenges to SMTC's 60-40 Filipino ownership. The petition rested solely on petitioners' vague assertions and baseless claims. On the other hand, SMTC countered by furnishing the Court a copy of its GIS providing its shareholders' stock ownership details, and by submitting a copy of its AOI, which reserved all of SMTC's 135,600,000 class A common shares to Filipinos[121] in a bid to guarantee that when all of its shares are outstanding, foreign ownership will not exceed 40%.

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[119] Under the Strict Rule or Grandfather Rule Proper, the combined totals in the Investing Corporation and the Investee Corporation must be traced (i.e., "grandfathered") to determine the total percentage of Filipino ownership; see *Narra Nickel Mining and Development, Corp. v. Redmont Consolidated Mines, Corp.*, *supra* note 112.

[120] *Id.* The Grandfather Rule applies only when the 60-40 Filipino-foreign equity ownership is in doubt (i.e., in cases where the joint venture corporation with Filipino and foreign stockholders with less than 60% Filipino stockholdings [or 59%] invests in other joint venture corporation which is either 60-40% Filipino-alien or the 59% less Filipino). Stated differently, where the 60-40 Filipino-foreign equity ownership is not in doubt, the Grandfather Rule will not apply.

[121] *Rollo*, p. 554. Seventh Article in SMTC's Articles of Incorporation.

Anent the nationality of the other joint venture partners, the Court defers to the findings of the COMELEC and the BAC, and finds sufficient their declaration that Smartmatic JV is, indeed, eligible to participate in the bidding process, and is in fact the bidder with the lowest calculated responsive bid.[122] If petitioners would insist otherwise by reason of Smartmatic JV's nationality, it becomes incumbent upon them to prove that the aggregate Filipino equity of the joint venture partners—SMTC, Total Information Management Corporation, Smartmatic International Holding B.V., and Jarltech International Corporation — does not comply with the 60% Filipino equity requirement, following the oft-cited doctrine that he who alleges must prove.[123] Regrettably, one fatal flaw in petitioners' posture is that they challenged the nationality of SMTC alone, which, after utilizing the control test, turned out to be a Philippine corporation as defined under RA 7042. There was no iota of evidence presented or, at the very least, even a claim advanced that the remaining partners are foreign-owned. There are, in fact, no other submissions whence this Court can inquire as to the nationalities of the other joint venture partners. Hence, there is no other alternative for this Court other than to adopt the findings of the COMELEC and the BAC upholding Smartmatic JV's eligibility to participate in the bidding process, subsumed in which is the joint venture and its individual partners' compliance with the nationality requirement.

WHEREFORE, in view of the foregoing, the petition is hereby **DISMISSED** for lack of merit. The June 29, 2015 Decision of the COMELEC *en banc* is hereby **AFFIRMED.**

SO ORDERED.

Sereno, C.J., Carpio, Leonardo-de Castro, Peralta, Bersamin, del Castillo, Villarama, Jr., Perez, Mendoza. Reyes, and *Jardeleza, JJ.,* concur.

Perlas-Bernabe, J., joins the separate opinion of *J.* Leonen.

Leonen, J., see concurring and dissenting opinion.

Brion, J., on official leave.

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[122] *Id.* at 26.

[123] *Lim v. Equitable PCI Bank*, G.R. No. 183918, January 15, 2014.

CONCURRING and DISSENTING OPINION

LEONEN, *J.*:

I concur in the result. The original and exclusive jurisdiction over matters pertaining to the administrative actions of the head of a procuring agency is by law vested in the Regional Trial Court. Hence, the Petition should have been dismissed. There is no need to go into the merits of the controversy.

I, therefore, disagree with the ponencia's further statement that valid Articles of Incorporation is not an eligibility requirement in bidding for government projects. The Commission on Elections' (COMELEC) issuance requires this document. A corporation must be disqualified from bidding if it lacks valid Articles of Incorporation on the day it submitted the bid documents. A corporation's Articles of Incorporation determines the limits and extent of its corporate powers. Acts done outside its stated purposes are *ultra vires*.

I

Petitioners Leo Y. Querubin, Maria Corazon M. Akol, and Augusto C. Lagman come to this court through a Petition[1] for certiorari or prohibition under Rule 64 in relation to Rule 65 of the 1997 Rules of Civil Procedure,[2] with prayer for the issuance of a temporary restraining order or writ of preliminary injunction. This Petition assails the COMELEC En Banc's Decision[3] dated June 29, 2015.

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[1] *Rollo*, pp. 3-54.

[2] *Id*. at 34.

[3] *Id*. at 61-72. The COMELEC *En Banc* was composed of Commissioners J. Andres D. Bautista (Chair), Christian Robert S. Lim, Al A. Parreño, Luie Tito F. Guia, Arthur D. Lim, Ma. Rowena Amelia V. Guanzon, and Sheriff M. Abas. Commissioner J. Andres D. Bautista penned a brief Concurring and Dissenting Opinion (*Id*. at 73). Commissioner Luie Tito G. Guia penned a Separate Opinion (*Id*. at 74-76). Commissioner Arthur D. Lim participate via telephone and submitted a separate Concurring Opinion (*Id*. at 77-78). Commissioners Al A. Parreño and Sheriff M. Abas joined Commissioner Arthur D. Lim's separate Concurring Opinion. Commissioner Ma. Rowena Amelia V. Guanzon abstained.

The COMELEC En Banc granted the Protest of the joint venture of Smartmatic-TIM Corporation (SMTC), Total Information Management Corporation, Smartmatic International Holding B.V., and Jarltech International Corporation (collectively, Smartmatic Joint Venture) relative to the Two-Stage Competitive Bidding for the Lease of Election Management System and Precinct-Based Optical Mark Reader or Optical Scan System (OMR Project).[4] The COMELEC En Banc also declared Smartmatic Joint Venture as the "bidder with the lowest calculated responsive bid[.]"[5]

II

On October 27, 2014, the bidding documents for the OMR Project were released by the COMELEC Bids and Awards Committee (BAC).[6] Under the OMR Project, the COMELEC would lease with option to purchase 23,000 new units[7] of precinct-based Optical Mark Reader or Optical Scan System for the May 9, 2016 elections.[8]

The bidding documents contained the following: an Invitation to Bid setting forth the Approved Budget for Contract amounting to ₱2.5 billion,[9] and an instruction for interested bidders "to submit eligibility and technical components, which includes an original or certified true copy of its registration certificate from the Securities and Exchange Commission[.]"[10]

The deadline for submitting the Initial Technical Proposals and Eligibility Requirements was set on December 4, 2014.[11]

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[4] *Id*. at 32, Commissioner Arthur D. Lim's Memorandum, and 71, COMELEC *En Banc* Decision.

[5] *Id*. at 71, COMELEC *En Banc* Decision.

[6] *Ponencia*, p. 2.

[7] *Rollo*, p. 61, COMELEC *En Banc* Decision.

[8] *Id*. at 588, COMELEC's Comment.

[9] *Id*. at 167, Smartmatic Joint Venture's Comment/Opposition. The amount is exactly ₱2,503,518,000.00.

[10] *Id*. at 168, *citing* Bidding Documents, Sec. II, Bid Data Sheet, p. 4.

[11] *Id*.

Smartmatic Joint Venture, Indra Sistemas, S.A. (Indra), and MIRU Systems Co. Ltd. bought Bidding Documents from the COMELEC.[12]

SMTC, the biggest shareholder with 46.5%[13] shares in the Smartmatic Joint Venture, has in its Articles of Incorporation the following as its primary corporate purpose:

> To do, perform and comply with all the obligations and responsibilities of, and accord legal personality to, the joint venture of Total Information Management Corporation ("TIM") and Smartmatic International Corporation ("Smartmatic") arising under the Request for Proposal and the Notice of Award issued by the Commission on Elections ("COMELEC") ***for the automation of the 2010 national and local elections*** ("Project"), including the leasing, selling, importing, and/or assembling of automated voting machines, computer software and other computer services and/or otherwise deal in all kinds of services to be used, offered or provided to the COMELEC for the preparations and the conduct of the Project, including project management services.[14] (Emphasis supplied)

On November 12, 2014, SMTC adopted amendments to its Articles of Incorporation.[15] Among others, it changed its primary corporate purpose from operating solely for the automation of the 2010 elections[16] to doing the following acts:

> To sell, supply, lease, import, export, develop, assemble, repair and deal with the automated voting machines, canvassing equipment, computer software, computer equipment and all other goods and supplies, and/or to provide, render and deal in all kinds of services, including project management services, for the conduct of elections, whether regular or special, in the Philippine[s] and to provide

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[12] *Id*.

[13] *Id*. at 76, Commissioner Luie Tito F. Guia's Memorandum.

[14] *Id*. at 6, Petition.

[15] *Id*. at 546, Certificate of Filing of [Smartmatic-TIM Corporation's] Amended Articles of Incorporation.

[16] *Id*. at 75, Commissioner Luie Tito F. Guia's Memorandum, which states that "[t]here is no indication that the project was for the automation of any other elections."

Information and Communication Technology (ICT) goods and services to private and government entities in the Philippines.[17]

The proposed amendments were pending with the Securities and Exchange Commission for approval.[18]

On December 4, 2014, the COMELEC received and opened the bids for prospective OMR Project suppliers.[19] Only Smartmatic Joint Venture and Indra participated in the opening of bids.[20] Meanwhile, the proposed amendments to SMTC's Articles of Incorporation had yet to be acted upon by the Securities and Exchange Commission. Thus, when Smartmatic Joint Venture submitted the required documents, SMTC, its biggest shareholder partner, still contained the automation of the 2010 elections as the latter's primary corporate purpose. Smartmatic Joint Venture informed the BAC, through a sworn Certification, of the Securities and Exchange Commission's pending action on the amendments to the Articles of Incorporation.[21]

On December 10, 2014, six days after the deadline for submission of the bidding documents, the Securities and Exchange Commission approved SMTC's amended Articles of Incorporation.[22] Smartmatic Joint Venture and Indra had their initial technical proposals tested on the same day.[23]

On December 15, 2014, in its Resolution No. 1, the BAC declared Smartmatic Joint Venture and Indra eligible to proceed

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[17] *Id*. at 549, Amended Articles of Incorporation of Smartmatic-TIM Corporation.

[18] *Id*. at 546, Certificate of Filing of [Smartmatic-TIM Corporation's] Amended Articles of Incorporation. The Securities and Exchange Commission approved the proposed amendments only on December 10, 2014.

[19] *Id*. at 75, Commissioner Luie Tito F. Guia's Memorandum.

[20] *Id*. at 621, Smartmatic Joint Venture's Comment/Opposition.

[21] *Id*. at 629.

[22] *Id*. at 546, Certificate of Filing of [Smartmatic-TIM Corporation's] Amended Articles of Incorporation. The deadline for submitting the bidding documents was on December 4, 2015.

[23] *Id*. at 170, Smartmatic Joint Venture's Comment/Opposition.

to the second stage of bidding.[24] The BAC required Smartmatic Joint Venture and Indra to present their Final Revised Technical Tenders and Price Proposals.[25]

On February 25, 2015, the date set for opening the second envelope, Smartmatic Joint Venture and Indra submitted nonresponsive bids.[26] Smartmatic Joint Venture failed to submit a complete financial proposal, while Indra submitted one in excess of the approved budget for the contract.[27] They were both disqualified, and the BAC declared a failure of bidding.[28]

A Motion for Reconsideration was filed by Smartmatic Joint Venture.[29] Upon the BAC's denial of the Motion, Smartmatic Joint Venture filed a (First) Protest before the COMELEC En Banc.[30]

Ruling on the Protest, the COMELEC En Banc suspended on March 26, 2015 the "opening of the Financial Bids and Eligibility Documents for the on-going Second Round of Bidding for the [OMR Project.]"[31]

The BAC then proceeded to the post-qualification evaluation to determine whether Smartmatic Joint Venture followed the specifications in the Bidding Documents.[32] The BAC sought for additional documents as well as a model unit of Smartmatic Joint Venture's SAES 1800 plus Optical Mark Reader (OMR+).[33]

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[24] *Id*.

[25] *Id*. at 171.

[26] *Id*. at 589, COMELEC's Comment.

[27] *Id*. at 894, COMELEC Bids and Awards Committee Resolution No. 4.

[28] *Id*. at 589, COMELEC's Comment.

[29] *Id*.

[30] *Id*.

[31] *Id*. at 589-590.

[32] *Id*. at 590.

[33] *Id*. at 447-448, COMELEC Bids and Awards Committee Notice dated March 27, 2015, and 605, COMELEC's Comment.

It tested[34] the sample OMR+ to determine Smartmatic Joint Venture's compliance with the OMR Project's Terms of Reference.

In its Resolution No. 9 dated May 5, 2015, the BAC post-disqualified the Smartmatic Joint Venture on the following grounds: (1) nonsubmission of the Articles of Incorporation; and (2) failure of the demo unit to comply with the technical requirements (i.e., that the system should have at least two storage devices, and it be capable of simultaneously writing to these devices "all data/files, audit log, statistics and ballot images").[35]

On May 9, 2015, Smartmatic Joint Venture filed a Motion for Reconsideration before the BAC.[36] It sought to conduct a redemonstration of the OMR+ system's compliance with the OMR Project's Terms of Reference.[37]

On May 12, 2015, Smartmatic Joint Venture conducted the redemonstration before the BAC, BAC-Special Technical Working Group, Information Technology Department, COMELEC En Banc, "and other stakeholders[.]"[38]

Through its Resolution No. 10 dated May 15, 2015, the BAC partially granted the Motion for Reconsideration:[39]

Regarding the required legal documents, the BAC declared that the Articles of Incorporation of the Smartmatic Joint Venture partners complied with Section 23.1(b) of the Revised Implementing Rules and Regulations of Republic Act No. 9184, otherwise known as the Government Procurement Reform Act.[40]

In his dissent, however, Commissioner Luie Tito F. Guia (Commissioner Guia) observes that the COMELEC "failed to

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[34] *Id*. at 624-625, Smartmatic Joint Venture's Comment/Opposition.

[35] *Id*. at 62, COMELEC *En Banc* Decision.

[36] *Id*. at 590, COMELEC's Comment.

[37] *Id*. at 62, COMELEC *En Banc* Decision.

[38] *Id*. COMELEC *En Banc* Decision contains a typographical error, stating the date as May 12, 2016 instead of May 12, 2015.

[39] *Id*.

[40] *Id*.

elaborate on [the] reasons"[41] for suddenly reversing itself and finding that Smartmatic-TIM Corporation has "legal capacity . . . to participate in the subject procurement[.]"[42]

Regarding the required technical documents, the BAC ruled that Smartmatic Joint Venture "remain[ed] post-disqualified"[43] due to the OMR+ system's failure to meet technical specifications in the Terms of Reference.[44]

On May 25, 2015, Smartmatic Joint Venture filed a (Second) Protest before the COMELEC En Banc, "seeking the conduct of another technical demonstration[.]"[45]

On June 16, 2015, in response to the query as to whether BAC requires the "submission of Articles of Incorporation and By-laws of each bidder[,]"[46] the BAC confirmed the need for each joint venture partner's Articles of Incorporation,[47] but not the latter's by-laws. This is found in its Bid Bulletin No. 5,[48] to wit:

The [Special Bids and Awards Committee] 1 ***requires*** the submission of copies of SEC Registration *and* ***Articles of Incorporation*** only of ***each*** bidder, including ***partner to the joint venture***, and sub-

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[41] *Id*. at 74, Commissioner Luie Tito F. Guia's Memorandum.

[42] *Id*., *citing* COMELEC Bids and Awards Committee Resolution No. 10.

[43] *Id*. at 62, COMELEC *En Banc* Decision.

[44] *Id*.

[45] *Id*. at 62-63.

[46] COMELEC Bids and Awards Committee Bid Bulletin No. 5, Lease with Option to Purchase of Election Management System (EMS) and Precinct-based Optical Mark Reader (OMR) or Optical Scan (OP-SCAN) System for the 2016 National and Local Elections, Reference No. BAC 01-2014-AES-OMR, June 16, 2015, Query No. 54. <http://www.comelec.gov.ph/?r=About COMELEC/BidsandAwards/ProcurementProjects/BAC012014AESOMR SecondBidding/BAC012014AESOMR SecondBiddingBidBul5> (visited December 7, 2015).

[47] COMELEC Bids and Awards Committee Bid Bulletin No. 5, Answer to Query No. 54.

[48] COMELEC Bids and Awards Committee Bid Bulletin No. 5.

contractor if already identified by the bidder before the submission and opening of bids.[49] (Emphasis supplied)

On June 19, 2015, the Technical Evaluation Committee began the technical demonstration of the OMR+ in the Department of Science and Technology, University of the Philippines Diliman Campus.[50] Engr. Peter Antonio B. Banzon, Chairman of the Technical Evaluation Committee, reported that the "actual simultaneous writing of data"[51] was inconclusive, and that there was a need "to use a specialized test instrument such as a Digital Storage Oscilloscope (DSO) that can access and compare the timing waveforms of electric signals on the inputs of the storage card itself[.]"[52] He suggested further testing of the system.[53]

On June 23, 2015, Smartmatic Joint Venture conducted another technical demonstration before the COMELEC En Banc.[54] The Technical Evaluation Committee submitted its Final Report dated June 24, 2015, finding that Smartmatic Joint Venture complied with the technical requirements.[55]

On June 29, 2015, the COMELEC En Banc granted the Protest of Smartmatic Joint Venture. The dispositive portion reads as follows:

WHEREFORE, the instant Protest is hereby **GRANTED**. Accordingly, the Commission hereby declares the Joint Venture of Smartmatic-TIM Corporation, Total Information Management Corporation, Smartmatic International Holding B.V., and Jarltech International Corporation, as the bidder with the lowest calculated responsive bid in connection with the public bidding for the lease

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[49] COMELEC Bids and Awards Committee Bid Bulletin No. 5, Answer to Query No. 54.

[50] *Rollo*, p. 63, COMELEC *En Banc* Decision.

[51] *Id*.

[52] *Id*.

[53] *Id*. at 63-64.

[54] *Id*. at 64.

[55] *Id*. at 64, 68-71.

with option to purchase of [sic] 23,000 units of precinct-based Optical Mark Reader or Optical Scan System for use in the May 9, 2016 national and local elections. Corollarily, the scheduled opening of financial proposal and eligibility documents for the Second Round of Bidding is hereby **CANCELLED**, with specific instruction for the Bids and Awards Committee to **RETURN** to the prospective bidders their respective payments made for the purchase of Bidding Documents pertaining to the Second Round of Bidding.[56] (Emphasis in the original)

In his Separate Opinion, COMELEC Chairman J. Andres D. Bautista wrote that "it is still in the best interest of the government that [the COMELEC] proceed with the *opening of the bids* for the procurement of 23,000 units of precinct-based Optical Mark Reader or Optical Scan System on 30 June 2015."[57] His statement comes on the heels of the COMELEC's Decision awarding the bid to Smartmatic Joint Venture.

Commissioner Guia agrees that the COMELEC must review the basis of the award, as having more bidders "would surely be more advantageous to the government."[58] Assailing SMTC's Articles of Incorporation, he states that the COMELEC should "resolve the AOI issue conclusively[.]"[59] Commissioner Guia adds that the joint venture partner "should be established at the time of the submission of the document, that is[,] on [December 4,] 2014."[60]

Aggrieved by the COMELEC En Banc Decision, petitioners filed this Petition for certiorari or prohibition with injunctive relief before this court.

This case concerns both procedural and substantive issues. For the procedural issues, it explores whether petitioners have

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[56] *Id*. at 71.

[57] *Id*. at 73, Commissioner J. Andres D. Bautista's Memorandum, emphasis supplied.

[58] *Id*. at 76, Commissioner Luie Tito F. Guia's Memorandum.

[59] *Id*. at 75.

[60] *Id*. at 76.

legal standing and whether this court has jurisdiction to hear the case. For the substantive issues, this case inquires as to whether a valid Articles of Incorporation is a requirement for eligibility to bid.

III

"Suing as taxpayers and registered voters,"[61] petitioners pray that this court annul the Decision of the COMELEC En Banc and issue a writ of preliminary injunction or temporary restraining order against public respondents.[62] Petitioners allegedly "suffered mortal wounds"[63] that only this court can vindicate.[64] They claim that the case also involves the "imperious necessity"[65] of preventing COMELEC's "illega[l] spending [of] public money"[66] while this Petition is being considered.[67]

Petitioners argue that this case is a proper subject of this court's jurisdiction.[68] They state that, pursuant to Rule 64, Section 2 in relation to Rule 65 of the Rules of Court, this court can review on certiorari the Decision of the COMELEC En Banc.[69] They also invoke the "transcendental importance"[70] of this case.

On the other hand, public respondent, as represented by the Office of the Solicitor General, alleges that petitioners, not being bidders themselves, lack a "material interest"[71] to pursue this case.[72] Public respondent further claims that "[p]etitioners do

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[61] *Id*. at 51, Petition.

[62] *Id*. at 52.

[63] *Id*. at 51.

[64] *Id*.

[65] *Id*.

[66] *Id*.

[67] *Id*.

[68] *Id*. at 34.

[69] *Id*.

[70] *Id*. at 40.

[71] *Id*. at 590, COMELEC's Comment.

[72] *Id*.

not have a right *in esse* [or] urgent necessity for the grant of injunctive relief."[73]

The concept of real party in interest for private suits under Rule 3, Section 2[74] of the Rules of Court is different from *locus standi* for public suits under the Constitution.

Locus standi pertains to government actions wherein a person, being a taxpayer or a voter, may suffer injury. In a number of cases,[75] this court has applied a liberal stance on taxpayer suits where it was shown that the case involves public funds. This is true in this case.

On the matter of jurisdiction, I disagree with the ponencia's statement that "the transcending public importance"[76] of the case allows for a procedural shortcut to this court.

Transcendental interest is the exception, not the rule.[77] The transcendental doctrine should not justify a "blatant disregard of procedural rules, [especially if] petitioner[s] had other available remedies[.]"[78]

Section 7 of Article IX-A (Constitutional Commission) of the Constitution states:

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[73] *Id*. at 614.

[74] *RULES OF COURT*, Rule 3, Sec. 2 provides:

SECTION 2. Parties in Interest. — A real party in interest is the party who stands to be benefited or injured by the judgment in the suit, or the party entitled to the avails of the suit. Unless otherwise authorized by law or these Rules, every action must be prosecuted or defended in the name of the real party in interest.

[75] *Spouses Constantino, Jr. v. Hon. Cuisia*, 509 Phil. 486, 504-505 (2005) [Per *J*. Tinga, *En Banc*], *Francisco, Jr. v. The House of Representatives*, 460 Phil. 830, 896-897 (2003) [Per *J*. Carpio Morales, *En Banc*], *Agan, Jr. v. Philippine International Air Terminals Co., Inc.*, 450 Phil. 744, 803-804 (2003) [Per *J*. Puno, *En Banc*].

[76] *Ponencia*, p. 20.

[77] *Rollo*, p. 599, COMELEC's Comment.

[78] *Galicto v. H.E. President Aquino III, et al.*, 683 Phil. 141, 169 (2012) [Per *J*. Brion, *En Banc*], citing *Concepcion, Jr. v. Commission on Elections*, 609 Phil. 201, 217 (2009) [Per *J*. Brion, *En Banc*].

SECTION 7 . . . *Unless otherwise provided* by this Constitution or *by law*, any decision, order, or ruling of each Commission may be brought to the Supreme Court on certiorari by the aggrieved party within thirty days from receipt of a copy thereof. (Emphasis supplied)

We interpreted this to refer to certiorari under Rule 65, and not appeal under Rule 45.[79] Rule 65 in relation to Rule 64 of the Rules of Court provides for resort to this court from the ruling of the COMELEC En Banc only when there is no other "plain, speedy, and adequate remedy in the ordinary course of law"[80] to assail the COMELEC's exercise of a quasi-judicial function.

Quasi-judicial power is an administrative agency's power to "adjudicate the rights of persons before it."[81] It involves hearing and determining questions of fact and application of the standards laid down by the law to enforce this same law.[82] The COMELEC Decision dated June 29, 2015 adjudicated the rights of Smartmatic Joint Venture. It was promulgated in pursuit of the COMELEC's role of procuring election-related supplies and enforcing election-related laws. Batas Pambansa Blg. 881 provides the following:

SECTION 52. Powers and functions of the Commission on Elections. – In addition to the powers and functions conferred upon it by the Constitution, the Commission shall have *exclusive* charge of the

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[79] *Ambil, Jr. v. Commission on Elections*, 398 Phil. 257, 275 (2000) [Per *J.* Pardo, *En Banc*].

[80] RULES OF COURT, Rule 65, Sec. 1 provides:

SECTION 1. Petition for *Certiorari*. — When any tribunal, board or officer exercising judicial or quasi-judicial functions has acted without or in excess of its or his jurisdiction, or with grave abuse of discretion amounting to lack or excess of jurisdiction, and there is no appeal, or any plain, speedy, and adequate remedy in the ordinary course of law, a person aggrieved thereby may file a verified petition in the proper court, alleging the facts with certainty and praying that judgment be rendered annulling or modifying the proceedings of such tribunal, board or officer, and granting such incidental reliefs as law and justice may require.

[81] *DOLE Philippines, Inc. v. Esteva*, 538 Phil. 817, 860 (2006) [Per *J.* Chico-Nazario, First Division].

[82] *Id*.

enforcement and administration of all laws relative to the conduct of elections for the purpose of ensuring free, orderly and honest elections . . . and shall:

. . . . . .

(h) *Procure any supplies, equipment, materials or services* needed for the holding of the election by public bidding . . .

(i) Prescribe the use or adoption of the latest technological and electronic devices, taking into account the situation prevailing in the area and the funds available for the purpose[.] (Emphasis supplied)

Meanwhile, the Implementing Rules and Regulations (Part A) of Republic Act No. 9184 states that "[d]ecisions of the BAC with respect to the conduct of bidding may be protested in writing to the head of the procuring entity[.]"[83]

Thus, COMELEC, being the head of the entity for procuring election supplies by public bidding, has quasi-adjudicative powers. To enforce election-related laws, it adjudicates protests relative to the procurement process by applying both the law and the facts of the case.

The ponencia emphasizes that *Macabago v. Commission on Elections*[84] clarifies Rule 64.[85] He states that Rule 64 applies

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[83] Rep. Act No. 9184, Implementing Rules and Regulations Part A, Sec. 55.1 provides:

Section 55. Protests on Decisions of the BAC

55.1. Decisions of the BAC with respect to the conduct of bidding may be protested in writing to the head of the procuring entity: Provided, however, That a prior motion for reconsideration should have been filed by the party concerned within the reglementary periods specified in this IRR-A, and the same has been resolved. The protest must be filed within seven (7) calendar days from receipt by the party concerned of the resolution of the BAC denying its motion for reconsideration. A protest may be made by filing a verified position paper with the head of the procuring entity concerned, accompanied by the payment of a non-refundable protest fee. The non-refundable protest fee shall be in an amount equivalent to no less than one percent (1%) of the ABC.

[84] 440 Phil. 683 (2002) [Per *J.* Callejo, Sr., *En Banc*].

[85] *Ponencia*, pp. 11-12.

only to the judgments of the COMELEC in the exercise of its power to resolve controversies "involving the election, qualification, or the returns of an elective office[,]"[86] and not "in the exercise of its administrative functions."[87]

Even assuming that the correct remedy is Rule 65 and not Rule 64 in relation to Rule 65, resort to this court cannot be had if there is another plain, speedy, and adequate remedy.

