

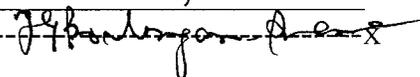
EN BANC

G.R. No. 207246: JOSE M. ROY III, *petitioner*, v. CHAIRPERSON TERESITA J. HERBOSA, et al., *respondents*; WILSON C. GAMBOA, JR., et al., *petitioners-in-intervention*; PHILIPPINE STOCK EXCHANGE and SHAREHOLDERS' ASSOCIATION OF THE PHILIPPINES, INC., *respondents-in-intervention*.

Promulgated:

November 22, 2016

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SEPARATE DISSENTING OPINION

CARPIO, J.:

On 28 June 2011, the Court rendered a ruling in *Gamboa v. Tevez*¹ (*Gamboa Decision*) by defining for the first time for over 75 years the term “capital” which appears not only in Section 11, Article XII of the 1987 Constitution, prescribing the minimum nationality requirement for public utilities, but likewise in several provisions thereof, such as Section 2, Article XII; Section 10, Article XII; Section 11, Article XII; Section 4(2), Article XIV, and Section 11(2), Article XVI.

In the *Gamboa Decision*, the Court held that “[a]ny citizen or juridical entity desiring to operate a public utility must x x x meet the minimum nationality requirement prescribed in Section 11, Article XII of the Constitution. Hence, for a corporation to be granted authority to operate a public utility, at least 60 percent of its “capital” must be owned by Filipino citizens.”² The 60 percent Filipino ownership of the “capital” assumes, or should result in, “**controlling interest**” in the corporation.

In the *Gamboa Decision*, the Court defined the term “capital” as referring to shares of stock that can vote in the election of directors. Voting rights translate to control. Otherwise stated, “the right to participate in the control or management of the corporation is exercised through the right to vote in the election of directors.”³

In the same decision, the Court pointed out that “[m]ere legal title is insufficient to meet the 60 percent Filipino-owned ‘capital’ required in the Constitution.”⁴ Full beneficial ownership of 60 percent of the total outstanding capital stock, coupled with 60 percent of the voting rights, is the minimum constitutional requirement for a corporation to operate a public utility, thus:

¹ 668 Phil. 1 (2011).

² Id. at 45.

³ Id. at 53.

⁴ Id. at 57.



x x x. Full beneficial ownership of 60 percent of the outstanding capital stock, coupled with 60 percent of the voting rights, is required. **The legal and beneficial ownership of 60 percent of the outstanding capital stock must rest in the hands of Filipino nationals in accordance with the constitutional mandate.** Otherwise, the corporation is “considered as non-Philippine national[s].”⁵ (Emphasis supplied)

Significantly, in the 9 October 2012 Resolution in *Gamboa (Gamboa Resolution)*⁶ denying the motion for reconsideration, the Court reiterated the twin requirement of full beneficial ownership of at least 60 percent of the outstanding capital stock and at least 60 percent of the voting rights. This is consistent with the Foreign Investments Act, as well as its Implementing Rules, thus:

This is consistent with Section 3 of the FIA which provides that where 100% of the capital stock is held by “a trustee of funds for pension or other employee retirement or separation benefits,” the trustee is a Philippine national if “at least sixty percent (60%) of the fund will accrue to the benefit of Philippine nationals.” Likewise, Section 1(b) of the Implementing Rules of the FIA provides that “for stocks to be deemed owned and held by Philippine citizens or Philippine nationals, mere legal title is not enough to meet the required Filipino equity. **Full beneficial ownership of the stocks, coupled with appropriate voting rights, is essential.**”⁷ (Emphasis in the original)

The Court further clarified, in no uncertain terms, that the 60 percent constitutional requirement of Filipino ownership applies uniformly and across the board to all classes of shares comprising the capital of a corporation. The 60 percent Filipino ownership requirement applies to each class of share, not to the total outstanding capital stock as a single class of share. The Court explained:

Since the constitutional requirement of at least 60 percent Filipino ownership applies not only to voting control of the corporation but also to the beneficial ownership of the corporation, it is therefore imperative that such requirement apply uniformly and across the board to all classes of shares, regardless of nomenclature and category, comprising the capital of a corporation. Under the Corporation Code, capital stock consists of all classes of shares issued to stockholders, that is, common shares as well as preferred shares, which may have different rights, privileges or restrictions as stated in the articles of incorporation.

x x x x

⁵ Id.

