EN BANC

G.R. No. 232199 – NATIONAL TRANSMISSION CORPORATION, *petitioner,* ***versus*** **COMMISSION ON AUDIT AND COA CHAIRPERSON MICHAEL G. AGUINALDO,** *respondents.*

Promulgated:

December 1, 2020

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CONCURRING OPINION

CAGUIOA, *J.*:

I write to express and explain my concurrence with the *ponencia*. I agree that the Commission on Audit (COA) correctly disallowed the payment of excess separation benefits; consequently, the payee and any authorizing or certifying officer clearly shown to have acted in bad faith or gross negligence should be solidarily liable for the amount of the disallowance.

I understand the facts of the case as follows:

Pursuant to the privatization of the National Transmission Corporation's (NTC) transmission assets under the Electric Power Industry Reform Act (EPIRA), the NTC Board of Directors (BOD) — which is empowered to fix the compensation and benefits of its employees under Section 12(c) of the EPIRA — issued a resolution authorizing the payment of separation benefits following the formula under Section 63 of the same law. Section 63 provided the formula as follows: ((monthly salary x 1.5) x years of service).

Subsequently, the NTC President/CEO (Chief Executive Officer) issued a Circular modifying the calculation for years of service as a multiplier. The resulting formula under the Circular was thus: ((monthly salary x 1.5) x (years of service x 1.5)). This led to the overpayment of around ₱883,341.63 to the payee Sabdullah T. Macapodi (Macapodi) who was credited 61 instead of 42.9 years of service.

The resident auditor disallowed the payment of separation benefits to the extent of the excess based on the EPIRA formula. The payee and the verifying/certifying persons were held liable for the disallowed amount. This was affirmed by the COA Director.

The COA Commission Proper affirmed the Notice of Disallowance (ND) with modification. It ruled that the payee no longer needs to return the

amount, the verifying/certifying officers are liable and that a supplemental ND should be issued holding the BOD liable.

The *ponencia* partly granted the petition. It held that the COA correctly disallowed the payment because it violated Sections 63 and 12(c) of the EPIRA. In determining the liability of the persons identified in the ND, it held the payee responsible to return based on *Dubongco v. COA*[1] (*Dubongco*); absolved the verifying and certifying officers who merely relied upon the directives of their superiors, and the BOD who followed the EPIRA formula; and, it found the President/CEO who introduced the unlawful multiplier via a Circular as responsible either criminally or administratively, as the case may be.

This disposition applies *Madera v. COA*,[2] (*Madera*) and has my full concurrence. In *Madera*, the Court promulgated the Rules on Return, thus:

> *E. The Rules on Return*
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> In view of the foregoing discussion, the Court pronounces:
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> 1. If a Notice of Disallowance is set aside by the Court, no return shall be required from any of the persons held liable therein.
> 2. If a Notice of Disallowance is upheld, the rules on return are as follows:
>   a. Approving and certifying officers who acted in good faith, in regular performance of official functions, and with the diligence of a good father of the family are not civilly liable to return consistent with Section 38 of the Administrative Code of 1987.
>   b. Approving and certifying officers who are clearly shown to have acted in bad faith, malice, or gross negligence are, pursuant to Section 43 of the Administrative Code of 1987, solidarily liable to return only the net disallowed amount which, as discussed herein, excludes amounts excused under the following sections 2c and 2d.
>   c. Recipients — whether approving or certifying officers or mere passive recipients — are liable to return the disallowed amounts respectively received by them, unless they are able to show that the amounts they received were genuinely given in consideration of services rendered.
>   d. The Court may likewise excuse the return of recipients based on undue prejudice, social justice considerations, and other *bona fide* exceptions as it may determine on a case to case basis.[3]

These rules were based on the newer precedents including *Dubongco DPWH v. COA*,[4] *Chozas v. COA*,[5] and *Rotoras v. COA*,[6] (*Rotoras*) which

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1 G.R. No. 237813, March 5, 2019.
2 G.R. No. 244128. September 8, 2020.
3 Id. at 35-36.
4 G.R. No. 237987, March 19, 2019.
5 G.R. Nos. 226319 & 235031, October 8, 2019.
6 G.R. No. 211999, August 20, 2019.