Petitioners' remedy lies with the Regional Trial Court. Section 58 of Republic Act No. 9184 provides that the Regional Trial Court has "jurisdiction over final decisions of the head of the procuring entity[,]" which is COMELEC in this case.

> SEC. 58. Report to Regular Courts; Certiorari. – Court action may be resorted to only after the protests contemplated in this Article shall have been completed. Cases that are filed in violation of the process specified in this Article shall be dismissed for lack of jurisdiction. The regional trial court shall have jurisdiction over final decisions of the head of the procuring entity. Court actions shall be governed by Rule 65 of the 1997 Rules of Civil Procedure.

Jurisprudence further solidifies this rule. In *Dimson (Manila), Inc., et al. v. Local Water Utilities Administration*,[88] this court held that the Regional Trial Court is the proper venue for Rule 65 petitions pertaining to issues on the procurement and bidding process.[89] Likewise, this court said in *First United Constructors Corporation v. Poro Point Management Corporation (PPMC), et al.*[90] that, notwithstanding the Regional Trial Court's concurrent certiorari jurisdiction with that of this court, this court should still refuse to permit an unrestricted freedom to directly seek this court's intervention when there are other remedies available.[91]

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[86] *Id*. at 12.

[87] *Id*. at 11.

[88] 645 Phil. 309 (2010) [Per *J*. Peralta, Second Division].

[89] *Id*. at 319.

[90] 596 Phil. 334 (2009) [Per *J*. Nachura, Third Division].

[91] *Id*. at 342.

In government procurement cases, the decisions of the COMELEC En Banc must be appealed before the Regional Trial Court, which has the power to issue an injunctive writ while the cases are pending before it. As this court held in *Bañez, Jr. v. Judge Concepcion, et al.*:[92]

> The strictness of the policy is designed to shield the [Supreme] Court from having to deal with causes that are also well within the competence of the lower courts, and thus leave time to the [Supreme] Court to deal with the more fundamental and more essential tasks that the Constitution has assigned to it.[93]

IV

Petitioners claim that the COMELEC En Banc Decision dated June 29, 2015 "is repugnant to the letter and spirit"[94] of Republic Act No. 9184 and Batas Pambansa Blg. 68 (Corporation Code).[95] For petitioners, the COMELEC committed grave abuse of discretion in promulgating its ruling.[96]

Petitioners echo Commissioner Guia's dissent. First, SMTC's primary corporate purpose is only for the 2010 national and local elections.[97] This is the limit of its authority to contract with others.[98] Second, the COMELEC did not address "satisfactorily"[99] why it accepted the submission of a document (invalid Articles of Incorporation) in which one of the joint venture partners is ineligible.[100] Petitioners also claim that SMTC

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[92] 693 Phil. 399 (2012) [Per *J.* Bersamin, First Division].

[93] *Id*. at 412.

[94] *Rollo*, p. 44, Petition.

[95] *Id*.

[96] *Id*.

[97] *Id*. at 48, Petition, and 75, Commissioner Luie Tito F. Guia's Memorandum.

[98] *Id*. at 45.

[99] *Id*. at 48, Petition, and 76, Commissioner Luie Tito F. Guia's Memorandum.

[100] *Id*.

committed a material misrepresentation in declaring that it "complies with the equity requirement under Philippine law[.]"[101] They assert that SMTC is 100% foreign-owned, based on an annual report.[102]

Meanwhile, the ponencia agrees with public respondent's arguments that the COMELEC En Banc did not commit grave abuse of discretion for the following reasons: the submission of the Articles of Incorporation is not a criterion for eligibility;[103] the issue has become moot because the Securities and Exchange Commission already approved the amendments;[104] and SMTC's secondary purpose and the Corporation Code allow it to participate in the bidding.[105]

It appears that in granting private respondent's protest, the COMELEC acted in reckless disregard of its own bidding rules and procedure.

For the OMR Project, the COMELEC required the submission of the Articles of Incorporation. This is shown in BAC Bid Bulletin No. 5, which respondents and the ponencia fail to mention. BAC Bid Bulletin No. 5 mandates all bidders in the OMR Project, including every joint venture partner, to submit their Articles of Incorporation, to wit:[106]

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[101] *Id*. at 36, Petition.

[102] *Id*. at 46, *citing* Annual Report and Consolidated financial statements Registration number 07477910 dated 31 December 2013 of Smartmatic Limited.

[103] *Ponencia*, pp. 21-30.

[104] *Id*. at 33-34.

[105] *Id*. at 35-36.

[106] COMELEC Bids and Awards Committee Bid Bulletin No. 5, Lease with Option to Purchase of Election Management System (EMS) and Precinct-based Optical Mark Reader (OMR) or Optical Scan (OP-SCAN) System for the 2016 National and Local Elections, Reference No. BAC 01-2014-AES-OMR, June 16, 2015 <http://www.comelec.gov.ph/?r=About COMELEC/BidsandAwards/ProcurementProjects/BAC012014AESO MRSecondBidding/BAC012014AESOMRSecondBiddingBidBul5> (visited December 7, 2015).

#	Query	Answer
54	Statement: A. Securities [and] Exchange Commission, for Corporation or Partnership; or its equivalent documents in case of foreign bidder. Question: ***Will BAC still require the submission of Articles of Incorporation*** and By-laws of each bidder? Section 12A of the [Invitation to Bid] only mentions the SEC registration or any proof of registration. (Emphasis supplied)	The [Special Bids and Awards Committee] 1 ***requires the submission*** of copies of SEC Registration and ***Articles of Incorporation*** only of each bidder, including partner to the joint venture, and sub-contractor if already identified by the bidder before the submission and opening of bids. Even though, Clause 12.1 of Section II (Instructions to Bidders) of the Bidding Documents mentions only SEC Registration, such requirement is not exclusive and absolute as the same clause gives the BAC a leeway to modify or add the requirement through the Bid Data Sheet (BDS). The clause "*unless otherwise stated in the BDS*" expressly gives the BAC such authority.[107] (Emphasis supplied)

When SMTC failed to submit its Articles of Incorporation, the COMELEC should have disqualified Smartmatic Joint Venture.

The COMELEC has the power to review a bidder's lack of eligibility at *any stage* of the procurement process. Section 23.7 (Eligibility Requirements for the Procurement of Goods and Infrastructure Projects) of the Revised Implementing Rules and Regulations of Republic Act No. 9184 and Section 30[108] of the

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[107] *Id*.

[108] *Rollo*, p. 249, COMELEC Bids and Award Committee's Philippine Bidding Documents for the Two-Stage Competitive Bidding for the Lease

bidding documents provide for this. Section 23.7 of the Implementing Rules and Regulations states:

Section 23. Eligibility Requirements for the Procurement of Goods and Infrastructure Projects

. . . . . .

23.7. Notwithstanding the eligibility of a prospective bidder, the procuring entity concerned *reserves the right to review* the qualifications of the bidder at *any stage* of the procurement process . . . Should such review uncover any misrepresentation made in the eligibility requirements, statements or documents, or any changes in the situation of the prospective bidder which will affect the capability of the bidder to undertake the project so that it fails the eligibility criteria, the procuring entity shall *consider the said prospective bidder as ineligible and shall disqualify it from obtaining an award or contract* . . . (Emphasis supplied)

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of Election Management System (EMS) and Precinct-Based Optical Mark Reader (OMR) or Optical Scan (OP-SCAN) System, Secs. 30.1 and 30.2(b), which provide:

[Section] 30. Reservation Clause

30.1. Notwithstanding the eligibility or post-qualification of a Bidder, the Procuring Entity concerned reserves the right to review its qualifications at any stage of the procurement process . . . Should such review uncover any misrepresentation made in the eligibility and bidding requirements, statements or documents, or any changes in the situation of the Bidder which will affect its capability to undertake the project so that it fails the preset eligibility or bid evaluation criteria, the Procuring Entity shall consider the said Bidder as ineligible and shall disqualify it from submitting a bid or from obtaining an award or contract.

30.2. Based on the following grounds, the Procuring Entity reserves the right to reject any and all bids, declare a failure of bidding at any time prior to the contract award, or not to award the contract, without thereby incurring any liability, and make no assurance that a contract shall be entered into as a result of the bidding:

. . . . . .

(b) If the Procuring Entity's BAC is found to have failed in following the prescribed bidding procedures[.]

Moreover, this court cannot be estopped by the findings of the BAC or the COMELEC En Banc. When Smartmatic Joint Venture submitted noncompliant legal requirements, there was no basis for the COMELEC to have allowed it to proceed to the next stage of bidding.

SMTC's transgression is already *fait accompli*, and amending its Articles of Incorporation (by changing its corporate purpose) cannot cure the defect. The Articles of Incorporation is part of the requirements for the issuance of a Certificate of Registration.[109] Thus, for the submitted Certificate of Registration to have been considered valid, the Articles of Incorporation forming part of it should likewise have been valid.

The purpose clause in the Articles of Incorporation "confers, as well as limits, the powers which a corporation may exercise."[110] That way, corporate officers shall know the limits of their actions, shareholders shall be informed of the corporation's type of business, and third parties shall know whether the corporation they are transacting with is actually authorized to act or has legal personality to conduct business.

This court cannot grant corporate personality where there previously was none. Acts done beyond the express, implied, and incidental powers of the corporation, as provided for in the law or its Articles of Incorporation, are *ultra vires*.

According to Section 45 of the Corporation Code, "[n]o corporation under this Code shall possess or exercise any corporate powers except those conferred by this Code or by its articles of incorporation and except such as are necessary or incidental to the exercise of the powers so conferred." It is clear from the provision that the necessary or incidental powers must relate to the express powers conferred by law or the Articles of Incorporation.

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[109] *See* Registration of Corporations and Partnerships with the SEC <http://www.sec.gov.ph/cmanual/CITIZENS%20MANUAL%20NO.%202.pdf> (visited December 7, 2015).

[110] SEC OGC Opinion No. 07-14, July 18, 2007 <http://www.sec.gov.ph/investorinfo/opinions/ogc/cy%202007/07-14.pdf> (visited December 7, 2015).

"[E]xpress powers cannot be enlarged by implication."[111] If a corporate charter's recital of specific powers is followed by a general language, this general language "is construed and confined within the limitations of the specific power named."[112] SMTC has a specific power: The Articles of Incorporation expressly "accord[s] legal personality to [SMTC] for the automation of the 2010 national and local elections[.]"[113] The ensuing general language (as stated in the secondary purpose) which supposedly allows SMTC to "enter into contracts . . . of every kind and description and for any lawful purpose"[114] cannot be enlarged to contemplate the OMR Project for the 2016 national and local elections.

Further, while it is true that Section 42 of the Corporation Code allows corporations to invest its funds in another corporation or business, and that SMTC's secondary purpose also provides for this, one must make a distinction between investment of funds (such as in banks, stocks, or money market placements) and active pursuit of business (i.e., bidding for the lease with option to purchase 23,000 new units of the OMR+ system for the 2016 elections).

The corporate charter of SMTC is time-bound, limited, restricted, and specific. Thus, insofar as the 2016 elections are concerned, SMTC was disqualified on the date it submitted the eligibility documents.

By participating in the bidding for the OMR Project, SMTC committed an *ultra vires* act.

The ponencia further asserts that the COMELEC and SMTC maintained their contractual relations after the 2010 election schedule. He states that for this reason, Smartmatic Joint Venture may validly undertake the OMR Project.[115]

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[111] SEC OGC Opinion No. 07-14.

[112] *Id*.

[113] *Rollo*, p. 6, Petition.

[114] *Id*. at 534, Articles of Incorporation of Smartmatic-TIM Corporation.

[115] *Ponencia*, pp. 30-33.

I disagree.

The COMELEC cannot be made to accommodate an ineligible bidder. While there may be legal ties between the COMELEC and SMTC for some of the post-2010 transactions related to the refurbishment of the precinct count optical scan (PCOS) voting machines, this bond of law ends for the OMR Project.

The ponencia cites two cases to show how "the *vinculum juris* between COMELEC and SMTC remains solid and unsevered despite the 2010 elections[.]"[116]

In *Archbishop Capalla, et al. v. Commission on Elections*,[117] this court upheld the COMELEC's purchase of the PCOS machines in 2012, which it leased from SMTC for the 2010 elections.[118] This was pursuant to the lease with an option-to-purchase clause in the amended Contract for the Provision of an Automated Election System for the May 10, 2010 Synchronized National and Local Elections (2009 Automated Election System Contract).[119]

In *Pabillo, et al. v. Commission on Elections*,[120] the 2009 Automated Election System Contract states that SMTC would make available parts, labor, and technical support and maintenance of the PCOS machines to the COMELEC for the next 10 years (10-year warranty), if the latter decides to exercise its option to purchase the PCOS machines.[121]

In contrast, the Terms of Reference of the OMR Project do not speak of the leased and purchased 2010 PCOS machines, but of an OMR+ with new and different specifications, for use

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[116] *Id*. at 33.

[117] 687 Phil. 617 (2012) [Per *J*. Peralta, *En Banc*].

[118] *Id*. at 663-664.

[119] *Id*. at 665.

[120] G.R. No. 216098, April 21, 2015 <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2015/april2015/216098.pdf> [Per *J*. Perlas-Bernabe, *En Banc*].

[121] *Id*. at 31.

specifically in the 2016 elections. The 2009 Automated Election System Contract cannot be unduly stretched to contemplate the OMR Project.

SMTC's authority to bid for the 2016 elections was determined on December 4, 2015, the date of submission of its legal documents. Section 25 of Republic Act No. 9184 provides that bid documents "submitted after the deadline shall not be accepted." Neither may the bid documents be modified after the deadline for submission of bids.[122]

The party that sleeps on its rights necessarily suffers the consequences of its own inaction. SMTC, the company that won the bidding for the automation of the 2010 elections, sought to amend its primary corporate purpose only *two weeks after* the Invitation to Bid for the 2016 elections had been released.[123] Being slow to act, SMTC has no one to blame but itself for submitting its amended Articles of Incorporation *six days after deadline*. A seasoned business enterprise such as SMTC is expected to exercise prudence in conducting its corporate affairs.

A corporation cannot amend its Articles of Incorporation without the state's consent. Thus, the effects of the amendment do not retroact to December 4, 2014.

During post-qualification, the BAC validated and ascertained whether the documents Smartmatic Joint Venture submitted on December 4, 2014 complied with the required bidding documents. On May 5, 2015, the BAC answered negatively, thus, disqualifying Smartmatic Joint Venture. Ten days after, however, the BAC reversed itself without adequate explanations. Pursuant to the Implementing Rules and Regulations of Republic Act No. 9184, the COMELEC En Banc should have exercised its

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[122] *Rollo*, p. 242, COMELEC Bids and Award Committee's Philippine Bidding Documents for the Two-Stage Competitive Bidding for the Lease of Election Management System (EMS) and Precinct-Based Optical Mark Reader (OMR) or Optical Scan (OP-SCAN) System.

[123] Sixteen days from October 27, 2014, when COMELEC released the eligibility requirements, to November 12, 2014, when SMTC adopted the amendments for approval of the Securities and Exchange Commission.

all-encompassing right to review the qualifications of the partners in the Smartmatic Joint Venture, notwithstanding any previous declaration of eligibility.

SMTC has the biggest equity share in the Smartmatic Joint Venture. SMTC's ineligibility militates against the qualifications of the Smartmatic Joint Venture. The acts of a joint venture partner bind the joint venture itself.

V

Petitioners failed to present any evidence relating to the nationality of the owners of the corporations. The only proof they showed was the financial report[124] of Smartmatic Limited, which is not a party to this case. Only SMTC and Smartmatic International Holding B.V. are partners in the Smartmatic Joint Venture. Respondents, on the other hand, presented SMTC's General Information Sheet,[125] showing that Smartmatic Joint Venture is Filipino-owned, not foreign-owned. In any case, the law allows the COMELEC to procure from foreign sources. Thus:

> SECTION 12. *Procurement of Equipment and Materials*. — To achieve the purpose of this Act, the Commission is authorized to procure, in accordance with existing laws, by purchase, lease, rent or other forms of acquisition, supplies, equipment, materials, software, facilities, and other services, from *local or foreign sources* free from taxes and import duties, subject to accounting and auditing rules and regulations. With respect to the May 10, 2010 elections and succeeding electoral exercises, the system procured must have demonstrated capability and been successfully used in a prior electoral exercise here or abroad.[126] (Emphasis supplied)

ACCORDINGLY, for the reasons stated, I vote to **DISMISS** this Petition.

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[124] *Rollo*, pp. 79-133.

[125] *Id*. at 1023.

[126] Rep. Act No. 8436 (1997), Sec. 8, as amended by Rep. Act No. 9369, Sec. 10.

EN BANC

[G.R. No. 218787. December 8, 2015]

LEO Y. QUERUBIN, MARIA CORAZON M. AKOL, and AUGUSTO C. LAGMAN, *petitioners, vs.* **COMMISSION ON ELECTIONS EN BANC, represented by Chairperson J. ANDRES D. BAUTISTA, and JOINT VENTURE OF SMARTMATIC-TIM CORPORATION, TOTAL INFORMATION MANAGEMENT CORPORATION, SMARTMATIC INTERNATIONAL HOLDING B.V. and JARLTECH INTERNATIONAL CORPORATION, represented by partner with biggest equity share, SMARTMATIC-TIM CORPORATION, its general manager ALASTAIR JOSEPH JAMES WELLS, Smartmatic Chairman LORD MALLOCH-BROWN, Smartmatic-Asia Pacific President CESAR FLORES, and any or all persons acting for and on behalf of the Joint Venture,** *respondents.*

SYLLABUS

1. REMEDIAL LAW; SPECIAL CIVIL ACTIONS; RULE 64 OF THE RULES OF COURT IS NOT THE PROPER REMEDY TO ASSAIL THE COMELEC'S DECISION IN THE EXERCISE OF ITS ADMINISTRATIVE POWERS.— The rule cited by petitioners is an application of the constitutional mandate requiring that, unless otherwise provided by law, the rulings of the constitutional commissions shall be subject to review only by the Supreme Court on certiorari. A reproduction of Article IX-A, Section 7 of the 1987 Constitution is in order: Section 7. Each Commission shall decide by a majority vote of all its Members, any case or matter brought before it within sixty days from the date of its submission for decision or resolution. A case or matter is deemed submitted for decision or resolution upon the filing of the last pleading, brief, or memorandum required by the rules of the Commission or by the Commission itself. **Unless otherwise provided by this Constitution or by law, any decision, order, or ruling of each Commission may be brought to the Supreme Court**

on *certiorari* by the aggrieved party within thirty days from receipt of a copy thereof. Though the provision appears unambiguous and unequivocal, the Court has consistently held that the phrase "decision, order, or ruling" of constitutional commissions, the COMELEC included, that may be brought directly to the Supreme Court on certiorari is not all-encompassing, and that it only relates to those rendered in the commissions' exercise of **adjudicatory or quasi-judicial powers**. In the case of the COMELEC, this would limit the provision's coverage to the decisions, orders, or rulings issued pursuant to its authority to be the sole judge of generally all controversies and contests relating to the elections, returns, and qualifications of elective offices. Consequently, Rule 64, which complemented the procedural requirement under Article IX-A, Section 7, should likewise be read in the same sense––that of excluding from its coverage decisions, rulings, and orders rendered by the COMELEC in the exercise of its **administrative** functions.

2. ID.; ID.; ID.; WHEN THE ASSAILED COMELEC'S DECISION IS RENDERED IN THE EXERCISE OF ITS ADMINISTRATIVE POWER, THE PROPER REMEDY IS A PETITION FOR *CERTIORARI* UNDER RULE 65; IN VIEW OF A MERITORIOUS CASE FOR THE RELAXATION OF THE RULES, THE COURT TREATS THE INSTANT RECOURSE AS ONE FILED UNDER RULE 65.— [R]ecall that the instant petition revolves around the issue on whether or not Smartmatic JV is eligible to participate in the bidding process for the COMELEC's procurement of 23,000 units of optical mark readers. The case does not stem from an election controversy involving the election, qualification, or the returns of an elective office. Rather, it pertains to the propriety of the polling commission's conduct of the procurement process, and its initial finding that Smartmatic JV is eligible to participate therein. It springs from the COMELEC's compliance with the Constitutional directive to enforce and administer all laws and regulations relative to the conduct of an election. Specifically, it arose from the electoral commission's exercise of Sec. 12 of RA 8436, otherwise known as the Automated Elections Law, as amended by RA 9369, which authorized the COMELEC "**to procure, in accordance with existing laws, by purchase, lease, rent or other forms of acquisition, supplies, equipment, materials, software,**

facilities, and other services, from local or foreign sources free from taxes and import duties, subject to accounting and auditing rules and regulation." The subject matter of Smartmatic JV's protest, therefore, does not qualify as one necessitating the COMELEC's exercise of its adjudicatory or quasi-judicial powers that could properly be the subject of a Rule 64 petition, but is, in fact, administrative in nature. Petitioners should then have sought redress *via* a petition for the issuance of the extraordinary writ of certiorari under Rule 65 to assail the COMELEC *en banc's* June 29, 2015 Decision granting the protest. As a caveat, however, the writ will only lie upon showing that the COMELEC acted capriciously or whimsically, with grave abuse of discretion amounting to lack or excess of jurisdiction in issuing the Decision, such as where the power is exercised in an arbitrary or despotic manner by reason of passion or personal hostility. The abuse of discretion must be so patent and gross as to amount to an evasion of positive duty or to a virtual refusal to perform the duty enjoined or to act at all in contemplation of law. Mere abuse of discretion will not suffice. It goes without saying that petitioners' action, having been lodged through an improper petition, is susceptible to outright dismissal. As the Court held in *Pates v. COMELEC*, a Rule 64 petition cannot simply be equated to Rule 65 even if it expressly refers to the latter rule. The clear distinction between the instant petition and *Pates*, however, is that in *Pates,* therein petitioner failed to present an exceptional circumstance or any compelling reason that would have warranted the liberal application of the Rules of Court. In stark contrast, herein petitioners, as will later on be discussed, were able to establish a meritorious case for the relaxation of the rules, relieving them from the rigid application of procedural requirements. We therefore treat the instant recourse as one filed not merely in relation to, but under Rule 65.

3. POLITICAL LAW; ELECTIONS; AUTOMATED ELECTIONS LAW (R.A. 8436) *VIS-À-VIS* GOVERNMENT PROCUREMENT ACT (R.A. 9184); THE PROPER REMEDY TO ASSAIL THE COMELEC RULINGS IN PROTEST OVER THE CONDUCT OF ITS PROCUREMENT OF ELECTION PARAPHERNALIA IS THROUGH A RULE 65 PETITION FOR CERTIORARI WITH THE REGIONAL TRIAL COURT.— [T]he COMELEC *en banc* was not resolving an election controversy when it resolved the protest, but was merely

performing its function to procure the necessary election paraphernalia for the conduct of the 2016 National and Local Elections. This power finds statutory basis in Sec. 12 of RA 8436 x x x[.] In *Pabillo v. COMELEC*, the Court held that the "existing laws" adverted to in the provision is none other than RA 9184. The law is designed to govern all cases of procurement of the national government, its departments, bureaus, offices and agencies, including state universities and colleges, government-owned and/or-controlled corporations, government financial institutions and local government units. It mandates that as a general rule, all government procurement must undergo competitive bidding and for purposes of conducting the bidding process, the procuring entity convenes a BAC. The BAC is tasked to oversee the entire procuring process, from advertisement of the project to its eventual award. It is the first to rule on objections or complaints relating to the conduct of the bidding process, subject to review by the head of the procuring entity via protest. x x x Thus, under Sec. 58, the proper remedy to question the ruling of the head of the procuring entity is through a Rule 65 petition for certiorari with the Regional Trial Court (RTC). The term "procuring entity" is defined under the RA 9184 as "**any branch, department, office, agency, or instrumentality of the government, including state universities and colleges, government-owned and/or - controlled corporations, government financial institutions, and local government units procuring Goods, Consulting Services and Infrastructure Projects**." This statutory definition makes no distinction as to whether or not the procuring entity is a constitutional commission under Article IX of the Constitution. It is broad enough to include the COMELEC within the contemplation of the term. Hence, under the law, grievances relating to the COMELEC rulings in protests over the conduct of its project procurement should then be addressed to the RTC. The mandatory recourse to the RTC in the appeal process applicable to COMELEC procurement project is not a novel development introduced by RA 9184. Even prior to the advent of the government procurement law, the requirement already finds jurisprudential support in *Filipinas Engineering and Machine Shop v. Ferrer*[.] x x x Additionally, even if the Court treats the protest proceeding as part of the procuring agency's adjudicatory function, the Court notes that Sec. 58 of RA 9184 would nevertheless apply, and the RTC would

still have jurisdiction, pursuant to the proviso "unless otherwise provided by law" as appearing in Article IX-A, Section 7 of the Constitution. In this case, the pertinent law provides that insofar as rulings of the COMELEC in procurement protests are concerned, said rulings can be challenged through a Rule 65 certiorari with the RTC.

4. ID.; ID.; ID.; ID.; ONLY THE LOSING BIDDERS HAVE THE PERSONALITY TO CHALLENGE THE COMELEC'S RULING IN PROTEST RELATING TO ITS PROJECT PROCUREMENT; NON-PARTICIPANTS IN THE PROCUREMENT PROJECT CANNOT SEEK RECOURSE TO FILE A PETITION FOR CERTIORARI.— [T]he application of Sec. 58 of RA 9184 has to be qualified. It cannot, in all instances, be the proper remedy to question the rulings of the heads of procuring entities in procurement protests. As in the prior case of *Roque v. COMELEC*, which similarly dealt with COMELEC procurement of OMRs the Court held that only a losing bidder would be aggrieved by, and *ergo* would have the personality to challenge, the head of the procuring entity's ruling in the protest. x x x Evidently, the remedy of certiorari filed before the RTC under Sec. 58 of RA 9184 is intended as a continuation of the motion for reconsideration filed before the BAC, and of the subsequent protest filed with the head of the procuring entity. This is confirmed by the condition *sine qua non* completion of the process under Rule XVII, Secs. 55-57 of the GPRA IRR before recourse to the trial courts become available. It is obvious under Sec. 55.1 of Rule XVII that only a **failed bidder** can turn the cogs of the protest mechanism by first moving for reconsideration of the assailed BAC ruling. The **party concerned**, the bidder adversely affected by the resolution of the motion, shall then have seven (7) days to file a protest with the head of the procuring entity. The pre-requisite that a protestant should likewise be a bidder is emphasized by Sec. 55.4 which requires that the "**name of the bidder**" and the "**office address of the bidder**" be indicated in its position paper. Accordingly, **only the bidder against whom the head of the procuring entity ruled, if it would challenge the ruling any further, is required to resort to filing a petition for certiorari before the trial courts under Sec. 58**. E[r]go, there is neither rhyme nor reason for petitioners herein, who are non-participants in the procurement project, to comply with the rules on protest under RA 9184, part and

parcel of which is the exclusivity of the jurisdiction of the RTC under Sec. 58 thereof.