⁶ 696 Phil. 276 (2012).

⁷ Id. at 338-339.



x x x **In short, the 60-40 ownership requirement in favor of Filipino citizens must apply separately to each class of shares, whether common, preferred non-voting, preferred voting or any other class of shares.** This uniform application of the 60-40 ownership requirement in favor of Filipino citizens clearly breathes life to the constitutional command that the ownership and operation of public utilities shall be reserved exclusively to corporations at least 60 percent of whose capital is Filipino-owned. Applying uniformly the 60-40 ownership requirement in favor of Filipino citizens to each class of shares, regardless of differences in voting rights, privileges and restrictions, guarantees effective Filipino control of public utilities, as mandated by the Constitution.

Moreover, such uniform application to each class of shares insures that the “controlling interest” in public utilities always lies in the hands of Filipino citizens. x x x.

As we held in our 28 June 2011 Decision, to construe broadly the term “capital” as the total outstanding capital stock, treated as a *single* class regardless of the actual classification of shares, grossly contravenes the intent and letter of the Constitution that the “State shall develop a self-reliant and independent national economy *effectively controlled* by Filipinos.” We illustrated the glaring anomaly which would result in defining the term “capital” as the total outstanding capital stock of a corporation, treated as a *single* class of shares regardless of the actual classification of shares, to wit:

Let us assume that a corporation has 100 common shares owned by foreigners and 1,000,000 non-voting preferred shares owned by Filipinos, with both classes of share having a par value of one peso (₱1.00) per share. Under the broad definition of the term “capital,” such corporation would be considered compliant with the 40 percent constitutional limit on foreign equity of public utilities since the overwhelming majority, or more than 99.999 percent, of the total outstanding capital stock is Filipino owned. This is obviously absurd.

In the example given, only the foreigners holding the common shares have voting rights in the election of directors, even if they hold only 100 shares. The foreigners, with a minuscule equity of less than 0.001 percent, exercise control over the public utility. On the other hand, the Filipinos, holding more than 99.999 percent of the equity, cannot vote in the election of directors and hence, have no control over the public utility. This starkly circumvents the intent of the framers of the Constitution, as well as the clear language of the Constitution, to place the control of public utilities in the hands of Filipinos. x x x.⁸ (Emphasis supplied)



⁸ Id. at 339, 341, 345.

Clearly, in both *Gamboa Decision* and *Resolution*, the Court categorically declared that the 60 percent minimum Filipino ownership refers not only to voting rights but likewise to full beneficial ownership of the stocks. Likewise, the 60 percent Filipino ownership applies uniformly to each class of shares. Such interpretation ensures effective control by Filipinos of public utilities, as expressly mandated by the Constitution.

On 20 May 2013, the Securities and Exchange Commission (SEC), through respondent Chairperson Teresita J. Herbosa, issued Memorandum Circular No. 8, series of 2013, to implement the Court's directive in the *Gamboa Decision* and *Resolution*. Section 2 thereof pertinently provides:

Section 2. All covered corporations shall, at all times, observe the constitutional or statutory ownership requirement. For purposes of determining compliance therewith, **the required percentage of Filipino ownership shall be applied to BOTH (a) the total number of outstanding shares of stock entitled to vote in the election of directors; AND (b) the total number of outstanding shares of stock, whether or not entitled to vote in the election of directors.** (Emphasis supplied)

SEC Memorandum Circular No. 8 provides for two conditions in determining whether a corporation intending to operate or operating a public utility complies with the mandatory 60 percent Filipino ownership requirement. It expressly states that the 60 percent Filipino ownership requirement "shall be applied to BOTH (a) the total number of outstanding shares of stock entitled to vote in the election of directors; AND (b) the total number of outstanding shares of stock, whether or not entitled to vote in the election of directors." Section 2 of SEC Memorandum Circular No. 8 therefore mandates that the 60 percent Filipino ownership requirement shall be applied separately to **both** the total number of stocks with voting rights, and to the entire outstanding stock with **and** without voting rights. If the 60 percent Filipino ownership requirement is not met **either** by the outstanding voting stock **or** by the total outstanding voting and non-voting stock, then the Constitutional requirement is violated.