ordered the return of the disallowed amounts by the payees — including passive recipients — on the basis of *solutio indebiti* and unjust enrichment. To reiterate, through these new precedents and most comprehensively in *Madera*, "the Court x x x has returned to the basic premise that the responsibility to return is a civil obligation to which fundamental civil law principles, such as unjust enrichment and *solutio indebiti* apply regardless of the good faith of passive recipients."[7]

Limiting the application of the principles of *solutio indebiti* and unjust enrichment to certain kinds of benefits (or under a specific set of facts as in *Dubongco* and *Rotoras*) or treating the good faith of a payee as justification to retain disallowed amounts have been abandoned with the promulgation of *Madera*, where the Court unanimously resolved to fix the liability of payees to return amounts unduly received except if the refund will result in unjust enrichment on the part of government.

Thus, I agree with the *ponencia* that the payee is liable to return the excess separation benefits he received — consistent with Rule 2(c) of *Madera.* Verily, I fully share the esteemed *ponente's* position that good faith is not an effective defense to excuse recipients from the obligation to refund the disallowed amount, and the payee's seemingly passive stance and lack of privity to the government instrumentality's internal policy-making and disbursement processes cannot justify holding onto or keeping an amount that was never his in the first place, as he shared during the deliberations.

This also fully squares with the concept of payee participation in *Madera*, thus:

> As may be gleaned from Section 16 of the RRSA, "the extent of their participation [or involvement] in the disallowed/charged transaction" is one of the determinants for liability. The Court has, in the past, taken this to mean that payees should be absolved from liability for lack of participation in the approval and disbursement process. However, under the MCSB and the RRSA, a "transaction" is defined as "[a]n event or condition the recognition of which gives rise to an entry in the accounting records."[8] To a certain extent, therefore, payees always do have an indirect "involvement" and "participation" in the transaction where the benefits they received are disallowed <u>because the accounting recognition of the release of funds and their mere receipt thereof results in the debit against government funds in the agency's account and a credit in the payees' favor</u>. Notably, when the COA includes payees as persons liable in an ND, the nature of their participation is stated as "received payment."
>
> Consistent with this, "the amount of damage or loss [suffered by] the government [in the disallowed transaction],"[9] another determinant of liability, is also indirectly attributable to payees <u>by their mere receipt of the disallowed funds</u>. This is because the loss incurred by the government

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7 *Madera v. COA*, supra note 2, at 33-34.

8 Sections 3.19 and 4.28 of the COA Circular No. 94-001 dated January 20, 1994 and the COA Circular No. 2009-006 dated September 15, 2009 (RRSA), respectively.

9 The RRSA, Section 16.1.

> stated in the ND as the disallowed amount corresponds to the amounts received by the payees. Thus, cogent with the application of civil law principles on unjust enrichment and *solutio indebiti*, the return by payees primarily rests upon this conception of a payee's undue receipt of amounts as recognized **within the government auditing framework**. In this regard, it bears repeating that the extent of liability of a payee who is a passive recipient is only with respect to the transaction where he participated or was involved in, *i.e.*, only to the extent of the amount that he unduly received. This limitation on the scope of a payee's participation as only corresponding to the amount he received therefore forecloses the possibility that a passive recipient may be held solidarily liable with approving/certifying officers beyond the amount that he individually received.[10]

It also bears noting that the amount of excess separation benefits received by the payee Macapodi can by no means be considered *de minimis* or a reasonable amount that the Court can excuse for any "exempting circumstance"[11] under Rule 2(d).

Proceeding to the question of the liability of officers, I submit that only officers who were clearly shown to have acted in bad faith or with gross negligence should be held solidarily liable for the disallowed amount, as provided in Rule 2(b) of *Madera*.

Accordingly, I vote to **PARTLY GRANT** the petition. The payee is liable to refund the properly disallowed excess separation benefits he received. Only officers clearly shown to have acted in bad faith or with gross negligence should be held solidarily liable therefor.

ALFREDO BENJAMIN S. CAGUIOA
Associate Justice

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EDGAR O. ARICHETA
Clerk of Court En Banc
Supreme Court

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[10] *Madera v. COA*, supra note 2, at 30-31.

[11] To borrow J. Inting's phrase in his Concurring Opinion, p. 11 in *Madera*.