5. REMEDIAL LAW; HIERARCHY OF COURTS; THE PRINCIPLE DICTATES THAT RECOURSE MUST FIRST BE MADE TO THE LOWER-RANKED COURT EXERCISING CONCURRENT JURISDICTION WITH A HIGHER COURT; EXCEPTIONS.— Notwithstanding the non-exclusivity of the original jurisdiction over applications for the issuance of writs of certiorari, however, the doctrine of hierarchy of courts dictates that recourse must first be made to the lower-ranked court exercising concurrent jurisdiction with a higher court. The rationale behind the principle is explained in *Bañez, Jr. v. Concepcion* in the following wise: The Court must enjoin the observance of the policy on the hierarchy of courts, and now affirms that the policy is not to be ignored without serious consequences. The strictness of the policy is designed to shield the Court from having to deal with causes that are also well within the competence of the lower courts, and thus leave time to the Court to deal with the more fundamental and more essential tasks that the Constitution has assigned to it. The Court may act on petitions for the extraordinary writs of certiorari, prohibition and mandamus only when absolutely necessary or when serious and important reasons exist to justify an exception to the policy. Petitioners do not have the absolute and unrestrained freedom of choice of the court to which an application for certiorari will be directed. Indeed, referral to the Supreme Court as the court of last resort will simply be empty rhetoric if party-litigants are able to flout judicial hierarchy at will. The Court reserves the direct invocation of its jurisdiction only when there are special and important reasons clearly and especially set out in the petition that would justify the same. In the leading case of *The Diocese of Bacolod v. Comelec*, the Court enumerated the specific instances when direct resort to this Court is allowed, to wit: (a) When there are genuine issues of constitutionality that must be addressed at the most immediate time; **(b) When the issues involved are of transcendental importance;** (c) Cases of first impression; (d) When the constitutional issues raised are best decided by this Court; **(e) When the time element presented in this case cannot be ignored; (f) When the petition reviews the act of a constitutional organ;** (g) When there is no other plain, speedy, and adequate remedy in the ordinary course of

law; (h) When public welfare and the advancement of public policy so dictates, or when demanded by the broader interest of justice; (i) When the orders complained of are patent nullities; and (j) When appeal is considered as clearly an inappropriate remedy.

6. ID.; ID.; ID.; ID.; EXCEPTIONS, APPLIED IN CASE AT BAR; THERE EXIST COMPELLING REASONS TO JUSTIFY THE DIRECT RESORT TO THE SUPREME COURT.— The Court finds the second and fifth, and sixth grounds applicable in the case at bar. Much has already been said of the "compelling significance and the transcending public importance" of the primordial issue underpinning petitions that assail election automation contracts: the success—and the far-reaching grim implications of the failure—of the nationwide automation project. So it is that the Court, in the growing number of cases concerning government procurement of election paraphernalia and services, has consistently exhibited leniency and dispensed of procedural requirements for petitioners to successfully lodge certiorari petitions. Technicalities should not stand in the way of resolving the substantive issues petitioners raised herein. x x x As regards the fifth ground, the time element, it is sufficient to state that with the 2016 polls visible in the horizon, the post-haste resolution of this case becomes all the more imperative. It would be the height of absurdity to require petitioners to undergo scrutiny through the lens of the RTC first, considering that the acquisition of 23,000 OMRs would, at the minimum, affect the clustering of precincts. Without the finalized list of clustered precincts, the polling place for the registered voters could not yet be ascertained. Needless to state, this would impede the preparations for the conduct of the polls and its unmitigated effects could very well lead to mass disenfranchisement of voters. Lastly, the sixth ground is indubitably applicable. The rulings of the COMELEC, as a constitutional body, can immediately be reviewed by the Court on proper petition. As quoted in *The Diocese of Bacolod v. COMELEC*, citing *Albano v. Arranz*, "**it is easy to realize the chaos that would ensue if the Court of First Instance of each and every province were [to] arrogate itself the power to disregard, suspend, or contradict any order of the Commission on Elections: that constitutional body would be speedily reduced to impotence**." In sum, there exist ample compelling reasons to justify the direct resort to

the Court as a departure from the doctrine of hierarchy of courts not in relation to but under Rule 65 of the Rules of Court on certiorari and prohibition, and to brush aside the procedural issues in this case to focus on the substantive issues surrounding the procurement of the 23,000 additional OMRs for the 2016 elections.

7. POLITICAL LAW; ELECTIONS; AUTOMATED ELECTIONS LAW (R.A. 8436) *VIS-À-VIS* GOVERNMENT PROCUREMENT ACT (R.A. 9184); BIDDING REQUIREMENTS FOR PROCUREMENT OF ELECTION PARAPHERNALIA TO BE USED IN 2016 NATIONAL AND LOCAL ELECTIONS; THE SUBMISSION OF THE ARTICLES OF INCORPORATION (AOI) OF THE BIDDER IS NOT AN ELIGIBILITY CRITERION; SUBMISSION OF AN AOI WAS NOT A PRE-QUALIFICATION REQUIREMENT.— It is a basic tenet that except only in cases in which alternative methods of procurement are allowed, all government procurement shall be done by competitive bidding. This is initiated by the BAC, which publishes an Invitation to Bid for contracts under competitive bidding in order to ensure the widest possible dissemination thereof. x x x Based on the rule, the BAC's function in determining the eligibility of a bidder during pre-qualification is ministerial in the sense that it only needs to countercheck the completeness and sufficiency of the documents submitted by a bidder against a checklist of requirements. It cannot, therefore, declare a bidder ineligible for failure to submit a document which, in the first place, is not even required in the bid documents. x x x [Sec. 23 of the GPRA IRR] do not require the submission of an AOI in order for a bidder to be declared eligible. The requirement that bears the most resemblance is the submission by each partner to the venture of a registration certificate issued by the Securities and Exchange Commission[.] x x x It may be that the procuring entity has the option to additionally require the submission of the bidders' respective AOIs in order to substantiate the latter's claim of due registration with the government entities concerned. However, a perusal of the bidding documents would readily reveal that the procuring entity, the COMELEC in this case, did not impose such a requirement. x x x Verily, based on Sec. 23.1(b) of the GPRA IRR, the Instruction to Bidders, the BDS, and the Checklist of Requirements, the non-submission of an AOI is not fatal to a bidder's eligibility to contract the

project at hand. Thus, it cannot be considered as a ground for declaring private respondents ineligible to participate in the bidding process. To hold otherwise would mean allowing the BAC to consider documents beyond the checklist of requirements, in contravention of their non-discretionary duty under Sec. 30(1) of the GPRA IRR.

8. ID.; ID.; ID.; ID.; ID.; NEITHER IS THE AOI A POST QUALIFICATION REQUIREMENT.— Even on post-qualification, the submission of an AOI was not included as an added requirement. x x x Clauses 12 and 13 of the Instruction to Bidders pertain to the eligibility documents, technical documents, and the financial component of a participant's bid. Meanwhile, the Clause 5 adverted to is an enumeration of persons or entities who may participate in the bidding. Nowhere in these clauses does it appear that an AOI is a mandatory requirement even for post-qualification. x x x From the foregoing, the inescapable result is that mere failure to file an AOI cannot automatically result in the bidder concerned being declared ineligible, contrary to petitioners' claim.

9. ID.; ID.; ID.; ID.; SMARTMATIC JV MAY VALIDLY UNDERTAKE THE SUBJECT PROCUREMENT PROJECT; SMTC STILL HAS THE AUTHORITY TO CONDUCT BUSINESS EVEN AFTER THE CONDUCT OF THE 2010 NATIONAL AND LOCAL ELECTIONS.— While it is true that SMTC's AOI made specific mention of the automation of the 2010 National and Local Elections as its primary purpose, it is erroneous to interpret this as meaning that the corporation's authority to transact business will cease thereafter. Indeed, the contractual relation between SMTC and the COMELEC has been the subject of prior controversies that have reached the Court, and We have on these occasions held that even beyond the 2010 election schedule, the parties remain to have subsisting rights and obligations relative to the products and services supplied by SMTC to the COMELEC for the conduct of the 2010 polls. x x x Based on Our ruling in *Capalla*, the cessation of SMTC's business cannot be assumed just because the May 10, 2010 polls have already concluded. For clearly, SMTC's purpose—the "automation of the 2010 national and local elections"—is not limited to the conduct of the election proper, but extends further to the fulfillment of SMTC's contractual obligations that spring forth from the AES Contract

during the lifetime of the agreement (i.e. until the release of the performance security), and even thereafter insofar as the surviving provisions of the contract are concerned. In other words, regardless of whether or not SMTC's performance security has already been released, establishing even just one surviving provision of the AES Contract would be sufficient to prove that SMTC has not yet completed its purpose under its AOI, toppling petitioners' argument like a house of cards. x x x [T]he *vinculum juris* between COMELEC and SMTC remains solid and unsevered despite the 2010 elections' inevitable conclusion. Several contractual provisions contained in the 2009 AES Contract, as observed in a review of our jurisprudence, continue to subsist and remain enforceable up to this date. *Pabillo*, in effect, at least guaranteed that SMTC's purpose under its AOI will not be fulfilled until May 10, 2020. Therefore, petitioners' theory—that SMTC no longer has a valid purpose—is flawed. Otherwise, there would be no way of enforcing the subsisting provisions of the contract and of holding SMTC to its warranties after the conduct of the May 10, 2010 elections.

10. ID.; ID.; ID.; ID.; ID.; THE ISSUE OF WHETHER OR NOT SMTC'S PARTICIPATION IN THE BIDDING PROCESS IS AN AUTHORIZED ACT IS MOOTED BY THE SUBSEQUENT APPROVAL OF THE AMENDMENT TO SMTC'S AOI.— [E]ven though the submission of an AOI was not required for either pre or post-qualification purposes, the COMELEC and BAC, on post-qualification, may still consider the same in determining whether or not the project is in line with the bidder's corporate purpose, and, ultimately, in ascertaining the bidder's eligibility. In the case at bar, We take note that during the opening of the bids on December 4, 2014, Smartmatic JV already informed the BAC that SMTC was already in the process of amending its AOI. The contents of the AOI, at that time, were immaterial since the AOI is not an eligibility requirement that can be considered by the BAC on pre-qualification. By post-qualification, however, the time the BAC can validly consider extraneous documents, SMTC's AOI has already been duly amended, and the amendments approved by the SEC on December 10, 2014, for its updated primary purpose[.] x x x Hence, any doubt on SMTC's authorization to continue its business has already been dispelled by December 10, 2014. It matters not that the amendments to

the AOI took effect only on that day for as long as it preceded post-qualification.

11. COMMERCIAL LAW; CORPORATIONS; *ULTRA VIRES* ACT, DEFINED; TEST TO DETERMINE WHETHER OR NOT AN ACT IS *ULTRA VIRES*.— [A]n *ultra vires* act is defined under BP 68 in the following wise: **Section 45.** *Ultra vires acts of corporations*. – No corporation under this Code shall possess or exercise any corporate powers except those conferred by this Code or by its articles of incorporation and **except such as are necessary or incidental to the exercise of the powers so conferred**. The language of the Code appears to confine the term *ultra vires* to an act outside or beyond express, implied and incidental corporate powers. Nevertheless, the concept can also include those acts that may ostensibly be within such powers but are, by general or special laws, either proscribed or declared illegal. *Ultra vires* acts or acts which are clearly beyond the scope of one's authority are null and void and cannot be given any effect. In determining whether or not a corporation may perform an act, one considers the logical and necessary relation between the act assailed and the corporate purpose expressed by the law or in the charter, for if the act were one which is lawful in itself or not otherwise prohibited and done for the purpose of serving corporate ends or reasonably contributes to the promotion of those ends in a substantial and not merely in a remote and fanciful sense, it may be fairly considered within corporate powers. **The test to be applied is whether the act in question is in direct and immediate furtherance of the corporation's business**, fairly incident to the express powers and reasonably necessary to their exercise. If so, the corporation has the power to do it; otherwise, not.

12. ID.; ID.; ID.; *ULTRA VIRES* ACT, NOT A CASE OF; SMTC'S PARTICIPATION IN THE BIDDING IS NOT AN *ULTRA VIRES* ACT BUT ONE THAT IS INCIDENTAL TO ITS CORPORATE PURPOSE.— [N]otwithstanding the specific mention of the 2010 National and Local Elections in SMTC's primary purpose, it is not, as earlier discussed, precluded from entering into contracts over succeeding ones. Here, SMTC cannot be deemed to be overstepping its limits by participating in the bidding for the 23,000 new optical mark readers for the 2016 polls since upgrading the machines that

the company supplied the COMELEC for the automation of the 2010 elections and offering them for subsequent elections is but a logical consequence of SMTC's course of business, and should, therefore, be considered included in, if not incidental to, its corporate purpose. A restricted interpretation of its purpose would mean limiting SMTC's activity to that of waiting for the expiration of its warranties in 2020. How then can the company be expected to subsist and sustain itself until then if it cannot engage in any other project, even in those similar to what the company already performed? In the final analysis, We see no defect in the AOI that needed to be cured before SMTC could have participated in the bidding as a partner in Smartmatic JV, the automation of the 2016 National and Local Elections being a logical inclusion of SMTC's corporate purpose.

13. ID.; ID.; NATIONALITY OF CORPORATIONS; PETITIONERS FAILED TO PROVE THAT SMTC IS 100% FOREIGN-OWNED.— While petitioners are correct in asserting that Smartmatic JV ought to be at least 60% Filipino-owned to qualify, they did not adduce sufficient evidence to prove that the joint venture did not meet the requirement. Petitioners, having alleged non-compliance, have the correlative burden of proving that Smartmatic JV did not meet the requirement, but aside from their bare allegation that SMTC is 100% foreign-owned, they did not offer any relevant evidence to substantiate their claim. Even the 2013 financial statements submitted to Court fail to impress for they pertain to the financial standing of **Smartmatic Limited**, which is a distinct and separate entity from **SMTC**. It goes without saying that Smarmatic Limited's nationality is irrelevant herein for it is not even a party to this case, and even to the joint venture.

14. ID.; ID.; ID.; SMTC SATISFACTORILY ESTABLISHED THAT IT IS A FILIPINO CORPORATION; CONTROL TEST, APPLIED.— Aside from the sheer weakness of petitioners' claim, SMTC satisfactorily refuted the challenge to its nationality and established that it is, indeed, a Filipino corporation as defined under our laws. As provided in Republic Act No. 7042 (RA 7042), otherwise known as the Foreign Investments Act, a Philippine corporation is defined in the following wise: x x x **a corporation organized under the laws of the Philippines of which at least sixty percent (60%) of the capital stock outstanding and entitled to vote is owned**

and held by citizens of the Philippines; x x x In *Narra Nickel Mining and Development, Corp. v. Redmont Consolidated Mines, Corp.*, the Court held that the "control test" is the prevailing mode of determining whether or not a corporation is Filipino. Under the "control test," shares belonging to corporations or partnerships at least 60% of the capital of which is owned by Filipino citizens shall be considered as of Philippine nationality. It is only when based on the attendant facts and circumstances of the case, there is, in the mind of the Court, doubt in the 60-40 Filipino-equity ownership in the corporation, that it may apply the "grandfather rule." x x x Applying the control test, 60% of SMTC's 226,000,000 shares, that is 135,600,000 shares, must be Filipino-owned. From the above-table, it is clear that SMTC reached this threshold amount to qualify as a Filipino-owned corporation.

15. ID.; ID.; ID.; FAILURE OF THE PETITIONERS TO ADDUCE EVIDENCE TO PROVE THAT THE JOINT VENTURE PARTNERS ARE FOREIGN-OWNED WILL RESULT IN UPHOLDING COMELEC'S FINDINGS THAT SMARTMATIC JV IS ELIGIBLE TO PARTICIPATE IN THE BIDDING PROCESS.— Anent the nationality of the other joint venture partners, the Court defers to the findings of the COMELEC and the BAC, and finds sufficient their declaration that Smartmatic JV is, indeed, eligible to participate in the bidding process, and is in fact the bidder with the lowest calculated responsive bid. If petitioners would insist otherwise by reason of Smartmatic JV's nationality, it becomes incumbent upon them to prove that the aggregate Filipino equity of the joint venture partners—SMTC, Total Information Management Corporation, Smartmatic International Holding B.V., and Jarltech International Corporation—does not comply with the 60% Filipino equity requirement, following the oft-cited doctrine that he who alleges must prove. Regrettably, one fatal flaw in petitioners' posture is that they challenged the nationality of SMTC alone, which, after utilizing the control test, turned out to be a Philippine corporation as defined under RA 7042. There was no iota of evidence presented or, at the very least, even a claim advanced that the remaining partners are foreign-owned. There are, in fact, no other submissions whence this Court can inquire as to the nationalities of the other joint venture partners. Hence, there is no other alternative for this Court other than to adopt the findings of the COMELEC and the

BAC upholding Smartmatic JV's eligibility to participate in the bidding process, subsumed in which is the joint venture and its individual partners' compliance with the nationality requirement.

LEONEN, *J., concurring and dissenting opinion*:

1. REMEDIAL LAW; COURTS; JURISDICTION; TRANSCENDENTAL PUBLIC IMPORTANCE DOCTRINE SHOULD NOT JUSTIFY A BLATANT DISREGARD OF THE PROCEDURAL RULES; THE DECISION OF THE COMELEC EN BANC IN PROCUREMENT OF ELECTION SUPPLIES BY PUBLIC BIDDING MUST BE APPEALED TO THE REGIONAL TRIAL COURT.— I disagree with the ponencia's statement that "the transcending public importance" of the case allows for a procedural shortcut to this court. Transcendental interest is the exception, not the rule. The transcendental doctrine should not justify a "blatant disregard of procedural rules, [especially if] petitioner[s] had other available remedies[.]" x x x Rule 65 in relation to Rule 64 of the Rules of Court provides for resort to this court from the ruling of the COMELEC En Banc only when there is no other "plain, speedy, and adequate remedy in the ordinary course of law" to assail the COMELEC's exercise of a quasi-judicial function. Quasi-judicial power is an administrative agency's power to "adjudicate the rights of persons before it." It involves hearing and determining questions of fact and application of the standards laid down by the law to enforce this same law. The COMELEC Decision dated June 29, 2015 adjudicated the rights of Smartmatic Joint Venture. It was promulgated in pursuit of the COMELEC's role of procuring election-related supplies and enforcing election-related laws [pursuant to] Batas Pambansa Blg. 881[.] x x x Meanwhile, the Implementing Rules and Regulations (Part A) of Republic Act No. 9184 states that "[d]ecisions of the BAC with respect to the conduct of bidding may be protested in writing to the head of the procuring entity[.]" Thus, COMELEC, being the head of the entity for procuring election supplies by public bidding, has quasi-adjudicative powers. To enforce election-related laws, it adjudicates protests relative to the procurement process by applying both the law and the facts of the case. x x x Even assuming that the correct remedy is Rule 65 and not Rule 64

in relation to Rule 65, resort to this court cannot be had if there is another plain, speedy, and adequate remedy. Petitioners' remedy lies with the Regional Trial Court. Section 58 of Republic Act No. 9184 provides that the Regional Trial Court has "jurisdiction over final decisions of the head of the procuring entity[,]" which is COMELEC in this case. x x x Jurisprudence further solidifies this rule. In *Dimson (Manila), Inc., et al. v. Local Water Utilities Administration*, this court held that the Regional Trial Court is the proper venue for Rule 65 petitions pertaining to issues on the procurement and bidding process. Likewise, this court said in *First United Constructors Corporation v. Poro Point Management Corporation (PPMC), et al.* that, notwithstanding the Regional Trial Court's concurrent certiorari jurisdiction with that of this court, this court should still refuse to permit an unrestricted freedom to directly seek this court's intervention when there are other remedies available. In government procurement cases, the decisions of the COMELEC En Banc must be appealed before the Regional Trial Court, which has the power to issue an injunctive writ while the cases are pending before it.

2. POLITICAL LAW; ELECTIONS; AUTOMATED ELECTIONS LAW (R.A. 8436) *VIS-À-VIS* GOVERNMENT PROCUREMENT ACT (R.A. 9184); BIDDING REQUIREMENTS FOR PROCUREMENT OF ELECTION PARAPHERNALIA TO BE USED IN 2016 NATIONAL AND LOCAL ELECTIONS; COMELEC ACTED IN RECKLESS DISREGARD OF ITS OWN BIDDING RULES AND PROCEDURE IN GRANTING SMARTMATIC JOINT VENTURE'S PROTEST.— It appears that in granting private respondent's protest, the COMELEC acted in reckless disregard of its own bidding rules and procedure. For the OMR Project, the COMELEC required the submission of the Articles of Incorporation. This is shown in BAC Bid Bulletin No. 5, which respondents and the ponencia fail to mention. BAC Bid Bulletin No. 5 mandates all bidders in the OMR Project, including every joint venture partner, to submit their Articles of Incorporation[.] x x x When SMTC failed to submit its Articles of Incorporation, the COMELEC should have disqualified Smartmatic Joint Venture. The COMELEC has the power to review a bidder's lack of eligibility at *any stage* of the procurement process. Section 23.7 (Eligibility Requirements for the Procurement of Goods and Infrastructure Projects) of

the Revised Implementing Rules and Regulations of Republic Act No. 9184 and Section 30 of the bidding documents provide for this. x x x [T]his court cannot be estopped by the findings of the BAC or the COMELEC En Banc. When Smartmatic Joint Venture submitted noncompliant legal requirements, there was no basis for the COMELEC to have allowed it to proceed to the next stage of bidding.

3. ID.; ID.; ID.; ID.; ID.; THE COMELEC CANNOT ACCOMMODATE AN INELIGIBLE BIDDER; THE 2009 AUTOMATED ELECTION SYSTEM CONTRACT BETWEEN THE COMELEC AND SMTC CANNOT BE UNDULY STRETCHED TO CONTEMPLATE THE PROCUREMENT PROJECT FOR THE 2016 ELECTIONS. — The COMELEC cannot be made to accommodate an ineligible bidder. While there may be legal ties between the COMELEC and SMTC for some of the post-2010 transactions related to the refurbishment of the precinct count optical scan (PCOS) voting machines, this bond of law ends for the OMR Project. The ponencia cites two cases to show how "the *vinculum juris* between COMELEC and SMTC remains solid and unsevered despite the 2010 elections[.]" In *Archbishop Capalla, et al. v. Commission on Elections*, this court upheld the COMELEC's purchase of the PCOS machines in 2012, which it leased from SMTC for the 2010 elections. This was pursuant to the lease with an option-to-purchase clause in the amended Contract for the Provision of an Automated Election System for the May 10, 2010 Synchronized National and Local Elections (2009 Automated Election System Contract). In *Pabillo, et al. v. Commission on Elections*, the 2009 Automated Election System Contract states that SMTC would make available parts, labor, and technical support and maintenance of the PCOS machines to the COMELEC for the next 10 years (10-year warranty), if the latter decides to exercise its option to purchase the PCOS machines. In contrast, the Terms of Reference of the OMR Project do not speak of the leased and purchased 2010 PCOS machines, but of an OMR+ with new and different specifications, for use specifically in the 2016 elections. The 2009 Automated Election System Contract cannot be unduly stretched to contemplate the OMR Project. SMTC's authority to bid for the 2016 elections was determined on December 4, 2015, the date of submission of its legal documents. Section 25 of Republic Act No. 9184 provides that bid documents "submitted after

the deadline shall not be accepted." Neither may the bid documents be modified after the deadline for submission of bids. The party that sleeps on its rights necessarily suffers the consequences of its own inaction. SMTC, the company that won the bidding for the automation of the 2010 elections, sought to amend its primary corporate purpose only *two weeks after* the Invitation to Bid for the 2016 elections had been released. Being slow to act, SMTC has no one to blame but itself for submitting its amended Articles of Incorporation *six days after deadline*. A seasoned business enterprise such as SMTC is expected to exercise prudence in conducting its corporate affairs.

4. COMMERCIAL LAW; CORPORATIONS; *ULTRA VIRES* ACT; BEING DISQUALIFIED ON THE DATE IT SUBMITTED THE ELIGIBILITY DOCUMENTS, SMTC COMMITTED AN *ULTRA VIRES* ACT WHEN IT PARTICIPATED IN THE BIDDING FOR THE PROCUREMENT PROJECT RELATIVE TO THE 2016 ELECTIONS.— SMTC's transgression is already *fait accompli*, and amending its Articles of Incorporation (by changing its corporate purpose) cannot cure the defect. The Articles of Incorporation is part of the requirements for the issuance of a Certificate of Registration. Thus, for the submitted Certificate of Registration to have been considered valid, the Articles of Incorporation forming part of it should likewise have been valid. The purpose clause in the Articles of Incorporation "confers, as well as limits, the powers which a corporation may exercise." That way, corporate officers shall know the limits of their actions, shareholders shall be informed of the corporation's type of business, and third parties shall know whether the corporation they are transacting with is actually authorized to act or has legal personality to conduct business. This court cannot grant corporate personality where there previously was none. Acts done beyond the express, implied, and incidental powers of the corporation, as provided for in the law or its Articles of Incorporation, are *ultra vires.* According to Section 45 of the Corporation Code, "[n]o corporation under this Code shall possess or exercise any corporate powers except those conferred by this Code or by its articles of incorporation and except such as are necessary or incidental to the exercise of the powers so conferred." It is clear from the provision that the necessary or incidental powers

must relate to the express powers conferred by law or the Articles of Incorporation. "[E]xpress powers cannot be enlarged by implication." If a corporate charter's recital of specific powers is followed by a general language, this general language "is construed and confined within the limitations of the specific power named." SMTC has a specific power: The Articles of Incorporation expressly "accord[s] legal personality to [SMTC] for the automation of the 2010 national and local elections[.]" The ensuing general language (as stated in the secondary purpose) which supposedly allows SMTC to "enter into contracts . . . of every kind and description and for any lawful purpose" cannot be enlarged to contemplate the OMR Project for the 2016 national and local elections. Further, while it is true that Section 42 of the Corporation Code allows corporations to invest its funds in another corporation or business, and that SMTC's secondary purpose also provides for this, one must make a distinction between investment of funds (such as in banks, stocks, or money market placements) and active pursuit of business (i.e., bidding for the lease with option to purchase 23,000 new units of the OMR+ system for the 2016 elections). The corporate charter of SMTC is time-bound, limited, restricted, and specific. Thus, insofar as the 2016 elections are concerned, SMTC was disqualified on the date it submitted the eligibility documents. By participating in the bidding for the OMR Project, SMTC committed an *ultra vires* act.

APPEARANCES OF COUNSEL

Manuelito R. Luna for petitioners.
The Solicitor General for public respondent.
Angara Abello Concepcion Regala & Cruz for respondents Joint Venture Smartmatic-Tim Corp., *et al.*

D E C I S I O N

VELASCO, JR., *J.*:

Nature of the Case

Before the Court is a petition for certiorari or prohibition under Rule 64 of the Rules of Court, with prayer for injunctive relief,

assailing the validity and seeking to restrain the implementation of the Commission of Elections (COMELEC) *en banc's* June 29, 2015 Decision[1] for allegedly being repugnant to the provisions of *Batas Pambansa Blg.* 68 (BP 68), otherwise known as the *Corporation Code of the Philippines*, and Republic Act No. 9184 (RA 9184) or the *Government Procurement Reform Act.*

The Facts

On October 27, 2014, the COMELEC *en banc*, through its Resolution No. 14-0715, released the bidding documents for the "Two-Stage Competitive Bidding for the Lease of Election Management System (EMS) and Precinct-Based Optical Mark Reader (OMR) or Optical Scan (OP-SCAN) System."[2] Specified in the published Invitation to Bid[3] are the details for the lease with option to purchase, through competitive public bidding, of twenty-three thousand (23,000) new units of precinct-based OMRs or OP-SCAN Systems, with a total Approved Budget for Contract of ₱2,503,518,000,[4] to be used in the 2016 National and Local Elections.[5] The COMELEC Bids and Awards

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[1] *Rollo*, pp. 61-72. Rendered by Chairman J. Andres D. Bautista and Commissioners Christian Robert S. Lim, Al A. Parreño, Luie Tito F. Guia, Arthur D. Lim, Ma. Rowena Amelia V. Guanzon and Sheriff M. Abas.