SEC Memorandum Circular No. 8 can be sustained as valid and fully compliant with the *Gamboa Decision* and *Resolution* only if (1) the stocks with voting rights and (2) the stocks without voting rights, which comprise the capital of a corporation operating a public utility, have **equal** par values. If the shares of stock have different par values, then applying SEC Memorandum Circular No. 8 would contravene the *Gamboa Decision* that the "**legal and beneficial ownership of 60 percent of the outstanding capital stock x x x rests in the hands of Filipino nationals in accordance with the constitutional mandate.**"

For example, assume that class "A" voting shares have a par value of ₱1.00, and class "B" non-voting preferred shares have a par value of ₱100.00. If 100 outstanding class "A" shares are all owned by Filipino



citizens, and 80 outstanding class “B” shares are owned by foreigners and 20 class “B” shares are owned by Filipino citizens, the 60-40 percent ownership requirement in favor of Filipino citizens for voting shares, as well as for the total voting and non-voting shares, will be complied with. If dividends are declared equivalent to the par value per share for all classes of shares, only 20.8 percent of the dividends will go to Filipino citizens while 79.2 percent of the dividends will go to foreigners, an absurdity or anomaly that the framers of the Constitution certainly did not intend. Such absurdity or anomaly will also be contrary to the *Gamboa Decision* that the **“legal and beneficial ownership of 60 percent of the outstanding capital stock x x x rests in the hands of Filipino nationals in accordance with the constitutional mandate.”**

Thus, SEC Memorandum Circular No. 8 is valid and constitutional provided that the par values of the shares with voting rights and the shares without voting rights are equal. If the par values vary, then the 60 percent Filipino ownership requirement must be applied to each class of shares in order that the **“legal and beneficial ownership of 60 percent of the outstanding capital stock x x x rests in the hands of Filipino nationals in accordance with the constitutional mandate,”** as expressly stated in the *Gamboa Decision* and as reiterated and amplified in the *Gamboa Resolution*.

Finally, Section 11, Article XII of the Constitution is clear: “No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philippines at least **sixty per centum of whose capital is owned by such citizens, x x x.**” The term “capital” in this constitutional provision does not refer to a specific class of share, as the Constitution does not distinguish between voting or non-voting, common or preferred shares of stock. Thus, the term “capital” refers to all shares of stock that are subscribed, which constitute the “capital” of a corporation.

Consequently, the 60 percent Filipino ownership requirement applies uniformly to all classes of shares that are subscribed. A simple application of the 60 percent Filipino ownership requirement is to apply the same to the total capital, taken together regardless of different classes of shares, as what SEC Memorandum Circular No. 8 does. However, if the shares of stock have different par values, such a simple application will result in an absurdity or anomaly as explained in the example discussed above. It is hornbook doctrine that if a provision of the Constitution or the law is susceptible of more than one meaning, one resulting in an absurdity or anomaly and the other in a sensible meaning, the meaning that results in an



absurdity or anomaly must be avoided,⁹ particularly an absurdity or anomaly that frustrates the intent of the Constitution or the law. Thus, to avoid such an absurdity or anomaly, the 60 percent Filipino ownership requirement should be applied to each class of shares if their par values are different.

ACCORDINGLY, I vote to **GRANT** the petition **IN PART**. SEC Memorandum Circular No. 8, series of 2013, is valid and constitutional if all the shares of stock have the same par values. However, if the shares of stock have different par values, the 60 percent Filipino ownership requirement must be applied to each class of shares.



ANTONIO T. CARPIO
Associate Justice

⁹ *Spouses Belo v. Philippine National Bank*, 405 Phil. 851 (2001); *Soriano v. Offshore Shipping and Manning Corp.*, 258 Phil. 309 (1989).