[2] *Id*. at 213-329. The bid documents are divided into eight (8) sections, namely: the Invitation to Bid, Instruction to Bidders, Bid Data Sheet, General Conditions of Contract, Special Conditions of Contract, Schedule of Requirements, Technical Specifications, and Bidding Forms.

[3] *Id*. at 216-218.

[4] *Id*. at 216.

COMPONENT	QUANTITY	UNIT COST	TOTAL
1– Voting Machines	23,000 units	Php 90,000.00	Php 2,070,000,000.00
2– Ballots	16,500,000 pieces	Php 20.00	Php 330,000,000.00
3– Ballot Boxes	20,406 units	Php 3,000.00	Php 61,218,000.00
4– Technical Support	4,550 Technicians (Polling Centers)		Php 42,300,000.00
	150 Technicians (National Technical Support Group)		
APPROVED BUDGET FOR THE CONTRACT (ABC)			**Php 2,503,518,000.00**

[5] *Id*. at 61-62.

Committee (BAC) set the deadline for the submission by interested parties of their eligibility requirements and initial technical proposal on December 4, 2014.[6]

The joint venture of Smartmatic-TIM Corporation (SMTC), Smartmatic International Holding B.V., and Jarltech International Corporation (collectively referred to as "Smartmatic JV") responded to the call and submitted bid for the project on the scheduled date. Indra Sistemas, S.A. (Indra) and MIRU Systems Co. Ltd. likewise signified their interest in the project, but only Indra, aside from Smartmatic JV, submitted its bid.[7]

During the opening of the bids, Smartmatic JV, in a sworn certification, informed the BAC that one of its partner corporations, SMTC, has a pending application with the Securities and Exchange Commission (SEC) to amend its Articles of Incorporation (AOI), attaching therein all pending documents.[8] The amendments adopted as early as November 12, 2014 were approved by the SEC on December 10, 2014.[9] On even date, Smartmatic JV and Indra participated in the end-to-end testing of their initial technical proposals for the procurement project before the BAC.

Upon evaluation of the submittals, the BAC, through its Resolution No. 1 dated December 15, 2014, declared Smartmatic JV and Indra eligible to participate in the second stage of the bidding process.[10] The BAC then issued a Notice requiring them to submit their Final Revised Technical Tenders and Price proposals on February 25, 2015, to which the eligible participants complied. Finding that the joint venture satisfied the requirements in the published Invitation to Bid, Smartmatic JV, on March 26, 2015, was declared to have tendered a complete and responsive

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[6] *Id*. at 217-218.

[7] *Id*. at 621.

[8] *Id*. at 623; *see also* BAC Resolution No. 10, Memorandum of Divida Blaz-Perez, *id*. at 433.

[9] *Id*. at 546.

[10] *Id*. at 623, 437.

Overall Summary of the Financial Proposal.[11] Meanwhile, Indra was disqualified for submitting a non-responsive bid.[12]

Subsequently, for purposes of post-qualification evaluation, the BAC required Smartmatic JV to submit additional documents and a prototype sample of its OMR.[13] The prototype was subjected to testing to gauge its compliance with the requirements outlined in the project's Terms of Reference (TOR).[14]

After the conduct of post-qualification, the BAC, through Resolution No. 9 dated May 5, 2015, disqualified Smartmatic JV on two grounds, viz:[15]

1. Failure to submit valid AOI; and
2. The demo unit failed to meet the technical requirement that the system shall be capable of writing all data/files, audit log, statistics and ballot images simultaneously in at least two (2) data storages.

The ruling prompted Smartmatic JV to move for reconsideration.[16] In denying the motion, the BAC, through Resolution No. 10[17] dated May 15, 2015, declared that Smartmatic JV complied with the requirements of Sec. 23.1(b) of the Revised Implementing Rules and Regulations of RA 9184 (GPRA IRR), including the submission of a valid AOI, but was nevertheless disqualified as it still failed to comply with the technical requirements of the project.[18]

Aggrieved, Smartmatic JV filed a Protest,[19] seeking permission to conduct another technical demonstration of its SAES 1800

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[11] *Id*. at 624.

[12] *Id*. at 624, 441-442.

[13] *Id*. at 624, 447-448.

[14] *Id*. at 900-901.

[15] *Id*. at 62, 449-451.

[16] *Id*. at 452-468.

[17] *Id*. at 424-429.

[18] *Id*. at 428.

[19] *Id*. at 469-506.

plus OMR (OMR+), the OMR Smartmatic JV presented during the public bidding before the COMELEC *en banc*.[20] Accordingly, on June 19, 2015, Smartmatic JV was allowed to prove compliance with the technical specifications for the second time, but this time before the electoral tribunal's Technical Evaluation Committee (TEC).[21] This was followed, on June 23, 2015, by another technical demonstration before the Commission *en banc* at the Advanced Science and Technology Institute (ASTI) at the University of the Philippines, Diliman, Quezon City.[22]

Ruling of the COMELEC *en banc*

Though initially finding that the OMR+'s ability to simultaneously write data in two storage devices could not conclusively be established,[23] the TEC, upon the use of a Digital Storage Oscilloscope (DSO) during the second demonstration,[24] determined that the OMR+ complied with the requirements specified in the TOR.[25] Adopting the findings of the TEC as embodied in its Final Report, the COMELEC *en banc*, on June 29, 2015, promulgated the assailed Decision granting Smartmatic JV's protest. The dispositive portion of the Decision reads:[26]

WHEREFORE, the instant Protest is hereby **GRANTED**. Accordingly, the Commission hereby declares the Joint Venture of Smartmatic-TIM Corporation, Total Information Management Corporation, Smartmatic International Holding B.V., and Jarltech International Corporation, as the bidder with the lowest calculated

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[20] *Id*. at 62-63.

[21] *Id*. at 63.

[22] *Id*. at 64.

[23] *Id*. at 63.

[24] *Id*. at 23. The DOS was used to visualize the electrical signals sent to the memory cards without modifying the OMR+ hardware and software. During the June 23, 2015 demonstration, the DSO displayed waveforms of time dimension and electrical voltage, which were then analyzed by the electronics design engineers of the ASTI.

[25] *Id*. at 23-26.

[26] *Id*. at 26.

responsive bid in connection with the public bidding for the lease with option to purchase of 23,000 new units of precinct-based Optical Mark Reader or Optical Scan System for use in the May 9, 2016 national and local elections. Corollarily, the scheduled opening of financial proposal and eligibility documents for the Second Round of Bidding is hereby **CANCELLED**, with specific instruction for the Bids and Awards Committee to **RETURN** to the prospective bidders their respective payments made for the purchase of Bidding Documents pertaining to the Second Round of Bidding.

Let the Bids and Awards Committee implement this Decision.

SO ORDERED.

The seven-man commission was unanimous in holding that Smartmatic JV's OMR+ sufficiently satisfied the technical requirements itemized in the TOR, reproducing in the assailed Decision, verbatim and with approbation, the entirety of the TEC's Final Report, thusly:[27]

This is to report on the result of the public test conducted on 23 June of the claim of Smartmatic TIM (SMTT) that their proposed SAES 1800 (PCOS+) has the capability to write ballot images, audit logs, and elections results on two separate storage (devices) simultaneously.

Technical discussion, demonstrations, and design reviews were conducted over two day period before the actual demonstration to the Comelec En Banc. These reviews were conducted between SMTT engineers and a team of embedded electronics design engineers from the Advanced Science and Technology Institute of the Department of Science and Technology.

Though these reviews are important to validate the behavior and functionality of the PCOS+, the best way to validate the claim of SMTT is to use a specialized test instrument connected to the actual electrical inputs of both storage cards.

To visualize the electrical signals being sent to the memory cards, an Agilent DSO7054A Digital Storage Oscilloscope (DSO) from ASTI connected to the same data input line on two SD card adapters with a micro SD card inside. This was done to simulate an actual

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[27] *Id*. at 69-71.

SC card and to make the DSO probe connections accessible and secure without modifying anything in the PCOS+ hardware or software. x x x

During normal operation such as on Election day, when the PCOS+ is accepting ballots from voters, the PCOS+ is designated to write data on both SD cards after the ballots has been determined to be valid and the voter choices have been shown to the voter for verification.

The data being written on the storage devices consist mainly of the scanned ballots image of the front and back of the ballot at 200 dots per inch in both the horizontal and vertical dimension with each dot encoded into a 4 bit value corresponding to 16 shades of gray. The other data saved on the storage device consists of the vote interpretation and updates to the audit log. Each time that data is written on the two storage device, the date is encrypted and a verification step is done to check that identical data is written on both devices. The entire write process lasts a few seconds for each ballot.

x x x x x x x x x

The DSO display the time dimension on the horizontal axis and the electrical voltage in the vertical axis, the display is generated left to right over time (earlier events are on the left). The yellow line on top shows the electrical signal on the Data 2 pin of the main storage card and the green line shows the electrical signal on the Data 2 pin of the backup storage card. The orange dashed horizontal and vertical lines are used for measuring the differences in time and voltage.

The vertical dashed line on the left marks the start of the data being written on the main and backup storage card and the vertical dashed line on the right marks the ends of the writing operation for one ballot. The time difference in this case is about 2.616 seconds as shown near the bottom left corner of the display.

The yellow and green vertical lines in between the two vertical dashed lines represent the digital ones and zeros being written on both storage cards. The yellow and green traces are not exactly identical because the main car also contains the operating system of the PCOS+ and additional data operations are being performed on it. Because the time scale is the same on both probes, we conclude that the PCOS+ is writing on both cards simultaneously during this time interval.

Notwithstanding Smartmatic JV's compliance with the technical requirements in the TOR, Commissioner Luie Tito F. Guia (Guia) would nonetheless dissent in part, questioning the sufficiency of the documents submitted by the Smartmatic JV.[28] Taking their cue from Commissioner Guia's dissent, petitioners now assail the June 29, 2015 Decision of the COMELEC through the instant recourse.

The Issues

Petitioners framed the issues in the extant case in the following wise:[29]

A. Procedural Issues

I. WHETHER OR NOT THE PETITION IS THE PROPER REMEDIAL VEHICLE TO ASSAIL THE SUBJECT DECISION OF THE COMELEC EN BANC;

II. WHETHER OR NOT THE SUPREME COURT HAS THE RIGHT AND DUTY TO ENTERTAIN THIS PETITION;

III. WHETHER OR NOT A JUSTICIABLE CASE OR CONTROVERSY EXISTS;

IV. WHETHER OR NOT THE CASE OR CONTROVERSY IS RIPE FOR JUDICIAL ADJUDICATION;

V. WHETHER OR NOT UNDER THE CIRCUMSTANCES, THE RULE ON "HIERARCHY OF COURTS" MAY BE DISPENSED WITH;

VI. WHETHER OR NOT THE PETITIONERS POSSESS *LOCUS STANDI*;

B. Substantive Issues

VII. WHETHER OR NOT THE COMELEC EN BANC ACTED WITH GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION IN GRANTING THE PROTEST AS WELL AS IN DECLARING THE JOINT VENTURE OF SMARTMATIC-TIM CORPORATION,

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[28] *Id*. at 74-76.

[29] *Id*. at 32-34.

TOTAL INFORMATION MANAGEMENT CORPORATION, SMARTMATIC INTERNATIONAL HOLDING B.V. AND JARLTECH INTERNATIONAL CORPORATION AS THE BIDDER WITH THE LOWEST CALCULATED RESPONSIVE BID IN CONNECTION WITH THE PUBLIC BIDDING FOR THE LEASE WITH OPTION TO PURCHASE OF 23,000 NEW UNITS OF PRECINCT-BASED OPTICAL MARK READER OR OPTICAL SCAN SYSTEM FOR USE IN THE MAY 9, 2016 NATIONAL AND LOCAL ELECTIONS

VIII. WHETHER OR NOT A WRIT OF PRELIMINARY INJUNCTION OR TEMPORARY RESTRAINING ORDER SHOULD ISSUE

In challenging the June 29, 2015 Decision, petitioners, filing as taxpayers, alleged that the COMELEC *en banc* acted with grave abuse of discretion amounting to lack or excess of jurisdiction in declaring Smartmatic JV as the bidder with the lowest calculated responsive bid.[30] According to petitioners, Smartmatic JV cannot be declared eligible, even more so as the bidder with the lowest calculated responsive bid, because one of its proponents, SMTC, holding 46.5% of the shares of Smartmatic JV, no longer has a valid corporate purpose as required under Sec. 14 of BP 68, which pertinently reads:

Section 14. *Contents of the articles of incorporation.* – All corporations organized under this code shall file with the Securities and Exchange Commission articles of incorporation in any of the official languages duly signed and acknowledged by all of the incorporators, containing substantially the following matters, except as otherwise prescribed by this Code or by special law:

x x x x x x x x x

2. The **specific purpose or purposes for which the corporation is being incorporated**. Where a corporation has more than one stated purpose, the articles of incorporation shall state which is the primary purpose and which is/are the secondary purpose or purposes: Provided, That a non-stock corporation may not include a purpose which would change or contradict its nature as such x x x.

[30] *Id*. at 34.

As proof, petitioners cite the primary purpose of SMTC as stated in the company's AOI, which was submitted to the COMELEC on December 4, 2014 as part of the joint venture's eligibility documents. To quote SMTC's primary purpose therein:[31]

> To do, perform and comply with all the obligations and responsibilities of, and accord legal personality to, the joint venture of Total Information Management Corporation ("TIM") and Smartmatic International Corporation ("Smartmatic") arising under the Request for Proposal and the Notice of Award issued by the Commission on Elections ("COMELEC") for the **automation of the 2010 national and local elections ("Project")**, including the leasing, selling, importing and/or assembling of automated voting machines, computer software and other computer services and/or otherwise deal in all kinds of services to be used, offered or provided to the COMELEC **for the preparations and the conduct of the Project** including project management services. (emphasis added)

In concurrence with Commissioner Guia's opinion, petitioners argue that the foregoing paragraph readily evinces that SMTC was created solely for the automation of the 2010 National and Local Elections, not for any other election.[32] Having already served its purpose, SMTC no longer has authority to engage in business, so petitioners claim. To allow SMTC then to have a hand in the succeeding elections would be tolerating its performance of an *ultra vires* act.

Petitioners hasten to add that without a valid purpose, the company could not have submitted a valid AOI, a procurement eligibility requirement under Sec. 23.1 (b) of the IRR of RA 9184. For them, the SEC's subsequent approval, on December 10, 2014, of the amendments to SMTC's AOI cannot cure the partner corporation's ineligibility because eligibility is determined at the time of the opening of the bids, which, in this case, was conducted on December 4, 2014.[33]

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[31] *Id*. at 75, 532.

[32] *Id*. at 48.

[33] *Id*. at 46.

Finally, petitioners contend that SMTC misrepresented itself by leading the BAC to believe that it may carry out the project despite its limited corporate purpose, and by claiming that it is a Philippine corporation when it is, allegedly, 100% foreign-owned.[34] They add that misrepresentation is a ground for the procuring agency to consider a bidder ineligible and disqualify it from obtaining an award or contract.[35]

In its Comment,[36] public respondent COMELEC, through the Office of the Solicitor General (OSG), refuted the arguments of petitioners on the main postulation that the sole issue raised before the COMELEC *en banc* was limited to the technical aspect of the project.[37] According to the OSG, the sufficiency of the documents submitted was already decided by the BAC on May 15, 2015 when it partially granted Smartmatic JV's motion for reconsideration through BAC Resolution No. 10. Anent the procedural issues, the OSG, in its bid to have the case dismissed outright, questioned petitioners' *locus standi* and failure to observe the hierarchy of courts.[38]

Meanwhile, private respondents, in their Comment/Opposition,[39] countered that the BAC has thoroughly explained and laid down the factual and legal basis behind its finding on Smartmatic JV's legal capacity to participate as bidder in the project procurement; that the issue on SMTC's AOI has been rendered moot by the SEC's subsequent approval on December 10, 2014 of the AOI's amendment broadening the company's primary purpose;[40] that SMTC's primary purpose, as amended, now reads:[41]

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[34] *Id*. at 46.

[35] *Id*. at 49.

[36] *Id*. at 587-618.

[37] *Id*. at 593-596.

[38] *Id*. at 596-604.

[39] *Id*. at 619-663.

[40] *Id*. at 647.

[41] *Id*. at 549.

To sell, supply, lease, import, export, develop, assemble, repair and deal with automated voting machines, canvassing equipment, computer software, computer equipment and all other goods and supplies, and /or to provide, render and deal in all kinds of services, including project management services for the conduct of elections, whether regular or special, in the Philippine(s) and to provide Information and Communication Technology (ICT) goods and services to private and government entities in the Philippines.

that the alleged defect in SMTC's AOI is of no moment since neither the law nor the bidding documents require a bidder to submit its AOI;[42] that even assuming for the sake of argument that SMTC's primary purpose precludes it from further contracting for the automation of the Philippine elections beyond 2010, its secondary purposes[43] and Sec. 42 of BP 68[44] authorize

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[42] *Id*. at 637-639.

[43] *Id*. at 533-534. Its secondary purposes read: a. to acquire by purchase, lease, contract, concession or otherwise, within the limits allowed by law, any and all real and/or personal properties of every kind and description whatsoever, whether tangible or intangible, which the Corporation may deem necessary or appropriate in connection with the conduct of any business in which the Corporation may lawfully engage, and, within the limits allowed by law, to own, hold, operate, improve, develop, manage, grant, lease, sell, assign, convey, transfer, exchange, or otherwise dispose of the whole or any part thereof;

x x x x x x x x x

h. To carry out any of the above-mentioned purposes as principal, agent, factor, licensee, concessionaire, contractor, or otherwise, either alone or on conjunction with any other person, firm, association, corporation, or entity, whether public or private;

i. To enter into contracts and arrangements of every kind and description for any lawful purpose with any person, firm, association, corporation, municipality, body politic, country, territory, province, state, or government, and to obtain from any government or authority such rights, privileges, contracts and concessionaires which the Corporation may deem desirable.

[44] **Section 42.** *Power to invest corporate funds in another corporation or business or for any other purpose.* – Subject to the provisions of this Code, a private corporation may invest its funds in any other corporation or business or for any purpose other than the primary purpose for which it was organized when approved by a majority of the board of directors or trustees and ratified by the stockholders representing at least two-thirds (2/3) of

the company to do so;[45] and that the COMELEC, in fact, has already dealt with SMTC numerous times after the 2010 elections.[46]

Private respondents would likewise debunk petitioners' allegation that SMTC misrepresented its nationality. They argue that based on its General Information Sheet (GIS), SMTC is a Filipino corporation, not a foreign one as petitioners alleged. Moreover, what is only required under RA 9184 is that the nationality of the joint venture be Filipino, and not necessarily that of its individual proponents.[47] In any event, so private respondents claim, the COMELEC, under the law, is not prohibited from acquiring election equipment from foreign sources, rendering SMTC and even Smartmatic JV's nationality immaterial.[48]

Lastly, private respondents pray for the petition's outright dismissal, following petitioner Akol and Lagman's alleged failure to comply with the rules on verifications, on the submission of certifications against forum-shopping, and on the efficient use of paper.[49]

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the outstanding capital stock, or by at least two thirds (2/3) of the members in the case of non-stock corporations, at a stockholder's or member's meeting duly called for the purpose. Written notice of the proposed investment and the time and place of the meeting shall be addressed to each stockholder or member at his place of residence as shown on the books of the corporation and deposited to the addressee in the post office with postage prepaid, or served personally: Provided, That any dissenting stockholder shall have appraisal right as provided in this Code: Provided, however, That where the investment by the corporation is reasonably necessary to accomplish its primary purpose as stated in the articles of incorporation, the approval of the stockholders or members shall not be necessary.

[45] *Rollo*, pp. 640-646.

[46] *Id.* at 646-647. Contract dated January 14, 2013 for the supply of 82,000 CF Cards Main, Contract dated January 28, 2013 for the supply of 82,000 CF Cards WORM, Contract dated January 18, 2013 for the Electronic Transmission of Election Results of the May 13, 2013 elections, Contract dated May 14, 2013 for the supply of 15,000 MTD Modems, and Contract dated March 22, 2013 for the National Support Center.

[47] *Id*. at 647-648.

[48] *Id*. at 648-652.

[49] *Id*. at 652-657.

The Court's Ruling

The petition lacks merit.

Rule 64 is not applicable in assailing the COMELEC *en banc*'s Decision granting Smartmatic JV's protest

In arguing for the propriety of the remedial vehicle chosen, petitioners claim that under Rule 64, Sec. 2 of the Rules of Court, "**[a] judgment or final order or resolution of the Commission on Elections x x x may be brought by the aggrieved party to the Supreme Court on certiorari under Rule 65**."[50] They postulate that the June 29, 2015 Decision of the COMELEC *en banc* declaring Smartmatic JV as the eligible bidder with the lowest calculated responsive bid is a "judgment" within the contemplation of the rule, and is, therefore, a proper subject of a Rule 64 petition.

The argument fails to persuade.

a. Rule 64 does not cover rulings of the COMELEC in the exercise of its administrative powers

The rule cited by petitioners is an application of the constitutional mandate requiring that, unless otherwise provided by law, the rulings of the constitutional commissions shall be subject to review only by the Supreme Court on certiorari. A reproduction of Article IX-A, Section 7 of the 1987 Constitution is in order:

Section 7. Each Commission shall decide by a majority vote of all its Members, any case or matter brought before it within sixty days from the date of its submission for decision or resolution. A case or matter is deemed submitted for decision or resolution upon the filing of the last pleading, brief, or memorandum required by the rules of the Commission or by the Commission itself. **Unless otherwise provided by this Constitution or by law, any decision, order, or ruling of each Commission may be brought to the Supreme Court**

[50] *Id*. at 34.

on *certiorari* by the aggrieved party within thirty days from receipt of a copy thereof. (emphasis added)

Though the provision appears unambiguous and unequivocal, the Court has consistently held that the phrase "decision, order, or ruling" of constitutional commissions, the COMELEC included, that may be brought directly to the Supreme Court on certiorari is not all-encompassing, and that it only relates to those rendered in the commissions' exercise of **adjudicatory or quasi-judicial powers**.[51] In the case of the COMELEC, this would limit the provision's coverage to the decisions, orders, or rulings issued pursuant to its authority to be the sole judge of generally all controversies and contests relating to the elections, returns, and qualifications of elective offices.[52]

Consequently, Rule 64, which complemented the procedural requirement under Article IX-A, Section 7, should likewise be read in the same sense—that of excluding from its coverage decisions, rulings, and orders rendered by the COMELEC in the exercise of its **administrative** functions. In such instances, a Rule 65 petition for certiorari is the proper remedy. As held in *Macabago v. COMELEC*:[53]

[A] judgment or final order or resolution of the COMELEC may be brought by the aggrieved party to this Court on certiorari under Rule 65, as amended, except as therein provided. We ruled in *Elpidio M. Salva, et al. vs. Hon. Roberto L. Makalintal, et al.* (340 SCRA 506 (2000)) that Rule 64 of the Rules applies only to judgments or final orders of the COMELEC in the exercise of its quasi-judicial functions. The rule does not apply to interlocutory orders of the COMELEC in the exercise of its quasi-judicial functions or to its administrative orders. In this case, the assailed order of the COMELEC declaring private respondents petition to be one for annulment of the elections or for a declaration of a failure of elections in the municipality and ordering the production of the original copies of

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[51] *Garces v. Court of Appeals*, G.R. No. 114795, July 17, 1996, 259 SCRA 99, 107.

[52] *Bedol v. Comelec*, G.R. No. 179830, December 3, 2009, 606 SCRA 554.

[53] G.R. No. 152163, November 18, 2002, 392 SCRA 178.

the VRRs for the technical examination is administrative in nature. Rule 64, a procedural device for the review of final orders, resolutions or decision of the COMELEC, does not foreclose recourse to this Court under Rule 65 from administrative orders of said Commission issued in the exercise of its administrative function.

As applied herein, recall that the instant petition revolves around the issue on whether or not Smartmatic JV is eligible to participate in the bidding process for the COMELEC's procurement of 23,000 units of optical mark readers. The case does not stem from an election controversy involving the election, qualification, or the returns of an elective office. Rather, it pertains to the propriety of the polling commission's conduct of the procurement process, and its initial finding that Smartmatic JV is eligible to participate therein. It springs from the COMELEC's compliance with the Constitutional directive to enforce and administer all laws and regulations relative to the conduct of an election.[54] Specifically, it arose from the electoral commission's exercise of Sec. 12 of RA 8436, otherwise known as the Automated Elections Law, as amended by RA 9369,[55] which authorized the COMELEC "**to procure, in accordance with existing laws, by purchase, lease, rent or other forms of acquisition, supplies, equipment, materials, software, facilities, and other services, from local or foreign sources free from taxes and import duties, subject to accounting and auditing rules and regulation**."

The subject matter of Smartmatic JV's protest, therefore, does not qualify as one necessitating the COMELEC's exercise of its adjudicatory or quasi-judicial powers that could properly be the subject of a Rule 64 petition, but is, in fact, administrative

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[54] CONSTITUTION, Art. IX-C, Sec. 2(1).

[55] An Act Amending Republic Act No. 8436, Entitled "An Act Authorizing the Commission on Elections to Use an Automated Election System in the May 11, 1998 National or Local Elections and in Subsequent National and Local Electoral Exercises, To Encourage Transparency, Credibility, Fairness and Accuracy of Elections, Amending for the Purpose Batas Pampansa Blg. 881, As Amended, Republic Act No. 7166 and Other Related Elections Laws, Providing Funds Therefor and for Other Purposes."

in nature. Petitioners should then have sought redress *via* a petition for the issuance of the extraordinary writ of certiorari under Rule 65 to assail the COMELEC *en banc's* June 29, 2015 Decision granting the protest. As a caveat, however, the writ will only lie upon showing that the COMELEC acted capriciously or whimsically, with grave abuse of discretion amounting to lack or excess of jurisdiction in issuing the Decision, such as where the power is exercised in an arbitrary or despotic manner by reason of passion or personal hostility. The abuse of discretion must be so patent and gross as to amount to an evasion of positive duty or to a virtual refusal to perform the duty enjoined or to act at all in contemplation of law.[56] Mere abuse of discretion will not suffice.

It goes without saying that petitioners' action, having been lodged through an improper petition, is susceptible to outright dismissal. As the Court held in *Pates v. COMELEC*,[57] a Rule 64 petition cannot simply be equated to Rule 65 even if it expressly refers to the latter rule.[58] The clear distinction between the instant petition and *Pates*, however, is that in *Pates,* therein petitioner failed to present an exceptional circumstance or any compelling reason that would have warranted the liberal application of the Rules of Court. In stark contrast, herein petitioners, as will later on be discussed, were able to establish a meritorious case for the relaxation of the rules, relieving them from the rigid application of procedural requirements. We therefore treat the instant recourse as one filed not merely in relation to, but under Rule 65.

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[56] *Duco v. Comelec*, G.R. No. 183366, August 19, 2009, 596 SCRA 572.

[57] G.R. No. 184915, June 30, 2009, 591 SCRA 481.

[58] *Pates v. Comelec*, *id*. They exist as separate rules for substantive reasons as discussed below. Procedurally, the most patent difference between the two – *i.e.,* the exception that Section 2, Rule 64 refers to – is Section 3 which provides for a special period for the filing of petitions for *certiorari* from decisions or rulings of the COMELEC *en banc*. The period is 30 days from notice of the decision or ruling (instead of the 60 days that Rule 65 provides), with the intervening period used for the filing of any motion for reconsideration deductible from the originally-granted 30 days (instead of the fresh period of 60 days that Rule 65 provides).

This brings us now to the question on where the petition ought to have been filed.

b. Jurisdiction of the RTC over rulings of the head of the procuring entity relating to procurement protests

Guilty of reiteration, the COMELEC *en banc* was not resolving an election controversy when it resolved the protest, but was merely performing its function to procure the necessary election paraphernalia for the conduct of the 2016 National and Local Elections. This power finds statutory basis in Sec. 12 of RA 8436,[59] as amended, which reads:

SEC.12. *Procurement of Equipment and Materials*. – To achieve the purpose of this Act, **the Commission is authorized to procure, in accordance with existing laws, by purchase, lease, rent or other forms of acquisition, supplies, equipment, materials, software, facilities, and other service, from local or foreign sources** free from taxes and import duties, subject to accounting and auditing rules and regulation. With respect to the May 10, 2010 election and succeeding electoral exercises, the system procured must have demonstrated capability and been successfully used in a prior electoral exercise here or board. Participation in the 2007 pilot exercise shall not be conclusive of the system's fitness.

In determining the amount of any bid from a technology, software or equipment supplier, the cost to the government of its deployment and implementation shall be added to the bid price as integral thereto. The value of any alternative use to which such technology, software or equipment can be put for public use shall not be deducted from the original face value of the said bid. (emphasis added)

In *Pabillo v. COMELEC*,[60] the Court held that the "existing laws" adverted to in the provision is none other than RA 9184. The law is designed to govern all cases of procurement of the national government, its departments, bureaus, offices and agencies, including state universities and colleges, government-

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[59] Formerly Section 8 of RA 8436, the provision was renumbered to Section 12 by RA 9369 .

[60] G.R. Nos. 216098 & 216562, April 21, 2015.

owned and/or-controlled corporations, government financial institutions and local government units.[61] It mandates that as a general rule, all government procurement must undergo competitive bidding[62] and for purposes of conducting the bidding process, the procuring entity convenes a BAC.

The BAC is tasked to oversee the entire procuring process, from advertisement of the project to its eventual award.[63] It is the first to rule on objections or complaints relating to the conduct of the bidding process, subject to review by the head of the procuring entity via protest. As outlined in RA 9184, the protest mechanism in procurement processes is as follows:

ARTICLE XVII
PROTEST MECHANISM

Section 55. *Protests on Decisions of the BAC.*– Decisions of the BAC in all stages of procurement may be **protested to the head of the procuring entity** and shall be in writing. Decisions of the BAC may be protested by filing a verified position paper and paying a non-refundable protest fee. The amount of the protest fee and the periods during which the protests may be filed and resolved shall be specified in the IRR.

Section 56. *Resolution of Protests.* – The protest shall be resolved strictly on the basis of records of the BAC. Up to a certain amount to be specified in the IRR, the decisions of the Head of the Procuring Entity shall be final.

Section 57. *Non-interruption of the Bidding Process.*– In no case shall any protest taken from any decision treated in this Article stay or delay the bidding process. Protests must first be resolved before any award is made.

Section 58. *Resort to Regular Courts; Certiorari.*– Court action may be resorted to only after the protests contemplated in this Article shall have been completed. **Cases that are filed in violation of the process specified in this Article shall be dismissed for lack of**

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[61] RA 9184, Sec. 3.

[62] *Id*., Sec. 10.

[63] *Id*., Sec. 12.

jurisdiction. The regional trial court shall have jurisdiction over final decision of the head of the procuring entity. Court actions shall be governed by **Rule 65** of the 1997 Rules of Civil Procedure.

This provision is without prejudice to any law conferring on the Supreme court the sole jurisdiction to issue temporary restraining orders and injunctions relating to Infrastructure Projects of Government. (emphasis added)

Thus, under Sec. 58, the proper remedy to question the ruling of the head of the procuring entity is through a Rule 65 petition for certiorari with the Regional Trial Court (RTC). The term "procuring entity" is defined under the RA 9184 as "**any branch, department, office, agency, or instrumentality of the government, including state universities and colleges, government-owned and/or — controlled corporations, government financial institutions, and local government units procuring Goods, Consulting Services and Infrastructure Projects**."[64] This statutory definition makes no distinction as to whether or not the procuring entity is a constitutional commission under Article IX of the Constitution. It is broad enough to include the COMELEC within the contemplation of the term. Hence, under the law, grievances relating to the COMELEC rulings in protests over the conduct of its project procurement should then be addressed to the RTC.

The mandatory recourse to the RTC in the appeal process applicable to COMELEC procurement project is not a novel development introduced by RA 9184. Even prior to the advent of the government procurement law, the requirement already finds jurisprudential support in *Filipinas Engineering and Machine Shop v. Ferrer*,[65] wherein the Court expounded this way:

[I]t has been consistently held that it is the Supreme Court, not the Court of First Instance, which has exclusive jurisdiction to review on certiorari final decisions, orders or rulings of the COMELEC relative to the conduct of elections and enforcement of election laws.

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[64] *Id*., Sec. 5(o).

[65] No. L-31455, February 28, 1985, 135 SCRA 25.

We are however, far from convince[d] that an order of the COMELEC awarding a contract to a private party, as a result of its choice among various proposals submitted in response to its invitation to bid comes within the purview of a "final order" which is exclusively and directly appealable to this court on certiorari. What is contemplated by the term "final orders, rulings and decisions" of the COMELEC reviewable by certiorari by the Supreme Court as provided by law are those rendered in actions or proceedings before the COMELEC and taken cognizance of by the said body in the exercise of its adjudicatory or quasi-judicial powers.

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[T]he order of the Commission granting the award to a bidder is not an order rendered in a legal controversy before it wherein the parties filed their respective pleadings and presented evidence after which the questioned order was issued; and that this order of the commission was issued pursuant to its authority to enter into contracts in relation to election purposes. In short, **the COMELEC resolution awarding the contract in favor of Acme was not issued pursuant to its quasi-judicial functions but merely as an incident of its inherent administrative functions over the conduct of elections, and hence, the said resolution may not be deemed as a "final order" reviewable by certiorari by the Supreme Court.** Being non-judicial in character, no contempt may be imposed by the COMELEC from said order, and no direct and exclusive appeal by certiorari to this Tribunal lie from such order. **Any question arising from said order may be well taken in an ordinary civil action before the trial courts.** (emphasis added)

Additionally, even if the Court treats the protest proceeding as part of the procuring agency's adjudicatory function, the Court notes that Sec. 58 of RA 9184 would nevertheless apply, and the RTC would still have jurisdiction, pursuant to the proviso "unless otherwise provided by law" as appearing in Article IX-A, Section 7 of the Constitution. In this case, the pertinent law provides that insofar as rulings of the COMELEC in procurement protests are concerned, said rulings can be challenged through a Rule 65 certiorari with the RTC.

c. The protest mechanism under RA 9184 can only be availed of by a losing bidder

Nevertheless, the application of Sec. 58 of RA 9184 has to be qualified. It cannot, in all instances, be the proper remedy to question the rulings of the heads of procuring entities in procurement protests. As in the prior case of *Roque v. COMELEC*,[66] which similarly dealt with COMELEC procurement of OMRs the Court held that only a losing bidder would be aggrieved by, and *ergo* would have the personality to challenge, the head of the procuring entity's ruling in the protest. This is bolstered by the GPRA IRR, which fleshed out the provisions of RA 9184 thusly:

RULE XVII – PROTEST MECHANISM

Section 55. Protests on Decisions of the BAC

55.1. Decisions of the BAC at any stage of the procurement process may be questioned by filing a request for reconsideration within the three (3) calendar days upon receipt of written notice or upon verbal notification. The BAC shall decide on the request for reconsideration within seven (7) calendar days from receipt thereof.

If a failed bidder signifies his intent to file a request for reconsideration, the BAC shall keep the bid envelopes of the said failed bidder unopened and/or duly sealed until such time that the request for reconsideration has been resolved.

55.2. In the event that the request for reconsideration is denied, decisions of the BAC may be protested in writing to the Head of the Procuring Entity: Provided, however, That a prior request for reconsideration should have been filed by the party concerned in accordance with the preceding Section, and the same has been resolved.

55.3. **The protest must be filed within seven (7) calendar days from receipt by the party concerned of the resolution of the BAC** denying its request for reconsideration. A protest may be made by filing a verified position paper with the Head of the Procuring Entity concerned, accompanied by the payment of a non-refundable protest fee. The non-refundable protest fee shall be in an amount equivalent to no less than one percent (1%) of the ABC.

55.4. The verified position paper shall contain the following information:

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[66] G.R. No. 188456, September 10, 2009, 599 SCRA 69.

a) The name of bidder;
b) The office address of the bidder;
c) The name of project/contract;
d) The implementing office/agency or procuring entity;
e) A brief statement of facts;
f) The issue to be resolved; and
g) Such other matters and information pertinent and relevant to the proper resolution of the protest.

The position paper is verified by an affidavit that the affiant has read and understood the contents thereof and that the allegations therein are true and correct of his personal knowledge or based on authentic records. An unverified position paper shall be considered unsigned, produces no legal effect, and results to the outright dismissal of the protest.

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Section 58. Resort to Regular Courts; Certiorari

58.1. **Court action may be resorted to only after the protests contemplated in this Rule shall have been completed**, i.e., resolved by the Head of the Procuring Entity with finality. The regional trial court shall have jurisdiction over final decisions of the Head of the Procuring Entity. Court actions shall be governed by Rule 65 of the 1997 Rules of Civil Procedure. (emphasis added)

Evidently, the remedy of certiorari filed before the RTC under Sec. 58 of RA 9184 is intended as a continuation of the motion for reconsideration filed before the BAC, and of the subsequent protest filed with the head of the procuring entity. This is confirmed by the condition *sine qua non* completion of the process under Rule XVII, Secs. 55-57 of the GPRA IRR before recourse to the trial courts become available.

It is obvious under Sec. 55.1 of Rule XVII that only a **failed bidder** can turn the cogs of the protest mechanism by first moving for reconsideration of the assailed BAC ruling. The **party concerned**, the bidder adversely affected by the resolution of the motion, shall then have seven (7) days to file a protest with the head of the procuring entity. The pre-requisite that a protestant should likewise be a bidder is emphasized by Sec. 55.4 which requires that the "**name of the bidder**" and the "**office address**

of the bidder" be indicated in its position paper. Accordingly, **only the bidder against whom the head of the procuring entity ruled, if it would challenge the ruling any further, is required to resort to filing a petition for certiorari before the trial courts under Sec. 58**. Ego, there is neither rhyme nor reason for petitioners herein, who are non-participants in the procurement project, to comply with the rules on protest under RA 9184, part and parcel of which is the exclusivity of the jurisdiction of the RTC under Sec. 58 thereof. Stated in the alternative, there is no legislative enactment requiring petitioners to seek recourse first with the RTC to question the COMELEC *en banc*'s June 29, 2015 Decision. Thus, if circumstances so warrant, direct resort to the Court will be allowed.

d. Hierarchy of courts and the exceptions to the doctrine

The expanded concept of judicial power under Article VIII, Section 1 of the Constitution[67] includes the duty of the judiciary not only "to settle actual controversies involving rights which are legally demandable and enforceable" but also, as an instrument of checks and balances, "to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government."[68] Under Rule 65 of the Rules of Court, the special civil actions for certiorari and prohibition are the available remedies for determining and correcting such grave abuses of discretion.

The power is wielded not by the Court alone, but concurrently with the Court of Appeals and the Regional Trial Courts, as

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[67] Section 1. The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.

Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.

[68] See also *Araullo v. Aquino III*, G.R. Nos. 209287, *etc*., July 1, 2014.

provided by law. With respect to the Court of Appeals, Section 9 (1) of Batas Pambansa Blg. 129 (BP 129) gives the appellate court original jurisdiction to issue, among others, a writ of certiorari, whether or not in aid of its appellate jurisdiction. For the RTCs, the power to issue a writ of certiorari, in the exercise of their original jurisdiction, is provided under Section 21 of BP 129.[69] Additionally, the Court has already held that the CTA, by constitutional mandate, is likewise vested with jurisdiction to issue writs of certiorari.[70] So too has the Sandiganbayan been vested with certiorari powers in aid of its appellate jurisdiction.[71]

Notwithstanding the non-exclusivity of the original jurisdiction over applications for the issuance of writs of certiorari, however, the doctrine of hierarchy of courts dictates that recourse must first be made to the lower-ranked court exercising concurrent jurisdiction with a higher court.[72] The rationale behind the principle is explained in *Bañez, Jr. v. Concepcion*[73] in the following wise:

> The Court must enjoin the observance of the policy on the hierarchy of courts, and now affirms that the policy is not to be ignored without serious consequences. The strictness of the policy is designed to shield the Court from having to deal with causes that are also well within the competence of the lower courts, and thus leave time to the Court to deal with the more fundamental and more essential tasks that the Constitution has assigned to it. The Court may act on petitions for the extraordinary writs of certiorari, prohibition and mandamus only when absolutely necessary or when serious and important reasons exist to justify an exception to the policy.

Petitioners do not have the absolute and unrestrained freedom of choice of the court to which an application for certiorari

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[69] *City of Manila v. Grecia-Cuerdo*, G.R. No. 175723, February 4, 2014.

[70] *Id*.

[71] PD 1606, Sec. 4(c), as amended by RA 8249, Sec. 4.

[72] *Bonifacio v. Gimenez*, G.R. No. 184800, May 5, 2010.

[73] G.R. No. 159508, August 29, 2012, 679 SCRA 237.

will be directed.[74] Indeed, referral to the Supreme Court as the court of last resort will simply be empty rhetoric if party-litigants are able to flout judicial hierarchy at will. The Court reserves the direct invocation of its jurisdiction only when there are special and important reasons clearly and especially set out in the petition that would justify the same.[75]

In the leading case of *The Diocese of Bacolod v. Comelec*,[76] the Court enumerated the specific instances when direct resort to this Court is allowed, to wit:

(a) When there are genuine issues of constitutionality that must be addressed at the most immediate time;
(b) When the issues involved are of transcendental importance;
(c) Cases of first impression;
(d) When the constitutional issues raised are best decided by this Court;
(e) When the time element presented in this case cannot be ignored;
(f) When the petition reviews the act of a constitutional organ;
(g) When there is no other plain, speedy, and adequate remedy in the ordinary course of law;
(h) When public welfare and the advancement of public policy so dictates, or when demanded by the broader interest of justice;
(i) When the orders complained of are patent nullities; and
(j) When appeal is considered as clearly an inappropriate remedy.

The Court finds the second and fifth, and sixth grounds applicable in the case at bar. Much has already been said of the "compelling significance and the transcending public importance" of the primordial issue underpinning petitions that

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[74] *Macapagal v. People*, G.R. No. 193217, February 26, 2014.

[75] *Id*.

[76] G.R. No. 205728, January 21, 2015.

assail election automation contracts: the success—and the far-reaching grim implications of the failure—of the nationwide automation project.[77] So it is that the Court, in the growing number of cases concerning government procurement of election paraphernalia and services, has consistently exhibited leniency and dispensed of procedural requirements for petitioners to successfully lodge certiorari petitions.[78] Technicalities should not stand in the way of resolving the substantive issues petitioners raised herein. On this same ground of transcendental importance, the Court may opt to treat the instant petition as one for certiorari under, not merely in relation to, Rule 65.

As regards the fifth ground, the time element, it is sufficient to state that with the 2016 polls visible in the horizon, the post-haste resolution of this case becomes all the more imperative. It would be the height of absurdity to require petitioners to undergo scrutiny through the lens of the RTC first, considering that the acquisition of 23,000 OMRs would, at the minimum, affect the clustering of precincts. Without the finalized list of clustered precincts, the polling place for the registered voters could not yet be ascertained. Needless to state, this would impede the preparations for the conduct of the polls and its unmitigated effects could very well lead to mass disenfranchisement of voters.

Lastly, the sixth ground is indubitably applicable. The rulings of the COMELEC, as a constitutional body, can immediately be reviewed by the Court on proper petition. As quoted in *The Diocese of Bacolod v. COMELEC*,[79] citing *Albano v. Arranz*,[80] "**it is easy to realize the chaos that would ensue if the Court of First Instance of each and every province were [to] arrogate itself the power to disregard, suspend, or contradict any order of the Commission on Elections: that constitutional body would be speedily reduced to impotence**."

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[77] *Roque v. COMELEC, supra* note 66; citing *Marabur v. Comelec*, G.R. No. 169513, February 26, 2007, 516 SCRA 696.

[78] *Id.*; *Pabillo v. COMELEC*, G.R. Nos. 216098 & 216562, April 21, 2015; *Capalla v. COMELEC*, G.R. No. 201112, June 13, 2012.

[79] G.R. No. 205728, January 21, 2015.

[80] No. L-19260, January 31, 1962, 4 SCRA 386.

In sum, there exist ample compelling reasons to justify the direct resort to the Court as a departure from the doctrine of hierarchy of courts not in relation to but under Rule 65 of the Rules of Court on certiorari and prohibition, and to brush aside the procedural issues in this case to focus on the substantive issues surrounding the procurement of the 23,000 additional OMRs for the 2016 elections.

The submission of an AOI is not an eligibility criterion

It bears stressing on the outset that no issue has been brought forth questioning the technical capability of Smartmatic JV's OMR+. Instead, the pivotal point to be resolved herein is whether or not the COMELEC acted with grave abuse of discretion in declaring Smartmatic JV eligible in spite of the alleged nullity of, or defect in, SMTC's AOI.

Petitioner would first insist that the submission of an AOI is an eligibility requirement that Smartmatic JV cannot be deemed to have complied with. In addressing this assertion, a discussion of the qualification process is apropos.

a. The submission of an AOI was not a pre-qualification requirement

It is a basic tenet that except only in cases in which alternative methods of procurement are allowed, all government procurement shall be done by competitive bidding. This is initiated by the BAC, which publishes an Invitation to Bid for contracts under competitive bidding in order to ensure the widest possible dissemination thereof.[81]

Answering the invitation, interested participants submit their bids using the forms specified in the bidding documents in two (2) separate sealed bid envelopes submitted simultaneously. The first contains the technical component of the bid, including the eligibility requirements under Section 23.1 of GPRA IRR, while the second contains the financial component of the bid.[82]

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[81] *Commission on Audit v. Linkworth International*, G.R. No. 182559, March 13, 2009, 518 SCRA 501.

[82] Sec. 25.1, RA 9184 IRR.

The BAC then sets out to determine the eligibility of the prospective bidders based on their compliance with the eligibility requirements set forth in the Invitation to Bid and their submission of the legal, technical and financial documents required under RA 9184 and the GPRA IRR.[83] The first screening is done via the pre-qualification stage as governed by Sec. 30.1 of RA 9184's IRR, which pertinently reads:

> Section 30. Preliminary Examination of Bids
>
> 30.1. The BAC shall open the first bid envelopes of prospective bidders in public to determine each bidder's compliance with the documents required to be submitted for eligibility and for the technical requirements, as prescribed in this IRR. For this purpose, **the BAC shall check the submitted documents of each bidder against a checklist of required documents** to ascertain if they are all present, using a **nondiscretionary "pass/fail" criterion**, as stated in the Instructions to Bidders. If a bidder submits the required document, it shall be rated "passed" for that particular requirement. In this regard, bids that fail to include any requirement or are incomplete or patently insufficient shall be considered as "failed." Otherwise, the BAC shall rate the said first bid envelope as "passed." (emphasis added)

For the procurement of highly technical goods wherein the two-stage bidding process is employed, such as the subject of procurement in this case, the same procedure for pre-qualification outlined above is followed in the first stage, except that the technical specifications are only in the form of performance criteria, and that the technical proposals will not yet include price tenders.[84]

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[83] *Commission on Audit v. Linkworth International*, supra note 81.

[84] Revised Implementing Rules and Regulations, RA 9184, Sec. 30.3. — For the procurement of goods where, due to the nature of the requirements of the project, the required technical specifications/requirements of the contract cannot be precisely defined in advance of bidding, or where the problem of technically unequal bids is likely to occur, a two (2)-stage bidding procedure may be employed. In these cases, the procuring entity concerned shall prepare the Bidding Documents, including the technical specification in the form of performance criteria only. Under this procedure, prospective bidders shall be requested at the first stage to submit their respective eligibility requirements if needed, and initial technical proposals only (no price tenders). The concerned BAC shall then evaluate the technical

Based on the rule, the BAC's function in determining the eligibility of a bidder during pre-qualification is ministerial in the sense that it only needs to countercheck the completeness and sufficiency of the documents submitted by a bidder against a checklist of requirements. It cannot, therefore, declare a bidder ineligible for failure to submit a document which, in the first place, is not even required in the bid documents.

Citing Sec. 23.1 (b) of the GPRA IRR, petitioners contend that an AOI is one of such mandatory documentary requirements and that the failure of a bidder to furnish the BAC a valid one would automatically render the bidder ineligible.

We are not convinced.

Sec. 23 of the adverted GPRA IRR reads:

Section 23. Eligibility Requirements for the Procurement of Goods and Infrastructure Projects

23.1. For purposes of determining the eligibility of bidders using the criteria stated in Section 23.5 of this IRR, only the following documents shall be required by the BAC, using the forms prescribed in the Bidding Documents:

a) Class "A" Documents

Legal Documents

i) Registration certificate from SEC, Department of Trade and Industry (DTI) for sole proprietorship, or CDA for

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merits of the proposals received from eligible bidders *vis-à-vis* the required performance standards. A meeting/discussion shall then be held by the BAC with those eligible bidders whose technical tenders meet the minimum required standards stipulated in the Bidding Documents for purposes of drawing up the final revised technical specifications/requirements of the contract. Once the final revised technical specifications are completed and duly approved by the concerned BAC, copies of the same shall be issued to all the bidders identified in the first stage who shall then be required to submit their revised technical tenders, including their price proposals in two (2) separate sealed envelopes in accordance with this IRR, at a specified deadline, after which time no more bids shall be received. The concerned BAC shall then proceed in accordance with the procedure prescribed in this IRR.

cooperatives, or any proof of such registration as stated in the Bidding Documents.

ii) Mayor's permit issued by the city or municipality where the principal place of business of the prospective bidder is located.

iii) Tax clearance per Executive Order 398, Series of 2005, as finally reviewed and approved by the BIR.

Technical Documents

iv) Statement of the prospective bidder of all its ongoing government and private contracts, including contracts awarded but not yet started, if any, whether similar or not similar in nature and complexity to the contract to be bid; and Statement identifying the bidder's single largest completed contract similar to the contract to be bid, except under conditions provided for in Section 23.5.1.3 of this IRR, within the relevant period as provided in the Bidding Documents in the case of goods. All of the above statements shall include all information required in the PBDs prescribed by the GPPB.

v) In the case of procurement of infrastructure projects, a valid Philippine Contractors Accreditation Board (PCAB) license and registration for the type and cost of the contract to be bid. Financial Documents

vi) The prospective bidder's audited financial statements, showing, among others, the prospective bidder's total and current assets and liabilities, stamped "received" by the BIR or its duly accredited and authorized institutions, for the preceding calendar year which should not be earlier than two (2) years from the date of bid submission.

vii) The prospective bidder's computation for its Net Financial Contracting Capacity (NFCC).

b) Class "B" Document

Valid joint venture agreement (JVA), in case the joint venture is already in existence. In the absence of a JVA, duly notarized statements from all the potential joint venture partners stating that they will enter into and abide by the provisions of the JVA in the instance that the bid is successful shall be included in the bid. Failure to enter into a joint venture in the event of a contract award shall be ground for the forfeiture of the bid

> security. **Each partner of the joint venture shall submit the legal eligibility documents.** The submission of technical and financial eligibility documents by any of the joint venture partners constitutes compliance. (emphasis added)

Clearly, the quoted provisions, as couched, do not require the submission of an AOI in order for a bidder to be declared eligible. The requirement that bears the most resemblance is the submission by each partner to the venture of a registration certificate issued by the Securities and Exchange Commission, but compliance therewith was never disputed by the petitioners. Moreover, it was never alleged that Smartmatic JV was remiss in submitting a copy of its joint venture agreement pursuant to Sec. 23.1(b), which petitioners specifically invoked.

It may be that the procuring entity has the option to additionally require the submission of the bidders' respective AOIs in order to substantiate the latter's claim of due registration with the government entities concerned. However, a perusal of the bidding documents would readily reveal that the procuring entity, the COMELEC in this case, did not impose such a requirement. As can be gleaned in the Instruction to Bidders,[85] only the following documents were required for purposes of determining a bidder's eligibility:

> **12. Documents Comprising the Bid: Eligibility and Technical Components**
>
> 12.1. Unless otherwise indicated in the BDS, the first envelope shall contain the following eligibility and technical documents:
>
> (a) Eligibility Documents –
>
> Class "A" Documents:
>
> (i) Registration certificate from the Securities and Exchange Commission (SEC), Department of Trade and Industry (DTI) for sole proprietorships, and Cooperative Development Authority (CDA) for cooperatives, or any proof of such registration as stated in the BDS;

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[85] *Rollo*, pp. 231-233.

(ii) Mayor's permit issued by the city or municipality where the principal place of business of the prospective bidder is located;

(iii) Statement of all its ongoing and completed government and private contracts within the period stated in the BDS, including contracts awarded but not yet started, if any. The statement shall include, for each contract, the following:

(iii.1) name of the contract;

(iii.2) date of the contract;

(iii.3) kinds of Goods;

(iii.4) amount of contract and value of outstanding contracts;

(iii.5) date of delivery; and

(iii.6) end user's acceptance or official receipt(s) issued for the contract, if completed.

(iv) Audited financial statements, stamped "received" by the Bureau of Internal Revenue (BIR) or its duly accredited and authorized institutions, for the preceding calendar year, which should not be earlier than two (2) years from the bid submission;

(v) NFCC computation or CLC in accordance with ITB Clause 5.5; and

(vi) Tax clearance per Executive Order 398, Series of 2005, as finally reviewed and approved by the BIR.(Updated pursuant to GPPB Resolution No. 21-2013 dated July 30, 2013)

Class "B" Document:

(vii) If applicable, the JVA in case the joint venture is already in existence, or duly notarized statements from all the potential joint venture partners stating that they will enter into and abide by the provisions of the JVA in the instance that the bid is successful;

(viii) Social Security Clearance (SSS);

(ix) Department of Labor and Employment Clearance (DOLE);

(x) Court Clearance (Regional Trial Court) (emphasis omitted)

The non-requirement of an AOI is further made evident by the Bid Data Sheet (BDS)[86] which provides a "**complete list**"[87] of eligibility proposal documents to be submitted during the first stage of the bidding process. As outlined in the BDS:[88]

TAB	CLASS "A" DOCUMENTS
I. LEGAL DOCUMENTS:(In case of a Joint Venture, each member of the JV shall submit the required Documents mentioned in Tabs "A", "B", "C" and "I")	
A.	**Registration Certificate Form**
	Securities and Exchange Commission from the Securities and Exchange Commission (SEC) for Corporation or Partnership; or its equivalent documents in case of foreign bidder.
	Department of Trade and Industry (DTI) for sole proprietorship; or its equivalent documents in case of foreign bidder.
	Cooperative Development Authority, for Cooperatives or its equivalent documents in case of foreign bidder.
B.	Mayor's Permit issued by the city or municipality where the principal place of business of the prospective bidder is located or its equivalent document in case of a foreign corporation.
C.	Tax Clearance per Executive Order 398, Series of 2005, as finally reviewed and approved by the BIR.
II. TECHNICAL DOCUMENTS	
D.	Statement of all ongoing and completed government and private contracts, within the last six (6) years from the date of submission and receipt of bids, including contracts awarded but not yet started, if any, using the prescribed form. Please refer to Section VIII. Bidding Forms.
E.	Statement of at least one similar completed largest contract within six (6) years from the date of the opening

[86] *Id*. at 254-264.

[87] *Id*. at 258.

[88] *Id*. at 258-259.

	bids equivalent to at least 50% of the ABC, using the prescribed form. Please refer to Section VIII. Bidding Forms.
F.	Bid security in the form, amount and validity in accordance with ITB Clause 18.
III. FINANCIAL DOCUMENTS	
G.	Audited financial statements, stamped received by the Bureau of Internal Revenue (BIR) or its duly accredited and authorized institutions, for the preceding calendar year, which should not be earlier than two (2) years from bid submission; or equivalent documents in case of foreign bidder, provided that the same is in accordance with International Financial Reporting Standards.
H.	NFCC Computation in accordance with ITB clause 5.
TAB	**CLASS "B" ELIGIBILITY REQUIREMENTS**
I.	Valid Joint Venture Agreement (JVA), in case the Joint Venture is already in existence at the time of the submission and opening of bids, OR duly notarized statements from all potential joint venture partners stating that they will enter into and abide by the provisions of the JVA if the bid is successful;
IV. OTHER DOCUMENTS	
J.	Conformity with the Schedule of Requirements and Initial Technical Proposal (approved TOR), as enumerated and specified in Sections VI and VII of the Bidding Documents, using the prescribed form.
K.	Certification from the Election Authority or Election Management Body that the system has demonstrated capability and has been successfully used in a prior electoral exercise here or abroad.
L.	Omnibus Sworn Statement using the prescribed form in Section VIII.

Even the furnished Schedule of Requirements[89] does not mandate the submission of an AOI:[90]

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[89] *Id*. at 325-329.

[90] *Id*. at 326-328.

REQUIREMENTS	CORPORATION/ SP/PARTNERSHIP		JOINT VENTURE	
	PASSED	FAILED	PASSED	FAILED
x x x				
ELIGIBILITY DOCUMENTS				
1. LEGAL DOCUMENTS				
I. Class "A" Documents				
a. Original/Certified true copy of Registration Certificate from the Securities and Exchange Commission (SEC), Department of Trade and Industry (DTI) for sole proprietorship, or Cooperative Development Authority (CDA) for Cooperatives or any proof of such registration as stated in the BDS;(In case of a JV, this requirement must be complied with by all the JV partners)				
b. Original/Certified true copy of valid and current Mayor's/ Business Permit/License issued by the city or municipality where the principal place of business of the prospective bidder is located; (In case of a JV, this requirement must be complied with by all the JV partners)				
c. Original/Certified true copy of valid Tax Clearance per Executive Order 398, Series of 2005(In case of a JV, this requirement must be complied with by all the JV partners)				
2. TECHNICAL DOCUMENTS				
d. Sworn Statement of all its on-going and completed government and private contracts within the last six (6) years prior to the deadline for the submission				

and opening of bids, including contracts awarded but not yet started, if any. The statement shall include, for each of the contract, the following: x x x				
e. Sworn Statement of the bidder's single largest contract completed within six (6) YEARS prior to the deadline for the submission and opening of bids, with a value of FIFTY (50%) percent of the ABC.				
f. The bid security (Payable to COMELEC) shall be in the following amount: x x x				
3. FINANCIAL DOCUMENTS				
g. Audited Financial Statements (AFS), stamped "received" by the Bureau of Internal Revenue (BIR) or its duly accredited and authorized institutions, for the preceding calendar year x x x				
h. NFCC computation which shall be based only on the current assets and current liabilities submitted to the BIR, through Electronic Filing and Payment System (EFPS)				
4. OTHERS				
i. Conformity with Section VI: Schedule of Requirements of the Bidding Documents				
j. Conformity with Section VII. Technical Specifications of the Bidding Documents. If proposal is the same with the initial technical requirements, just put "COMPLY"				
k. Certification from the Election Authority or Election management Body that the system has				

demonstrated capability and has been successfully used in a prior electoral exercise here or abroad.				
l. OMNIBUS AFFIDAVIT in accordance with Section 25.2 (a)(iv) of the IRR of RA 9184 and using the form prescribed in Section VIII of the Philippine bidding Documents. Shall include: x x x				

Verily, based on Sec. 23.1(b) of the GPRA IRR, the Instruction to Bidders, the BDS, and the Checklist of Requirements, the non-submission of an AOI is not fatal to a bidder's eligibility to contract the project at hand. Thus, it cannot be considered as a ground for declaring private respondents ineligible to participate in the bidding process. To hold otherwise would mean allowing the BAC to consider documents beyond the checklist of requirements, in contravention of their non-discretionary duty under Sec. 30(1) of the GPRA IRR.

b. Neither is the AOI a post-qualification requirement

After the preliminary examination stage, the BAC opens, examines, evaluates and ranks all bids and prepares the Abstract of Bids which contains, among others, the names of the bidders and their corresponding calculated bid prices arranged from lowest to highest. The objective of the bid evaluation is to identify the bid with the lowest calculated price or the Lowest Calculated Bid. The Lowest Calculated Bid shall then be subject to post-qualification to determine its responsiveness to the eligibility and bid requirements.[91]

During post-qualification, the procuring entity verifies, validates, and ascertains all statements made and documents submitted by the bidder with the lowest calculated or highest rated bid using a non-discretionary criteria as stated in the bidding

[91] *Commission on Audit v. Linkworth International*, *supra* note 81.

documents.[92] If, after post-qualification, the Lowest Calculated Bid is determined to be post-qualified, it shall be considered the Lowest Calculated Responsive Bid and the contract shall be awarded to the bidder.[93]

To recall, the BAC, on December 15, 2014, declared that only Smartmatic JV and Indra were eligible to participate in the second stage of the bidding process. Of the two, only Smartmatic JV submitted a complete and responsive Overall Summary of the Financial Proposal and was thus subjected to post-qualification evaluation. Initially, the BAC post-disqualified Smartmatic JV for allegedly failing to submit a valid AOI. It is this preliminary finding that petitioners want reinstated.

We disagree.

Even on post-qualification, the submission of an AOI was not included as an added requirement. The Instruction to Bidders pertinently provides:[94]

29. Post-Qualification

29.1. The Procuring Entity shall determine to its satisfaction whether the Bidder that is evaluated as having submitted the Lowest Calculated Bid (LCB) complies with and is responsive to all the requirements and conditions specified in ITB Clauses 5, 12 and 13.

x x x x x x x x x

29.3. The determination shall be **based upon an examination of the documentary evidence of the Bidder's qualifications submitted pursuant to ITB Clauses 12 and 13**, **as well as other information as the Procuring Entity deems necessary and appropriate**, using a non-discretionary "pass/fail" criterion. (emphasis added)

Clauses 12 and 13 of the Instruction to Bidders pertain to the eligibility documents, technical documents, and the financial component of a participant's bid.[95] Meanwhile, the Clause 5

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[92] Sec. 34.3, Revised Implementing Rules and Regulations, R.A. No. 9184.

[93] *Commission on Audit v. Linkworth International*, *supra* note 81.

[94] *Rollo*, pp. 247-248.

[95] *Id*. at 231-234.

adverted to is an enumeration of persons or entities who may participate in the bidding.[96] Nowhere in these clauses does it appear that an AOI is a mandatory requirement even for post-qualification. Even the BAC's March 27, 2015 Notice addressed to Smartmatic JV supports this finding:[97]

> x x x [F]or purposes of post-qualification proceedings, please submit copies of the following documents to the Bid and Awards Committee (BAC), through the BAC Secretariat, as stated in Clause 29.2 (a) of Section III, Bid Data Sheet of the Bidding Documents, within three (3) calendar days from receipt of this Notice:
>
> a) Latest Income and Business Tax Returns. x x x
>
> b) Certificate of PhilGEPS Registration.
>
> c) ISO 9001:2008 Certification of the Optical Mark/reader or Optical Scan manufacturer for OMR.
>
> In addition, the following certifications must be submitted:
>
> a) That all system requirements for customization as stated in the Terms of Reference and RA 9369 shall be fully complied with, subject to the application of applicable penalties for non-compliance; and
>
> b) That it shall not demand for additional payment from COMELEC to procure additional OMR system requirements during Project Implementation for items that it may have overlooked in its Bid Proposal.
>
> The bidder is also required to submit the machines, including the software and hardware, back-up power supply and other equipment and peripherals necessary for the conduct of the testing during post-qualification, including the prototype sample of the ballot box based on what is required in the Terms of Reference (TOR) for the OMR on April 6, 2015 as per instruction from the Technical Working Group (TWG).

From the foregoing, the inescapable result is that mere failure to file an AOI cannot automatically result in the bidder concerned being declared ineligible, contrary to petitioners' claim.

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[96] *Id*. at 225-226.

[97] *Id*. at 447-448.

Smartmatic JV may validly undertake the project sought to be procured

a. SMTC still has the authority to conduct business even after the conduct of the 2010 national and local elections

A thorough reading of petitioners' contention, however, would show that it is not only assailing Smartmatic JV's ineligibility based on the alleged incompleteness of its documentary requirements(i.e. for non-submission of a valid AOI), but also because they considered the subject of the procurement beyond the ambit of SMTCs corporate purpose. Petitioners postulate that SMTC's authority to conduct business ceased upon fulfillment of its primary purpose stated in its AOI– that of automating the 2010 National and Local Elections, and this allegedly rendered SMTC's subsequent involvement in the subject procurement project an *ultra vires* act.

Petitioners' myopic interpretation of SMTC's purpose is incorrect.

While it is true that SMTC's AOI made specific mention of the automation of the 2010 National and Local Elections as its primary purpose, it is erroneous to interpret this as meaning that the corporation's authority to transact business will cease thereafter. Indeed, the contractual relation between SMTC and the COMELEC has been the subject of prior controversies that have reached the Court, and We have on these occasions held that even beyond the 2010 election schedule, the parties remain to have subsisting rights and obligations relative to the products and services supplied by SMTC to the COMELEC for the conduct of the 2010 polls.

For instance, the Court, in the landmark case of *Capalla v. COMELEC (Capalla)*,[98] upheld the validity of the March 30, 2012 Deed of Sale by and between SMTC and COMELEC when

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[98] G.R. Nos. 201112, *etc*., October 23, 2012.

the latter exercised the option to purchase (OTP) clause embodied in their 2009 Automated Election System Contract (AES Contract). Even though the original deadline for the option was only until December 31, 2010, We ruled that the parties to the AES Contract, pursuant to Art. 19 thereof,[99] can still validly extend the same by mutual agreement. The Court ratiocinated that Art. 19 of the AES Contract may still be invoked even after December 31, 2010, for the agreement subsisted in view of the COMELEC's failure to return SMTC's performance security, a condition for the contract's termination. As provided under Art. 2 of the AES Contract:[100]

Article 2
EFFECTIVITY

2.1. This Contract shall take effect upon the fulfillment of all of the following conditions:

(a) Submission by the PROVIDER of the Performance Security;
(b) Signing of this Contract in seven (7) copies by the parties; and
(c) Receipt by the PROVIDER of the Notice to Proceed.

2.2. The Term of this Contract begins from the date of effectivity **until the release of the Performance Security,without prejudice to the surviving provisions of this Contract,** including the warranty provision as prescribed in Article 8.3 and the period of the option to purchase. (emphasis supplied)

Based on Our ruling in *Capalla*, the cessation of SMTC's business cannot be assumed just because the May 10, 2010 polls have already concluded. For clearly, SMTC's purpose—the "automation of the 2010 national and local elections"—is not limited to the conduct of the election proper, but extends further to the fulfillment of SMTC's contractual obligations

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[99] "This contract and its Annexes may be amended by mutual agreement of the parties. All such amendments shall be in writing and signed by the duly authorized representatives of both parties." As cited in *Capalla v. COMELEC*, *id.*

[100] *Id*.

that spring forth from the AES Contract during the lifetime of the agreement (i.e. until the release of the performance security), and even thereafter insofar as the surviving provisions of the contract are concerned. In other words, regardless of whether or not SMTC's performance security has already been released, establishing even just one surviving provision of the AES Contract would be sufficient to prove that SMTC has not yet completed its purpose under its AOI, toppling petitioners' argument like a house of cards.

Unfortunately for petitioners, one such surviving provision has already been duly noted by the Court in the recent case of *Pabillo v. COMELEC (Pabillo)*.[101] In *Pabillo*, the Court cited Art. 8.8 of the AES Contract, which significantly reads:

> 8.8 If COMELEC opts to purchase the PCOS and Consolidation and Canvassing System (CCS), the following warranty provisions indicated in the RFP shall form part of the purchase contract:
>
> 1) For PCOS, **SMARTMATIC shall warrant the availability of parts, labor and technical support and maintenance to COMELEC for ten (10) years, if purchased (Item 18, Part V of the RFP), beginning May 10, 2010.** Any purchase of parts, labor and technical support and maintenance not covered under Article 4.3 above shall be subject to the prevailing market prices at the time and at such terms and conditions as may be agreed upon. (emphasis added)

Pertinently, We have interpreted the foregoing contractual provision in *Pabillo* in the following wise:[102]

> **Smartmatic-TIM warrants that its parts, labor and technical support and maintenance will be available to the COMELEC,** if it so decides to purchase such parts, labor and technical support and maintenance services,**within the warranty period stated, i.e., ten (10) years for the PCOS, reckoned from May 10, 2010, or until May 10, 2020**. Article 8.8 skews from the ordinary concept of warranty since it is a mere warranty on availability, which entails a subsequent purchase contract, founded upon a new consideration,

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[101] *Supra* note 60.

[102] *Id.*

the costs of which (unlike in the first warranty) are still to be paid. With Article 8.8 in place, **the COMELEC is assured that it would always have access to a capable parts/service provider in Smartmatic-TIM, during the 10-year warranty period therefor**, on account of the peculiar nature of the purchased goods. (emphasis added)

Indubitably, the *vinculum juris* between COMELEC and SMTC remains solid and unsevered despite the 2010 elections' inevitable conclusion. Several contractual provisions contained in the 2009 AES Contract, as observed in a review of our jurisprudence, continue to subsist and remain enforceable up to this date. *Pabillo*, in effect, at least guaranteed that SMTC's purpose under its AOI will not be fulfilled until May 10, 2020. Therefore, petitioners' theory—that SMTC no longer has a valid purpose—is flawed. Otherwise, there would be no way of enforcing the subsisting provisions of the contract and of holding SMTC to its warranties after the conduct of the May 10, 2010 elections.

Having resolved the continuity of SMTC's business, We now proceed to determine whether its participation in the bidding process is an authorized or an *ultra vires* act.

b. The issue is mooted by the subsequent approval of the amendment to SMTC's AOI

Commissioner Guia, in his dissent, opines that a bidder should be authorized to participate in the bidding as early as the time the pre-qualification was conducted, which in this case was held on December 4, 2014. Thus, the December 10, 2014 approval of SMTC's amended AOI, to Commissioner Guia's mind, cannot cure the alleged vice attending SMTC's submission of its bid, as a partner in Smartmatic JV, for a project that it was, at that time, unauthorized to undertake.

The argument fails to persuade.

As earlier discussed, the function of the BAC, in making an initial assessment as to the eligibility of the bidders during pre-qualification, is ministerial and nondiscretionary. It merely

counterchecks the documents submitted by the bidder against the checklist of requirements included in the bid documents disseminated by the procuring agency. It cannot consider documents not listed in the checklist for purposes of ascertaining a bidder's eligibility during pre-qualification.

The only time the procuring agency can go beyond the checklist is during post-qualification wherein it is allowed to check to its satisfaction the veracity of the information submitted to it by the bidder. To recall, Sec. 29.3 of the Invitation to Bid provides that on post-qualification, the procuring entity may utilize any "**other information as [it] may deem necessary and appropriate**" in order to test the accuracy of the information provided in the bidder's eligibility documents and bid proposal. In the end, notwithstanding the dispensability of the AOI insofar as compliance with documentary requirements is concerned, the procuring entity may nevertheless consider the same in ultimately determining a bidder's eligibility.

Stated in the alternative, the procuring entity, for purposes of post-qualification, cannot be faulted for, as it is not precluded from, considering information volunteered by the bidder with the highest bid. Bearing in mind the non-discretionary function of the BAC during pre-qualification, it is then understandable that it is only on post-qualification, when it is allowed to consider other documents, during which an extensive inquiry will be made to detect any defect in the bidder's capacity to contract. Hence, even though the submission of an AOI was not required for either pre or post-qualification purposes, the COMELEC and BAC, on post-qualification, may still consider the same in determining whether or not the project is in line with the bidder's corporate purpose, and, ultimately, in ascertaining the bidder's eligibility.

In the case at bar, We take note that during the opening of the bids on December 4, 2014, Smartmatic JV already informed the BAC that SMTC was already in the process of amending its AOI. The contents of the AOI, at that time, were immaterial since the AOI is not an eligibility requirement that can be considered by the BAC on pre-qualification. By post-qualification,

however, the time the BAC can validly consider extraneous documents, SMTC's AOI has already been duly amended, and the amendments approved by the SEC on December 10, 2014, for its updated primary purpose to read:[103]

> To sell, supply, lease, import, export, develop, assemble, repair and deal with automated voting machines, canvassing equipment, computer software, computer equipment and all other goods and supplies, and /or to provide, render and deal in all kinds of services, including project management services for the conduct of elections, whether regular or special, in the Philippine(s) and to provide Information and Communication Technology (ICT) goods and services to private and government entities in the Philippines.

Hence, any doubt on SMTC's authorization to continue its business has already been dispelled by December 10, 2014. It matters not that the amendments to the AOI took effect only on that day[104] for as long as it preceded post-qualification.

c. SMTC's participation in the bidding is not an ultra vires act but one that is incidental to its corporate purpose

In any event, there is merit in private respondents' argument that SMTC's participation in the bidding is not beyond its declared corporate purpose; that, in the first place, there was no impediment in SMTC's AOI that could have prevented Smartmatic JV from participating in the project.

To elucidate, an *ultra vires* act is defined under BP 68 in the following wise:

> **Section 45.** *Ultra vires acts of corporations.* – No corporation under this Code shall possess or exercise any corporate powers except those conferred by this Code or by its articles of incorporation and

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[103] *Rollo*, p. 549.

[104] **Section 16.** *Amendment of Articles of Incorporation.* – x x x The amendments shall take effect upon their approval by the Securities and Exchange Commission or from the date of filing with the said Commission if not acted upon within six (6) months from the date of filing for a cause not attributable to the corporation.

except such as are necessary or incidental to the exercise of the powers so conferred. (emphasis added)

The language of the Code appears to confine the term *ultra vires* to an act outside or beyond express, implied and incidental corporate powers. Nevertheless, the concept can also include those acts that may ostensibly be within such powers but are, by general or special laws, either proscribed or declared illegal.[105] *Ultra vires* acts or acts which are clearly beyond the scope of one's authority are null and void and cannot be given any effect.[106]

In determining whether or not a corporation may perform an act, one considers the logical and necessary relation between the act assailed and the corporate purpose expressed by the law or in the charter, for if the act were one which is lawful in itself or not otherwise prohibited and done for the purpose of serving corporate ends or reasonably contributes to the promotion of those ends in a substantial and not merely in a remote and fanciful sense, it may be fairly considered within corporate powers.[107] **The test to be applied is whether the act in question is in direct and immediate furtherance of the corporation's business**, fairly incident to the express powers and reasonably necessary to their exercise. If so, the corporation has the power to do it; otherwise, not.[108]

In the case at bar, notwithstanding the specific mention of the 2010 National and Local Elections in SMTC's primary purpose, it is not, as earlier discussed, precluded from entering into contracts over succeeding ones. Here, SMTC cannot be

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[105] Concurring opinion of Justice Vitug <http://www.lawphil.net/judjuris/juri2000/feb2000/gr_137686_2000.html>.

[106] *Gancayco v. City Government of Quezon City*, G.R. Nos. 177807 & 177933, October 11, 2011, 658 SCRA 853.

[107] <http://sc.judiciary.gov.ph/jurisprudence/2000/feb2000/137686_Concur.htm>.

[108] Concurring opinion of Justice Vitug in <http://www.lawphil.net/judjuris/juri2000/feb2000/gr_137686_2000.html>; *see also* <http://www.lawphil.net/judjuris/juri1962/may1962/gr_l-15092_1962.html>.

deemed to be overstepping its limits by participating in the bidding for the 23,000 new optical mark readers for the 2016 polls since upgrading the machines that the company supplied the COMELEC for the automation of the 2010 elections and offering them for subsequent elections is but a logical consequence of SMTC's course of business, and should, therefore, be considered included in, if not incidental to, its corporate purpose. A restricted interpretation of its purpose would mean limiting SMTC's activity to that of waiting for the expiration of its warranties in 2020. How then can the company be expected to subsist and sustain itself until then if it cannot engage in any other project, even in those similar to what the company already performed?

In the final analysis, We see no defect in the AOI that needed to be cured before SMTC could have participated in the bidding as a partner in Smartmatic JV, the automation of the 2016 National and Local Elections being a logical inclusion of SMTC's corporate purpose.

Smartmatic JV cannot be declared ineligible for SMTC's nationality

In a desperate last ditch effort to have Smartmatic JV declared ineligible to participate in the procurement project, petitioners question the nationality of SMTC. They direct the Court's attention to the 2013 Annual Report and Consolidated Financial Statements[109] of Smartmatic Limited to prove that SMTC is 100% foreign owned. They then contend that SMTC is the biggest shareholder in the bidding joint venture at 46.5% share, making the joint venture less than 60% Filipino-owned and, hence, ineligible.

The argument is specious.

Clause 5 of the Instruction to Bidders provides that the following may participate in the bidding process:[110]

5.1. Unless otherwise provided in the BDS, the following persons shall be eligible to participate in the bidding:

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[109] *Rollo*, pp. 79-128.

[110] *Id*. at 225-226.

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(e) Unless otherwise provided in the BDS, persons/entities forming themselves into a JV, i.e., group of two (2) or more persons/entities that intend to be jointly and severally responsible or liable for a peculiar contract: **Provided, however, that Filipino ownership or interest of the joint venture concerned shall be at least sixty percent (60%)**.

While petitioners are correct in asserting that Smartmatic JV ought to be at least 60% Filipino-owned to qualify, they did not adduce sufficient evidence to prove that the joint venture did not meet the requirement. Petitioners, having alleged non-compliance, have the correlative burden of proving that Smartmatic JV did not meet the requirement, but aside from their bare allegation that SMTC is 100% foreign-owned, they did not offer any relevant evidence to substantiate their claim. Even the 2013 financial statements submitted to Court fail to impress for they pertain to the financial standing of **Smartmatic Limited**,[111] which is a distinct and separate entity from **SMTC**. It goes without saying that Smarmatic Limited's nationality is irrelevant herein for it is not even a party to this case, and even to the joint venture.

Aside from the sheer weakness of petitioners' claim, SMTC satisfactorily refuted the challenge to its nationality and established that it is, indeed, a Filipino corporation as defined under our laws. As provided in Republic Act No. 7042 (RA 7042), otherwise known as the Foreign Investments Act, a Philippine corporation is defined in the following wise:

Section 3. ***Definitions.*** – As used in this Act:

a) The term "Philippine national" shall mean a citizen of the Philippines or a domestic partnership or association wholly owned by citizens of the Philippines**; or a corporation organized under the laws of the Philippines of which at least sixty percent (60%) of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines**; or a trustee of funds for

[111] Smartmatic International's United Kingdom office.

pension or other employee retirement or separation benefits, where the trustee is a Philippine national and at least sixty (60%) of the fund will accrue to the benefit of the Philippine nationals: Provided, That where a corporation and its non-Filipino stockholders own stocks in a Securities and Exchange Commission (SEC) registered enterprise, at least sixty percent (60%) of the capital stocks outstanding and entitled to vote of both corporations must be owned and held by citizens of the Philippines and at least sixty percent (60%) of the members of the Board of Directors of both corporations must be citizens of the Philippines, in order that the corporations shall be considered a Philippine national.

In *Narra Nickel Mining and Development, Corp. v. Redmont Consolidated Mines, Corp.*,[112] the Court held that the "control test" is the prevailing mode of determining whether or not a corporation is Filipino. Under the "control test," shares belonging to corporations or partnerships at least 60% of the capital of which is owned by Filipino citizens shall be considered as of Philippine nationality.[113] It is only when based on the attendant facts and circumstances of the case, there is, in the mind of the Court, doubt in the 60-40 Filipino-equity ownership in the corporation, that it may apply the "grandfather rule."[114]

Perusing SMTC's GIS[115] proves useful in applying the control test. Upon examination, SMTC's GIS reveals that it has an authorized capital stock of ₱226,000,000.00, comprised of ₱226,000,000 common stocks[116] at ₱1.00 par value, of which 100% is subscribed and paid.[117] The GIS further provides information on the stockholders as follows:[118]

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[112] G.R. No. 195580, April 21, 2014.

[113] *Id.*; citing DOJ Opinion No. 20 s. 2005.

[114] *Id.*

[115] *Rollo*, pp. 567-573.

[116] Common stocks are voting shares.

[117] *Rollo*, p. 568.

[118] *Id*. at 570.

NAME NATIONALITY AND CURRENT RESIDENTIAL ADDRESS	SHARES SUBSCRIBED				AMOUNT PAID
	TYPE	NUMBER	AMOUNT	% OF OWNERSHIP	
1920 Business Inc. Filipino King's Court 2, 2129 Don Chino Roces Ave., Makati, Metro Manila	Common	135,599,997	135,599,997.00	60%	677,999,997.00
	"A"				
	TOTAL	135,599,997	135,599,997.00		
Smartmatic International, Corp. Barbadian 4 Stafford House, Garisson St., Michael, Barbados	Common	90,399,998	90,399,998.00	40%	451,999,998.00
	"B"				
	TOTAL	90,399,998	90,399,998.00		
Juan C. Villa, Jr. Filipino No. 74, Jalan Setiabakti, Damansara Heights, Kuala Lumpur	Common	1	1.00	0%	1.00
	"B"				
	TOTAL	1	1.00		
Jacinto R. Perez, Jr. Filipino 1211 Consuelo St., Singalong, Manila	Common		1.00		1.00
	"A"	1			
	TOTAL	1	1.00		
Alastair Joseph James Wells British 1405 Spanish Bay, Bonifacio Ridge, 1st Avenue, Bonifacio Global City, Taguig	Common	1	1.00	0%	1.00
	"B"				
	TOTAL	1	1.00		
Marian Ivy F. Reyes-Fajardo Filipino 71-B Tindalo St., Monte Vista, Subdivision, Marikina	Common	1	1.00	0%	1.00
	"A"				
	Total	1	1.00		
Salvador P. Aque Filipino 2250 P. Burgos, Pasay City	Common			0%	1.00
	"A"	1	1.00		
	Total	1	1.00		

Applying the control test, 60% of SMTC's 226,000,000 shares, that is 135,600,000 shares, must be Filipino-owned. From the above-table, it is clear that SMTC reached this threshold amount

to qualify as a Filipino-owned corporation. To demonstrate, the following are SMTC's Filipino investors:

NAME OF SHAREHOLDER	TYPE OF SHARE	NUMBER OF SHARES
1920 Business Inc.	Common "A"	135,599,997
Juan C. Villa, Jr.	Common "B"	1
Jacinto R. Perez, Jr.	Common "A"	1
Marian Ivy F. Reyes-Fajardo	Common "A"	1
Salvador P. Aque	Common "A"	1
	TOTAL	135,600,001

Indeed, the application of the control test would yield the result that SMTC is a Filipino corporation. There is then no truth to petitioners' claim that SMTC is 100% foreign-owned. Consequently, it becomes unnecessary to confirm this finding through the grandfather rule[119] since the test is only employed when the 60% Filipino ownership in the corporation is in doubt.[120] In this case, not even the slightest doubt is cast since the petition is severely wanting in facts and circumstances that raise legitimate challenges to SMTC's 60-40 Filipino ownership. The petition rested solely on petitioners' vague assertions and baseless claims. On the other hand, SMTC countered by furnishing the Court a copy of its GIS providing its shareholders' stock ownership details, and by submitting a copy of its AOI, which reserved all of SMTC's 135,600,000 class A common shares to Filipinos[121] in a bid to guarantee that when all of its shares are outstanding, foreign ownership will not exceed 40%.

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[119] Under the Strict Rule or Grandfather Rule Proper, the combined totals in the Investing Corporation and the Investee Corporation must be traced (i.e., "grandfathered") to determine the total percentage of Filipino ownership; see *Narra Nickel Mining and Development, Corp. v. Redmont Consolidated Mines, Corp.*, *supra* note 112.

[120] *Id.* The Grandfather Rule applies only when the 60-40 Filipino-foreign equity ownership is in doubt (i.e., in cases where the joint venture corporation with Filipino and foreign stockholders with less than 60% Filipino stockholdings [or 59%] invests in other joint venture corporation which is either 60-40% Filipino-alien or the 59% less Filipino). Stated differently, where the 60-40 Filipino-foreign equity ownership is not in doubt, the Grandfather Rule will not apply.

[121] *Rollo*, p. 554. Seventh Article in SMTC's Articles of Incorporation.

Anent the nationality of the other joint venture partners, the Court defers to the findings of the COMELEC and the BAC, and finds sufficient their declaration that Smartmatic JV is, indeed, eligible to participate in the bidding process, and is in fact the bidder with the lowest calculated responsive bid.[122] If petitioners would insist otherwise by reason of Smartmatic JV's nationality, it becomes incumbent upon them to prove that the aggregate Filipino equity of the joint venture partners—SMTC, Total Information Management Corporation, Smartmatic International Holding B.V., and Jarltech International Corporation — does not comply with the 60% Filipino equity requirement, following the oft-cited doctrine that he who alleges must prove.[123] Regrettably, one fatal flaw in petitioners' posture is that they challenged the nationality of SMTC alone, which, after utilizing the control test, turned out to be a Philippine corporation as defined under RA 7042. There was no iota of evidence presented or, at the very least, even a claim advanced that the remaining partners are foreign-owned. There are, in fact, no other submissions whence this Court can inquire as to the nationalities of the other joint venture partners. Hence, there is no other alternative for this Court other than to adopt the findings of the COMELEC and the BAC upholding Smartmatic JV's eligibility to participate in the bidding process, subsumed in which is the joint venture and its individual partners' compliance with the nationality requirement.

WHEREFORE, in view of the foregoing, the petition is hereby **DISMISSED** for lack of merit. The June 29, 2015 Decision of the COMELEC *en banc* is hereby **AFFIRMED.**

SO ORDERED.

Sereno, C.J., Carpio, Leonardo-de Castro, Peralta, Bersamin, del Castillo, Villarama, Jr., Perez, Mendoza. Reyes, and *Jardeleza, JJ.,* concur.

Perlas-Bernabe, J., joins the separate opinion of *J.* Leonen.

Leonen, J., see concurring and dissenting opinion.

Brion, J., on official leave.

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[122] *Id.* at 26.

[123] *Lim v. Equitable PCI Bank*, G.R. No. 183918, January 15, 2014.

CONCURRING and DISSENTING OPINION

LEONEN, *J.*:

I concur in the result. The original and exclusive jurisdiction over matters pertaining to the administrative actions of the head of a procuring agency is by law vested in the Regional Trial Court. Hence, the Petition should have been dismissed. There is no need to go into the merits of the controversy.

I, therefore, disagree with the ponencia's further statement that valid Articles of Incorporation is not an eligibility requirement in bidding for government projects. The Commission on Elections' (COMELEC) issuance requires this document. A corporation must be disqualified from bidding if it lacks valid Articles of Incorporation on the day it submitted the bid documents. A corporation's Articles of Incorporation determines the limits and extent of its corporate powers. Acts done outside its stated purposes are *ultra vires*.

I

Petitioners Leo Y. Querubin, Maria Corazon M. Akol, and Augusto C. Lagman come to this court through a Petition[1] for certiorari or prohibition under Rule 64 in relation to Rule 65 of the 1997 Rules of Civil Procedure,[2] with prayer for the issuance of a temporary restraining order or writ of preliminary injunction. This Petition assails the COMELEC En Banc's Decision[3] dated June 29, 2015.

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[1] *Rollo*, pp. 3-54.

[2] *Id*. at 34.

[3] *Id*. at 61-72. The COMELEC *En Banc* was composed of Commissioners J. Andres D. Bautista (Chair), Christian Robert S. Lim, Al A. Parreño, Luie Tito F. Guia, Arthur D. Lim, Ma. Rowena Amelia V. Guanzon, and Sheriff M. Abas. Commissioner J. Andres D. Bautista penned a brief Concurring and Dissenting Opinion (*Id*. at 73). Commissioner Luie Tito G. Guia penned a Separate Opinion (*Id*. at 74-76). Commissioner Arthur D. Lim participate via telephone and submitted a separate Concurring Opinion (*Id*. at 77-78). Commissioners Al A. Parreño and Sheriff M. Abas joined Commissioner Arthur D. Lim's separate Concurring Opinion. Commissioner Ma. Rowena Amelia V. Guanzon abstained.

The COMELEC En Banc granted the Protest of the joint venture of Smartmatic-TIM Corporation (SMTC), Total Information Management Corporation, Smartmatic International Holding B.V., and Jarltech International Corporation (collectively, Smartmatic Joint Venture) relative to the Two-Stage Competitive Bidding for the Lease of Election Management System and Precinct-Based Optical Mark Reader or Optical Scan System (OMR Project).[4] The COMELEC En Banc also declared Smartmatic Joint Venture as the "bidder with the lowest calculated responsive bid[.]"[5]

II

On October 27, 2014, the bidding documents for the OMR Project were released by the COMELEC Bids and Awards Committee (BAC).[6] Under the OMR Project, the COMELEC would lease with option to purchase 23,000 new units[7] of precinct-based Optical Mark Reader or Optical Scan System for the May 9, 2016 elections.[8]

The bidding documents contained the following: an Invitation to Bid setting forth the Approved Budget for Contract amounting to ₱2.5 billion,[9] and an instruction for interested bidders "to submit eligibility and technical components, which includes an original or certified true copy of its registration certificate from the Securities and Exchange Commission[.]"[10]

The deadline for submitting the Initial Technical Proposals and Eligibility Requirements was set on December 4, 2014.[11]

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[4] *Id*. at 32, Commissioner Arthur D. Lim's Memorandum, and 71, COMELEC *En Banc* Decision.

[5] *Id*. at 71, COMELEC *En Banc* Decision.

[6] *Ponencia*, p. 2.

[7] *Rollo*, p. 61, COMELEC *En Banc* Decision.

[8] *Id*. at 588, COMELEC's Comment.

[9] *Id*. at 167, Smartmatic Joint Venture's Comment/Opposition. The amount is exactly ₱2,503,518,000.00.

[10] *Id*. at 168, *citing* Bidding Documents, Sec. II, Bid Data Sheet, p. 4.

[11] *Id*.

Smartmatic Joint Venture, Indra Sistemas, S.A. (Indra), and MIRU Systems Co. Ltd. bought Bidding Documents from the COMELEC.[12]

SMTC, the biggest shareholder with 46.5%[13] shares in the Smartmatic Joint Venture, has in its Articles of Incorporation the following as its primary corporate purpose:

> To do, perform and comply with all the obligations and responsibilities of, and accord legal personality to, the joint venture of Total Information Management Corporation ("TIM") and Smartmatic International Corporation ("Smartmatic") arising under the Request for Proposal and the Notice of Award issued by the Commission on Elections ("COMELEC") ***for the automation of the 2010 national and local elections*** ("Project"), including the leasing, selling, importing, and/or assembling of automated voting machines, computer software and other computer services and/or otherwise deal in all kinds of services to be used, offered or provided to the COMELEC for the preparations and the conduct of the Project, including project management services.[14] (Emphasis supplied)

On November 12, 2014, SMTC adopted amendments to its Articles of Incorporation.[15] Among others, it changed its primary corporate purpose from operating solely for the automation of the 2010 elections[16] to doing the following acts:

> To sell, supply, lease, import, export, develop, assemble, repair and deal with the automated voting machines, canvassing equipment, computer software, computer equipment and all other goods and supplies, and/or to provide, render and deal in all kinds of services, including project management services, for the conduct of elections, whether regular or special, in the Philippine[s] and to provide

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[12] *Id*.

[13] *Id*. at 76, Commissioner Luie Tito F. Guia's Memorandum.

[14] *Id*. at 6, Petition.

[15] *Id*. at 546, Certificate of Filing of [Smartmatic-TIM Corporation's] Amended Articles of Incorporation.

[16] *Id*. at 75, Commissioner Luie Tito F. Guia's Memorandum, which states that "[t]here is no indication that the project was for the automation of any other elections."

Information and Communication Technology (ICT) goods and services to private and government entities in the Philippines.[17]

The proposed amendments were pending with the Securities and Exchange Commission for approval.[18]

On December 4, 2014, the COMELEC received and opened the bids for prospective OMR Project suppliers.[19] Only Smartmatic Joint Venture and Indra participated in the opening of bids.[20] Meanwhile, the proposed amendments to SMTC's Articles of Incorporation had yet to be acted upon by the Securities and Exchange Commission. Thus, when Smartmatic Joint Venture submitted the required documents, SMTC, its biggest shareholder partner, still contained the automation of the 2010 elections as the latter's primary corporate purpose. Smartmatic Joint Venture informed the BAC, through a sworn Certification, of the Securities and Exchange Commission's pending action on the amendments to the Articles of Incorporation.[21]

On December 10, 2014, six days after the deadline for submission of the bidding documents, the Securities and Exchange Commission approved SMTC's amended Articles of Incorporation.[22] Smartmatic Joint Venture and Indra had their initial technical proposals tested on the same day.[23]

On December 15, 2014, in its Resolution No. 1, the BAC declared Smartmatic Joint Venture and Indra eligible to proceed

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[17] *Id*. at 549, Amended Articles of Incorporation of Smartmatic-TIM Corporation.

[18] *Id*. at 546, Certificate of Filing of [Smartmatic-TIM Corporation's] Amended Articles of Incorporation. The Securities and Exchange Commission approved the proposed amendments only on December 10, 2014.

[19] *Id*. at 75, Commissioner Luie Tito F. Guia's Memorandum.

[20] *Id*. at 621, Smartmatic Joint Venture's Comment/Opposition.

[21] *Id*. at 629.

[22] *Id*. at 546, Certificate of Filing of [Smartmatic-TIM Corporation's] Amended Articles of Incorporation. The deadline for submitting the bidding documents was on December 4, 2015.

[23] *Id*. at 170, Smartmatic Joint Venture's Comment/Opposition.

to the second stage of bidding.[24] The BAC required Smartmatic Joint Venture and Indra to present their Final Revised Technical Tenders and Price Proposals.[25]

On February 25, 2015, the date set for opening the second envelope, Smartmatic Joint Venture and Indra submitted nonresponsive bids.[26] Smartmatic Joint Venture failed to submit a complete financial proposal, while Indra submitted one in excess of the approved budget for the contract.[27] They were both disqualified, and the BAC declared a failure of bidding.[28]

A Motion for Reconsideration was filed by Smartmatic Joint Venture.[29] Upon the BAC's denial of the Motion, Smartmatic Joint Venture filed a (First) Protest before the COMELEC En Banc.[30]

Ruling on the Protest, the COMELEC En Banc suspended on March 26, 2015 the "opening of the Financial Bids and Eligibility Documents for the on-going Second Round of Bidding for the [OMR Project.]"[31]

The BAC then proceeded to the post-qualification evaluation to determine whether Smartmatic Joint Venture followed the specifications in the Bidding Documents.[32] The BAC sought for additional documents as well as a model unit of Smartmatic Joint Venture's SAES 1800 plus Optical Mark Reader (OMR+).[33]

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[24] *Id*.

[25] *Id*. at 171.

[26] *Id*. at 589, COMELEC's Comment.

[27] *Id*. at 894, COMELEC Bids and Awards Committee Resolution No. 4.

[28] *Id*. at 589, COMELEC's Comment.

[29] *Id*.

[30] *Id*.

[31] *Id*. at 589-590.

[32] *Id*. at 590.

[33] *Id*. at 447-448, COMELEC Bids and Awards Committee Notice dated March 27, 2015, and 605, COMELEC's Comment.

It tested[34] the sample OMR+ to determine Smartmatic Joint Venture's compliance with the OMR Project's Terms of Reference.

In its Resolution No. 9 dated May 5, 2015, the BAC post-disqualified the Smartmatic Joint Venture on the following grounds: (1) nonsubmission of the Articles of Incorporation; and (2) failure of the demo unit to comply with the technical requirements (i.e., that the system should have at least two storage devices, and it be capable of simultaneously writing to these devices "all data/files, audit log, statistics and ballot images").[35]

On May 9, 2015, Smartmatic Joint Venture filed a Motion for Reconsideration before the BAC.[36] It sought to conduct a redemonstration of the OMR+ system's compliance with the OMR Project's Terms of Reference.[37]

On May 12, 2015, Smartmatic Joint Venture conducted the redemonstration before the BAC, BAC-Special Technical Working Group, Information Technology Department, COMELEC En Banc, "and other stakeholders[.]"[38]

Through its Resolution No. 10 dated May 15, 2015, the BAC partially granted the Motion for Reconsideration:[39]

Regarding the required legal documents, the BAC declared that the Articles of Incorporation of the Smartmatic Joint Venture partners complied with Section 23.1(b) of the Revised Implementing Rules and Regulations of Republic Act No. 9184, otherwise known as the Government Procurement Reform Act.[40]

In his dissent, however, Commissioner Luie Tito F. Guia (Commissioner Guia) observes that the COMELEC "failed to

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[34] *Id*. at 624-625, Smartmatic Joint Venture's Comment/Opposition.

[35] *Id*. at 62, COMELEC *En Banc* Decision.

[36] *Id*. at 590, COMELEC's Comment.

[37] *Id*. at 62, COMELEC *En Banc* Decision.

[38] *Id*. COMELEC *En Banc* Decision contains a typographical error, stating the date as May 12, 2016 instead of May 12, 2015.

[39] *Id*.

[40] *Id*.

elaborate on [the] reasons"[41] for suddenly reversing itself and finding that Smartmatic-TIM Corporation has "legal capacity . . . to participate in the subject procurement[.]"[42]

Regarding the required technical documents, the BAC ruled that Smartmatic Joint Venture "remain[ed] post-disqualified"[43] due to the OMR+ system's failure to meet technical specifications in the Terms of Reference.[44]

On May 25, 2015, Smartmatic Joint Venture filed a (Second) Protest before the COMELEC En Banc, "seeking the conduct of another technical demonstration[.]"[45]

On June 16, 2015, in response to the query as to whether BAC requires the "submission of Articles of Incorporation and By-laws of each bidder[,]"[46] the BAC confirmed the need for each joint venture partner's Articles of Incorporation,[47] but not the latter's by-laws. This is found in its Bid Bulletin No. 5,[48] to wit:

The [Special Bids and Awards Committee] 1 ***requires*** the submission of copies of SEC Registration *and* ***Articles of Incorporation*** only of ***each*** bidder, including ***partner to the joint venture***, and sub-

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[41] *Id*. at 74, Commissioner Luie Tito F. Guia's Memorandum.

[42] *Id*., *citing* COMELEC Bids and Awards Committee Resolution No. 10.

[43] *Id*. at 62, COMELEC *En Banc* Decision.

[44] *Id*.

[45] *Id*. at 62-63.

[46] COMELEC Bids and Awards Committee Bid Bulletin No. 5, Lease with Option to Purchase of Election Management System (EMS) and Precinct-based Optical Mark Reader (OMR) or Optical Scan (OP-SCAN) System for the 2016 National and Local Elections, Reference No. BAC 01-2014-AES-OMR, June 16, 2015, Query No. 54. <http://www.comelec.gov.ph/?r=About COMELEC/BidsandAwards/ProcurementProjects/BAC012014AESOMR SecondBidding/BAC012014AESOMR SecondBiddingBidBul5> (visited December 7, 2015).

[47] COMELEC Bids and Awards Committee Bid Bulletin No. 5, Answer to Query No. 54.

[48] COMELEC Bids and Awards Committee Bid Bulletin No. 5.

contractor if already identified by the bidder before the submission and opening of bids.[49] (Emphasis supplied)

On June 19, 2015, the Technical Evaluation Committee began the technical demonstration of the OMR+ in the Department of Science and Technology, University of the Philippines Diliman Campus.[50] Engr. Peter Antonio B. Banzon, Chairman of the Technical Evaluation Committee, reported that the "actual simultaneous writing of data"[51] was inconclusive, and that there was a need "to use a specialized test instrument such as a Digital Storage Oscilloscope (DSO) that can access and compare the timing waveforms of electric signals on the inputs of the storage card itself[.]"[52] He suggested further testing of the system.[53]

On June 23, 2015, Smartmatic Joint Venture conducted another technical demonstration before the COMELEC En Banc.[54] The Technical Evaluation Committee submitted its Final Report dated June 24, 2015, finding that Smartmatic Joint Venture complied with the technical requirements.[55]

On June 29, 2015, the COMELEC En Banc granted the Protest of Smartmatic Joint Venture. The dispositive portion reads as follows:

WHEREFORE, the instant Protest is hereby **GRANTED**. Accordingly, the Commission hereby declares the Joint Venture of Smartmatic-TIM Corporation, Total Information Management Corporation, Smartmatic International Holding B.V., and Jarltech International Corporation, as the bidder with the lowest calculated responsive bid in connection with the public bidding for the lease

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[49] COMELEC Bids and Awards Committee Bid Bulletin No. 5, Answer to Query No. 54.

[50] *Rollo*, p. 63, COMELEC *En Banc* Decision.

[51] *Id*.

[52] *Id*.

[53] *Id*. at 63-64.

[54] *Id*. at 64.

[55] *Id*. at 64, 68-71.

with option to purchase of [sic] 23,000 units of precinct-based Optical Mark Reader or Optical Scan System for use in the May 9, 2016 national and local elections. Corollarily, the scheduled opening of financial proposal and eligibility documents for the Second Round of Bidding is hereby **CANCELLED**, with specific instruction for the Bids and Awards Committee to **RETURN** to the prospective bidders their respective payments made for the purchase of Bidding Documents pertaining to the Second Round of Bidding.[56] (Emphasis in the original)

In his Separate Opinion, COMELEC Chairman J. Andres D. Bautista wrote that "it is still in the best interest of the government that [the COMELEC] proceed with the *opening of the bids* for the procurement of 23,000 units of precinct-based Optical Mark Reader or Optical Scan System on 30 June 2015."[57] His statement comes on the heels of the COMELEC's Decision awarding the bid to Smartmatic Joint Venture.

Commissioner Guia agrees that the COMELEC must review the basis of the award, as having more bidders "would surely be more advantageous to the government."[58] Assailing SMTC's Articles of Incorporation, he states that the COMELEC should "resolve the AOI issue conclusively[.]"[59] Commissioner Guia adds that the joint venture partner "should be established at the time of the submission of the document, that is[,] on [December 4,] 2014."[60]

Aggrieved by the COMELEC En Banc Decision, petitioners filed this Petition for certiorari or prohibition with injunctive relief before this court.

This case concerns both procedural and substantive issues. For the procedural issues, it explores whether petitioners have

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[56] *Id*. at 71.

[57] *Id*. at 73, Commissioner J. Andres D. Bautista's Memorandum, emphasis supplied.

[58] *Id*. at 76, Commissioner Luie Tito F. Guia's Memorandum.

[59] *Id*. at 75.

[60] *Id*. at 76.

legal standing and whether this court has jurisdiction to hear the case. For the substantive issues, this case inquires as to whether a valid Articles of Incorporation is a requirement for eligibility to bid.

III

"Suing as taxpayers and registered voters,"[61] petitioners pray that this court annul the Decision of the COMELEC En Banc and issue a writ of preliminary injunction or temporary restraining order against public respondents.[62] Petitioners allegedly "suffered mortal wounds"[63] that only this court can vindicate.[64] They claim that the case also involves the "imperious necessity"[65] of preventing COMELEC's "illega[l] spending [of] public money"[66] while this Petition is being considered.[67]

Petitioners argue that this case is a proper subject of this court's jurisdiction.[68] They state that, pursuant to Rule 64, Section 2 in relation to Rule 65 of the Rules of Court, this court can review on certiorari the Decision of the COMELEC En Banc.[69] They also invoke the "transcendental importance"[70] of this case.

On the other hand, public respondent, as represented by the Office of the Solicitor General, alleges that petitioners, not being bidders themselves, lack a "material interest"[71] to pursue this case.[72] Public respondent further claims that "[p]etitioners do

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[61] *Id*. at 51, Petition.

[62] *Id*. at 52.

[63] *Id*. at 51.

[64] *Id*.

[65] *Id*.

[66] *Id*.

[67] *Id*.

[68] *Id*. at 34.

[69] *Id*.

[70] *Id*. at 40.

[71] *Id*. at 590, COMELEC's Comment.

[72] *Id*.

not have a right *in esse* [or] urgent necessity for the grant of injunctive relief."[73]

The concept of real party in interest for private suits under Rule 3, Section 2[74] of the Rules of Court is different from *locus standi* for public suits under the Constitution.

Locus standi pertains to government actions wherein a person, being a taxpayer or a voter, may suffer injury. In a number of cases,[75] this court has applied a liberal stance on taxpayer suits where it was shown that the case involves public funds. This is true in this case.

On the matter of jurisdiction, I disagree with the ponencia's statement that "the transcending public importance"[76] of the case allows for a procedural shortcut to this court.

Transcendental interest is the exception, not the rule.[77] The transcendental doctrine should not justify a "blatant disregard of procedural rules, [especially if] petitioner[s] had other available remedies[.]"[78]

Section 7 of Article IX-A (Constitutional Commission) of the Constitution states:

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[73] *Id*. at 614.

[74] *RULES OF COURT*, Rule 3, Sec. 2 provides:

SECTION 2. Parties in Interest. — A real party in interest is the party who stands to be benefited or injured by the judgment in the suit, or the party entitled to the avails of the suit. Unless otherwise authorized by law or these Rules, every action must be prosecuted or defended in the name of the real party in interest.

[75] *Spouses Constantino, Jr. v. Hon. Cuisia*, 509 Phil. 486, 504-505 (2005) [Per *J*. Tinga, *En Banc*], *Francisco, Jr. v. The House of Representatives*, 460 Phil. 830, 896-897 (2003) [Per *J*. Carpio Morales, *En Banc*], *Agan, Jr. v. Philippine International Air Terminals Co., Inc.*, 450 Phil. 744, 803-804 (2003) [Per *J*. Puno, *En Banc*].

[76] *Ponencia*, p. 20.

[77] *Rollo*, p. 599, COMELEC's Comment.

[78] *Galicto v. H.E. President Aquino III, et al.*, 683 Phil. 141, 169 (2012) [Per *J*. Brion, *En Banc*], citing *Concepcion, Jr. v. Commission on Elections*, 609 Phil. 201, 217 (2009) [Per *J*. Brion, *En Banc*].

SECTION 7 . . . *Unless otherwise provided* by this Constitution or *by law*, any decision, order, or ruling of each Commission may be brought to the Supreme Court on certiorari by the aggrieved party within thirty days from receipt of a copy thereof. (Emphasis supplied)

We interpreted this to refer to certiorari under Rule 65, and not appeal under Rule 45.[79] Rule 65 in relation to Rule 64 of the Rules of Court provides for resort to this court from the ruling of the COMELEC En Banc only when there is no other "plain, speedy, and adequate remedy in the ordinary course of law"[80] to assail the COMELEC's exercise of a quasi-judicial function.

Quasi-judicial power is an administrative agency's power to "adjudicate the rights of persons before it."[81] It involves hearing and determining questions of fact and application of the standards laid down by the law to enforce this same law.[82] The COMELEC Decision dated June 29, 2015 adjudicated the rights of Smartmatic Joint Venture. It was promulgated in pursuit of the COMELEC's role of procuring election-related supplies and enforcing election-related laws. Batas Pambansa Blg. 881 provides the following:

SECTION 52. Powers and functions of the Commission on Elections. – In addition to the powers and functions conferred upon it by the Constitution, the Commission shall have *exclusive* charge of the

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[79] *Ambil, Jr. v. Commission on Elections*, 398 Phil. 257, 275 (2000) [Per *J.* Pardo, *En Banc*].

[80] RULES OF COURT, Rule 65, Sec. 1 provides:

SECTION 1. Petition for *Certiorari*. — When any tribunal, board or officer exercising judicial or quasi-judicial functions has acted without or in excess of its or his jurisdiction, or with grave abuse of discretion amounting to lack or excess of jurisdiction, and there is no appeal, or any plain, speedy, and adequate remedy in the ordinary course of law, a person aggrieved thereby may file a verified petition in the proper court, alleging the facts with certainty and praying that judgment be rendered annulling or modifying the proceedings of such tribunal, board or officer, and granting such incidental reliefs as law and justice may require.

[81] *DOLE Philippines, Inc. v. Esteva*, 538 Phil. 817, 860 (2006) [Per *J.* Chico-Nazario, First Division].

[82] *Id*.

enforcement and administration of all laws relative to the conduct of elections for the purpose of ensuring free, orderly and honest elections . . . and shall:

. . . . . .

(h) *Procure any supplies, equipment, materials or services* needed for the holding of the election by public bidding . . .

(i) Prescribe the use or adoption of the latest technological and electronic devices, taking into account the situation prevailing in the area and the funds available for the purpose[.] (Emphasis supplied)

Meanwhile, the Implementing Rules and Regulations (Part A) of Republic Act No. 9184 states that "[d]ecisions of the BAC with respect to the conduct of bidding may be protested in writing to the head of the procuring entity[.]"[83]

Thus, COMELEC, being the head of the entity for procuring election supplies by public bidding, has quasi-adjudicative powers. To enforce election-related laws, it adjudicates protests relative to the procurement process by applying both the law and the facts of the case.

The ponencia emphasizes that *Macabago v. Commission on Elections*[84] clarifies Rule 64.[85] He states that Rule 64 applies

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[83] Rep. Act No. 9184, Implementing Rules and Regulations Part A, Sec. 55.1 provides:

Section 55. Protests on Decisions of the BAC

55.1. Decisions of the BAC with respect to the conduct of bidding may be protested in writing to the head of the procuring entity: Provided, however, That a prior motion for reconsideration should have been filed by the party concerned within the reglementary periods specified in this IRR-A, and the same has been resolved. The protest must be filed within seven (7) calendar days from receipt by the party concerned of the resolution of the BAC denying its motion for reconsideration. A protest may be made by filing a verified position paper with the head of the procuring entity concerned, accompanied by the payment of a non-refundable protest fee. The non-refundable protest fee shall be in an amount equivalent to no less than one percent (1%) of the ABC.

[84] 440 Phil. 683 (2002) [Per *J.* Callejo, Sr., *En Banc*].

[85] *Ponencia*, pp. 11-12.

only to the judgments of the COMELEC in the exercise of its power to resolve controversies "involving the election, qualification, or the returns of an elective office[,]"[86] and not "in the exercise of its administrative functions."[87]

Even assuming that the correct remedy is Rule 65 and not Rule 64 in relation to Rule 65, resort to this court cannot be had if there is another plain, speedy, and adequate remedy.

Petitioners' remedy lies with the Regional Trial Court. Section 58 of Republic Act No. 9184 provides that the Regional Trial Court has "jurisdiction over final decisions of the head of the procuring entity[,]" which is COMELEC in this case.

> SEC. 58. Report to Regular Courts; Certiorari. – Court action may be resorted to only after the protests contemplated in this Article shall have been completed. Cases that are filed in violation of the process specified in this Article shall be dismissed for lack of jurisdiction. The regional trial court shall have jurisdiction over final decisions of the head of the procuring entity. Court actions shall be governed by Rule 65 of the 1997 Rules of Civil Procedure.

Jurisprudence further solidifies this rule. In *Dimson (Manila), Inc., et al. v. Local Water Utilities Administration*,[88] this court held that the Regional Trial Court is the proper venue for Rule 65 petitions pertaining to issues on the procurement and bidding process.[89] Likewise, this court said in *First United Constructors Corporation v. Poro Point Management Corporation (PPMC), et al.*[90] that, notwithstanding the Regional Trial Court's concurrent certiorari jurisdiction with that of this court, this court should still refuse to permit an unrestricted freedom to directly seek this court's intervention when there are other remedies available.[91]

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[86] *Id*. at 12.

[87] *Id*. at 11.

[88] 645 Phil. 309 (2010) [Per *J*. Peralta, Second Division].

[89] *Id*. at 319.

[90] 596 Phil. 334 (2009) [Per *J*. Nachura, Third Division].

[91] *Id*. at 342.

In government procurement cases, the decisions of the COMELEC En Banc must be appealed before the Regional Trial Court, which has the power to issue an injunctive writ while the cases are pending before it. As this court held in *Bañez, Jr. v. Judge Concepcion, et al.*:[92]

> The strictness of the policy is designed to shield the [Supreme] Court from having to deal with causes that are also well within the competence of the lower courts, and thus leave time to the [Supreme] Court to deal with the more fundamental and more essential tasks that the Constitution has assigned to it.[93]

IV

Petitioners claim that the COMELEC En Banc Decision dated June 29, 2015 "is repugnant to the letter and spirit"[94] of Republic Act No. 9184 and Batas Pambansa Blg. 68 (Corporation Code).[95] For petitioners, the COMELEC committed grave abuse of discretion in promulgating its ruling.[96]

Petitioners echo Commissioner Guia's dissent. First, SMTC's primary corporate purpose is only for the 2010 national and local elections.[97] This is the limit of its authority to contract with others.[98] Second, the COMELEC did not address "satisfactorily"[99] why it accepted the submission of a document (invalid Articles of Incorporation) in which one of the joint venture partners is ineligible.[100] Petitioners also claim that SMTC

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[92] 693 Phil. 399 (2012) [Per *J.* Bersamin, First Division].

[93] *Id*. at 412.

[94] *Rollo*, p. 44, Petition.

[95] *Id*.

[96] *Id*.

[97] *Id*. at 48, Petition, and 75, Commissioner Luie Tito F. Guia's Memorandum.

[98] *Id*. at 45.

[99] *Id*. at 48, Petition, and 76, Commissioner Luie Tito F. Guia's Memorandum.

[100] *Id*.

committed a material misrepresentation in declaring that it "complies with the equity requirement under Philippine law[.]"[101] They assert that SMTC is 100% foreign-owned, based on an annual report.[102]

Meanwhile, the ponencia agrees with public respondent's arguments that the COMELEC En Banc did not commit grave abuse of discretion for the following reasons: the submission of the Articles of Incorporation is not a criterion for eligibility;[103] the issue has become moot because the Securities and Exchange Commission already approved the amendments;[104] and SMTC's secondary purpose and the Corporation Code allow it to participate in the bidding.[105]

It appears that in granting private respondent's protest, the COMELEC acted in reckless disregard of its own bidding rules and procedure.

For the OMR Project, the COMELEC required the submission of the Articles of Incorporation. This is shown in BAC Bid Bulletin No. 5, which respondents and the ponencia fail to mention. BAC Bid Bulletin No. 5 mandates all bidders in the OMR Project, including every joint venture partner, to submit their Articles of Incorporation, to wit:[106]

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[101] *Id*. at 36, Petition.

[102] *Id*. at 46, *citing* Annual Report and Consolidated financial statements Registration number 07477910 dated 31 December 2013 of Smartmatic Limited.

[103] *Ponencia*, pp. 21-30.

[104] *Id*. at 33-34.

[105] *Id*. at 35-36.

[106] COMELEC Bids and Awards Committee Bid Bulletin No. 5, Lease with Option to Purchase of Election Management System (EMS) and Precinct-based Optical Mark Reader (OMR) or Optical Scan (OP-SCAN) System for the 2016 National and Local Elections, Reference No. BAC 01-2014-AES-OMR, June 16, 2015 <http://www.comelec.gov.ph/?r=About COMELEC/BidsandAwards/ProcurementProjects/BAC012014AESO MRSecondBidding/BAC012014AESOMRSecondBiddingBidBul5> (visited December 7, 2015).

#	Query	Answer
54	Statement: A. Securities [and] Exchange Commission, for Corporation or Partnership; or its equivalent documents in case of foreign bidder. Question: ***Will BAC still require the submission of Articles of Incorporation*** and By-laws of each bidder? Section 12A of the [Invitation to Bid] only mentions the SEC registration or any proof of registration. (Emphasis supplied)	The [Special Bids and Awards Committee] 1 ***requires the submission*** of copies of SEC Registration and ***Articles of Incorporation*** only of each bidder, including partner to the joint venture, and sub-contractor if already identified by the bidder before the submission and opening of bids. Even though, Clause 12.1 of Section II (Instructions to Bidders) of the Bidding Documents mentions only SEC Registration, such requirement is not exclusive and absolute as the same clause gives the BAC a leeway to modify or add the requirement through the Bid Data Sheet (BDS). The clause "*unless otherwise stated in the BDS*" expressly gives the BAC such authority.[107] (Emphasis supplied)

When SMTC failed to submit its Articles of Incorporation, the COMELEC should have disqualified Smartmatic Joint Venture.

The COMELEC has the power to review a bidder's lack of eligibility at *any stage* of the procurement process. Section 23.7 (Eligibility Requirements for the Procurement of Goods and Infrastructure Projects) of the Revised Implementing Rules and Regulations of Republic Act No. 9184 and Section 30[108] of the

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[107] *Id*.

[108] *Rollo*, p. 249, COMELEC Bids and Award Committee's Philippine Bidding Documents for the Two-Stage Competitive Bidding for the Lease

bidding documents provide for this. Section 23.7 of the Implementing Rules and Regulations states:

Section 23. Eligibility Requirements for the Procurement of Goods and Infrastructure Projects

. . . . . .

23.7. Notwithstanding the eligibility of a prospective bidder, the procuring entity concerned *reserves the right to review* the qualifications of the bidder at *any stage* of the procurement process . . . Should such review uncover any misrepresentation made in the eligibility requirements, statements or documents, or any changes in the situation of the prospective bidder which will affect the capability of the bidder to undertake the project so that it fails the eligibility criteria, the procuring entity shall *consider the said prospective bidder as ineligible and shall disqualify it from obtaining an award or contract* . . . (Emphasis supplied)

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of Election Management System (EMS) and Precinct-Based Optical Mark Reader (OMR) or Optical Scan (OP-SCAN) System, Secs. 30.1 and 30.2(b), which provide:

[Section] 30. Reservation Clause

30.1. Notwithstanding the eligibility or post-qualification of a Bidder, the Procuring Entity concerned reserves the right to review its qualifications at any stage of the procurement process . . . Should such review uncover any misrepresentation made in the eligibility and bidding requirements, statements or documents, or any changes in the situation of the Bidder which will affect its capability to undertake the project so that it fails the preset eligibility or bid evaluation criteria, the Procuring Entity shall consider the said Bidder as ineligible and shall disqualify it from submitting a bid or from obtaining an award or contract.

30.2. Based on the following grounds, the Procuring Entity reserves the right to reject any and all bids, declare a failure of bidding at any time prior to the contract award, or not to award the contract, without thereby incurring any liability, and make no assurance that a contract shall be entered into as a result of the bidding:

. . . . . .

(b) If the Procuring Entity's BAC is found to have failed in following the prescribed bidding procedures[.]

Moreover, this court cannot be estopped by the findings of the BAC or the COMELEC En Banc. When Smartmatic Joint Venture submitted noncompliant legal requirements, there was no basis for the COMELEC to have allowed it to proceed to the next stage of bidding.

SMTC's transgression is already *fait accompli*, and amending its Articles of Incorporation (by changing its corporate purpose) cannot cure the defect. The Articles of Incorporation is part of the requirements for the issuance of a Certificate of Registration.[109] Thus, for the submitted Certificate of Registration to have been considered valid, the Articles of Incorporation forming part of it should likewise have been valid.

The purpose clause in the Articles of Incorporation "confers, as well as limits, the powers which a corporation may exercise."[110] That way, corporate officers shall know the limits of their actions, shareholders shall be informed of the corporation's type of business, and third parties shall know whether the corporation they are transacting with is actually authorized to act or has legal personality to conduct business.

This court cannot grant corporate personality where there previously was none. Acts done beyond the express, implied, and incidental powers of the corporation, as provided for in the law or its Articles of Incorporation, are *ultra vires*.

According to Section 45 of the Corporation Code, "[n]o corporation under this Code shall possess or exercise any corporate powers except those conferred by this Code or by its articles of incorporation and except such as are necessary or incidental to the exercise of the powers so conferred." It is clear from the provision that the necessary or incidental powers must relate to the express powers conferred by law or the Articles of Incorporation.

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[109] *See* Registration of Corporations and Partnerships with the SEC <http://www.sec.gov.ph/cmanual/CITIZENS%20MANUAL%20NO.%202.pdf> (visited December 7, 2015).

[110] SEC OGC Opinion No. 07-14, July 18, 2007 <http://www.sec.gov.ph/investorinfo/opinions/ogc/cy%202007/07-14.pdf> (visited December 7, 2015).

"[E]xpress powers cannot be enlarged by implication."[111] If a corporate charter's recital of specific powers is followed by a general language, this general language "is construed and confined within the limitations of the specific power named."[112] SMTC has a specific power: The Articles of Incorporation expressly "accord[s] legal personality to [SMTC] for the automation of the 2010 national and local elections[.]"[113] The ensuing general language (as stated in the secondary purpose) which supposedly allows SMTC to "enter into contracts . . . of every kind and description and for any lawful purpose"[114] cannot be enlarged to contemplate the OMR Project for the 2016 national and local elections.

Further, while it is true that Section 42 of the Corporation Code allows corporations to invest its funds in another corporation or business, and that SMTC's secondary purpose also provides for this, one must make a distinction between investment of funds (such as in banks, stocks, or money market placements) and active pursuit of business (i.e., bidding for the lease with option to purchase 23,000 new units of the OMR+ system for the 2016 elections).

The corporate charter of SMTC is time-bound, limited, restricted, and specific. Thus, insofar as the 2016 elections are concerned, SMTC was disqualified on the date it submitted the eligibility documents.

By participating in the bidding for the OMR Project, SMTC committed an *ultra vires* act.

The ponencia further asserts that the COMELEC and SMTC maintained their contractual relations after the 2010 election schedule. He states that for this reason, Smartmatic Joint Venture may validly undertake the OMR Project.[115]

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[111] SEC OGC Opinion No. 07-14.

[112] *Id*.

[113] *Rollo*, p. 6, Petition.

[114] *Id*. at 534, Articles of Incorporation of Smartmatic-TIM Corporation.

[115] *Ponencia*, pp. 30-33.

I disagree.

The COMELEC cannot be made to accommodate an ineligible bidder. While there may be legal ties between the COMELEC and SMTC for some of the post-2010 transactions related to the refurbishment of the precinct count optical scan (PCOS) voting machines, this bond of law ends for the OMR Project.

The ponencia cites two cases to show how "the *vinculum juris* between COMELEC and SMTC remains solid and unsevered despite the 2010 elections[.]"[116]

In *Archbishop Capalla, et al. v. Commission on Elections*,[117] this court upheld the COMELEC's purchase of the PCOS machines in 2012, which it leased from SMTC for the 2010 elections.[118] This was pursuant to the lease with an option-to-purchase clause in the amended Contract for the Provision of an Automated Election System for the May 10, 2010 Synchronized National and Local Elections (2009 Automated Election System Contract).[119]

In *Pabillo, et al. v. Commission on Elections*,[120] the 2009 Automated Election System Contract states that SMTC would make available parts, labor, and technical support and maintenance of the PCOS machines to the COMELEC for the next 10 years (10-year warranty), if the latter decides to exercise its option to purchase the PCOS machines.[121]

In contrast, the Terms of Reference of the OMR Project do not speak of the leased and purchased 2010 PCOS machines, but of an OMR+ with new and different specifications, for use

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[116] *Id*. at 33.

[117] 687 Phil. 617 (2012) [Per *J*. Peralta, *En Banc*].

[118] *Id*. at 663-664.

[119] *Id*. at 665.

[120] G.R. No. 216098, April 21, 2015 <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2015/april2015/216098.pdf> [Per *J*. Perlas-Bernabe, *En Banc*].

[121] *Id*. at 31.

specifically in the 2016 elections. The 2009 Automated Election System Contract cannot be unduly stretched to contemplate the OMR Project.

SMTC's authority to bid for the 2016 elections was determined on December 4, 2015, the date of submission of its legal documents. Section 25 of Republic Act No. 9184 provides that bid documents "submitted after the deadline shall not be accepted." Neither may the bid documents be modified after the deadline for submission of bids.[122]

The party that sleeps on its rights necessarily suffers the consequences of its own inaction. SMTC, the company that won the bidding for the automation of the 2010 elections, sought to amend its primary corporate purpose only *two weeks after* the Invitation to Bid for the 2016 elections had been released.[123] Being slow to act, SMTC has no one to blame but itself for submitting its amended Articles of Incorporation *six days after deadline*. A seasoned business enterprise such as SMTC is expected to exercise prudence in conducting its corporate affairs.

A corporation cannot amend its Articles of Incorporation without the state's consent. Thus, the effects of the amendment do not retroact to December 4, 2014.

During post-qualification, the BAC validated and ascertained whether the documents Smartmatic Joint Venture submitted on December 4, 2014 complied with the required bidding documents. On May 5, 2015, the BAC answered negatively, thus, disqualifying Smartmatic Joint Venture. Ten days after, however, the BAC reversed itself without adequate explanations. Pursuant to the Implementing Rules and Regulations of Republic Act No. 9184, the COMELEC En Banc should have exercised its

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[122] *Rollo*, p. 242, COMELEC Bids and Award Committee's Philippine Bidding Documents for the Two-Stage Competitive Bidding for the Lease of Election Management System (EMS) and Precinct-Based Optical Mark Reader (OMR) or Optical Scan (OP-SCAN) System.

[123] Sixteen days from October 27, 2014, when COMELEC released the eligibility requirements, to November 12, 2014, when SMTC adopted the amendments for approval of the Securities and Exchange Commission.

all-encompassing right to review the qualifications of the partners in the Smartmatic Joint Venture, notwithstanding any previous declaration of eligibility.

SMTC has the biggest equity share in the Smartmatic Joint Venture. SMTC's ineligibility militates against the qualifications of the Smartmatic Joint Venture. The acts of a joint venture partner bind the joint venture itself.

V

Petitioners failed to present any evidence relating to the nationality of the owners of the corporations. The only proof they showed was the financial report[124] of Smartmatic Limited, which is not a party to this case. Only SMTC and Smartmatic International Holding B.V. are partners in the Smartmatic Joint Venture. Respondents, on the other hand, presented SMTC's General Information Sheet,[125] showing that Smartmatic Joint Venture is Filipino-owned, not foreign-owned. In any case, the law allows the COMELEC to procure from foreign sources. Thus:

> SECTION 12. *Procurement of Equipment and Materials*. — To achieve the purpose of this Act, the Commission is authorized to procure, in accordance with existing laws, by purchase, lease, rent or other forms of acquisition, supplies, equipment, materials, software, facilities, and other services, from *local or foreign sources* free from taxes and import duties, subject to accounting and auditing rules and regulations. With respect to the May 10, 2010 elections and succeeding electoral exercises, the system procured must have demonstrated capability and been successfully used in a prior electoral exercise here or abroad.[126] (Emphasis supplied)

ACCORDINGLY, for the reasons stated, I vote to **DISMISS** this Petition.

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[124] *Rollo*, pp. 79-133.

[125] *Id*. at 1023.

[126] Rep. Act No. 8436 (1997), Sec. 8, as amended by Rep. Act No. 9369, Sec. 10.

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except: (a) Where the order is a patent nullity, as where the court a quo has no jurisdiction; (b) Where the questions raised in the certiorari proceeding have been duly raised and passed upon by the lower court, or are the same as those raised and passed upon in the lower court; (c) Where there is an urgent necessity for the resolution of the question and any further delay would prejudice the interests of the Government or of the petitioner or the subject matter of the action is perishable; (d) Where, under the circumstances, a motion for reconsideration would be useless; (e) Where petitioner was deprived of due process and there is extreme urgency for relief; (f) Where, in a criminal case, relief from an order of arrest is urgent and the granting of such relief by the trial court is improbable; (g) Where the proceedings in the lower court are a nullity for lack of due process; (h) Where the proceedings were *ex parte* or in which the petitioner had no opportunity to object; and (i) Where the issue raised is one purely of law or where public interest is involved. (W.M. Manufacturing, Inc. *vs.* Dalag, G.R. No. 209418, Dec. 7, 2015) p. 353

—— An original or independent action based on grave abuse of discretion amounting to lack or excess of jurisdiction and will lie only if there is no appeal or any other plain, speedy, and adequate remedy in the ordinary course of law and it cannot be a substitute for a lost appeal. (Hadja Rawiya Suib *vs.* Emong Ebbah, G.R. No. 182375, Dec. 2, 2015) p. 1

—— In cases where the party availed of the wrong remedy, the Court, in the spirit of liberality and in the interest of substantial justice, has the right to treat the petition as a petition for review, if the petition for *certiorari* was filed within the reglementary period, when errors of judgment are averred, and when there is sufficient reason to justify the relaxation of the rules. (*Id.*)

—— In view of a meritorious case for the relaxation of the rules, the Court treats a petition filed under Rule 64 as

—— The second and fifth, and sixth grounds are applicable in the case where there is a "compelling significance and the transcending public importance" of the primordial issue underpinning petitions that assail election automation contracts: the success––and the far-reaching grim implications of the failure—of the nationwide automation project which justify the direct resort to the Supreme Court. (*Id.*)

Jurisdiction —— The court or tribunal must look at the material allegations in the complaint, the issues or questions that are the subject of the controversy, and the character of the relief prayed for in order to determine whether the nature and subject matter of the complaint is within its jurisdiction. (Heirs of Simeon Latayan *vs.* Peing Tan, G.R. No. 201652, Dec. 2, 2015) p. 117

DAMAGES

Actual damages —— A claimant is entitled to actual damages when the damage he sustained is the natural and probable consequences of the negligent act and he adequately proved the amount of such damage. (Rosit *vs.* Davao Doctors Hospital, G.R. No. 210445, Dec. 7, 2015) p. 393

Attorney's fees —— May be awarded only when the employee is illegally dismissed in bad faith and is compelled to litigate or incur expenses to protect his rights by reason of the unjustified acts of his employer, but there must always be a factual basis for the award thereof. (Solidbank Corp. *vs.* CA, G.R. No. 166581, Dec. 7, 2015) p. 211

—— The award of attorney's fees to the winning party lies within the discretion of the court, taking into account the circumstances of each case. (Star Electric Corp. *vs.* R & G Construction Dev't. and Trading, Inc., G.R. No. 212058, Dec. 7, 2015) p. 410

Exemplary damages —— Conditions when exemplary damages may be awarded: First, they may be imposed by way of example or correction only in addition, among others, to compensatory damages, and cannot be recovered as a

—— In order to give life to the rule on double jeopardy, our rules on criminal proceedings require that a judgment of acquittal, whether ordered by the trial or the appellate court, is final, unappealable, and immediately executory upon its promulgation. (*Id.*)

ELECTIONS

Automated Elections Law (R.A. No. 8436) vis-a-vis Government Procurement Act (R.A. No. 9184) —— Smartmatic-Tim Corporation (SMTC) still has the authority to conduct business even after the conduct of the 2010 National and Local Elections. (Querubin *vs.* COMELEC En Banc, G.R. No. 218787, Dec. 8, 2015) p. 766

—— The issue of whether or not SMTC's participation in the bidding process is an authorized act is mooted by the subsequent approval of the amendment to SMTC's Articles of Incorporation. (*Id.*)

—— The submission of the Articles of Incorporation (AOI) of the bidder is not a pre-qualification or post qualification requirement for procurement of election paraphernalia to be used in the 2016 National and Local Elections. (*Id.*)

ELECTRIC POWER INDUSTRY REFORM ACT OF 2001 (EPIRA LAW) (R.A. NO. 9136)

Application of —— Being engaged in the business of power generation does not make one a generation company under the EPIRA; neither is the filing of an application for Certificate of Compliance (COC) with the Energy Regulatory Commission (ERC) automatically entitle one to the rights of a generation company under the EPIRA. (Commissioner of Internal Revenue *vs.* Toledo Power Company, G.R. No. 196415, Dec. 2, 2015) p. 92

Generation facility distinguished from generation company –– A generation facility is defined under the EPIRA Rules and Regulations as "a facility for the production of electricity" while a generation company "refers to any person or entity authorized by the ERC to operate facilities used in the generation of electricity". (Commissioner of

MEDICAL MALPRACTICE

Doctrine of informed consent –– There are four essential elements a plaintiff must prove in a malpractice action based upon the doctrine of informed consent: (1) the physician had a duty to disclose material risks; (2) he failed to disclose or inadequately disclosed those risks; (3) as a direct and proximate result of the failure to disclose, the patient consented to treatment she otherwise would not have consented to; and (4) plaintiff was injured by the proposed treatment. (Rosit *vs.* Davao Doctors Hospital, G.R. No. 210445, Dec. 7, 2015) p. 393

Medical negligence ––A type of claim to redress a wrong committed by a medical professional, that has caused bodily harm to or the death of a patient. (Rosit *vs.* Davao Doctors Hospital, G.R. No. 210445, Dec. 7, 2015) p. 393

–– Resort to the doctrine of *res ipsa loquitur* as an exception to the requirement of an expert testimony in medical negligence cases may be availed of if the following essential requisites are satisfied: (1) the accident was of a kind that does not ordinarily occur unless someone is negligent; (2) the instrumentality or agency that caused the injury was under the exclusive control of the person charged; and (3) the injury suffered must not have been due to any voluntary action or contribution of the person injured. (*Id.*)

–– There are four elements involved in a medical negligence case, namely: duty, breach, injury, and proximate causation. (*Id.*)

–– To establish medical negligence, an expert testimony is generally required to define the standard of behavior by which the court may determine whether the physician has properly performed the requisite duty toward the patient. (*Id.*)

ORDERS

TAX REFUND/TAX CREDIT

Period for filing — A judicial claim is not prematurely filed when the mandatory and jurisdictional 120+30 day period was not observed as the taxpayer simply relied on BIR Ruling No. DA-489-03, which, at that time, was not yet struck down. (Pilipinas Total Gas, Inc. *vs.* Commissioner of Internal Revenue, G.R. No. 207112, Dec. 8, 2015) p. 473

— Considering that the judicial claim was denied due course and dismissed by the Court of Tax Appeals Division on the ground of premature and/or belated filing, no ruling on the issue of entitlement to the refund was made, thus, the case shall be remanded to the CTA Division for trial *de novo.* (*Id.*)

— Rulings are non-retroactive under Sec. 112 of the National Internal Revenue Code except in the following cases: (a) Where the taxpayer deliberately misstates or omits material facts from his return or any document required of him by the Bureau of Internal Revenue; (b) Where the facts subsequently gathered by the Bureau of Internal Revenue are materially different from the facts on which the ruling is based; or (c) Where the taxpayer acted in bad faith. (*Id.*)

— Taxpayers cannot simply be faulted for failing to submit the complete documents enumerated in Revenue Memorandum Circular No. 53-98, absent notice from a revenue officer or employee that other documents are required. (*Id.*)

— The 120-day period granted to the Commissioner of Internal Revenue to decide the administrative claim under Sec. 112 is primarily intended to benefit the taxpayer; to allow the former to determine the completeness of the documents submitted and, thus, dictate the running of the 120-day period, would undermine the objectives, as it would provide it the unbridled power to indefinitely delay the administrative claim. (*Id.*)

on these factual findings, are to be given the highest respect. (People *vs.* Mercado a.k.a. "Bong", G.R. No. 213832, Dec. 7, 2015) p. 446

WRIT OF KALIKASAN

Precautionary principle — By applying the *precautionary principle*, the court may construe a set of facts as warranting either judicial action or inaction, with the goal of preserving and protecting the environment. (International Service for the Acquisition of Agri-Biotech Applications, Inc. *vs.* Greenpeace Southeast Asia (Phils.), G.R. No. 209271, Dec. 8, 2015) p. 508

— Finds direct application in the evaluation of evidence in cases before the courts as it bridges the gap in cases where scientific certainty in factual findings cannot be achieved. (*Id.*)

— For purposes of evidence, the *precautionary principle* should be treated as a principle of last resort, where application of the regular Rules of Evidence would cause an inequitable result for the environmental plaintiff in settings in which the risk of harm is uncertain, the possibility of irreversible harm and the possibility of serious harm. (*Id.*)

— Origin and purpose. (*Id.*)

— The more prudent course is to immediately enjoin the *Bt talong* field trials and approval for its propagation or commercialization until the government offices shall have performed their respective mandates to implement the NBF. (*Id.*)

— There exists a preponderance of evidence that the release of genetically manipulated organisms (GMO) into the environment threatens to damage our ecosystems and not just the trial field sites and eventually the health of our people once the *bt* eggplants are consumed as food. (*Id.*)

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