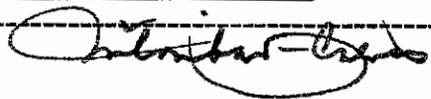


EN BANC

G.R. No. 185184 – METROPOLITAN WATERWORKS AND SEWERAGE SYTEM, represented by its Administrator, DIOSDADO JOSE M. ALLADO, Petitioner, v. PROVINCIAL GOVERNMENT OF BULACAN, represented by GOVERNOR JOSEFINA M. DELA CRUZ, Respondent.

Promulgated:

October 3, 2023

X----------X

CONCURRING OPINION

GESMUNDO, C.J.:

This is a Petition for Review on *Certiorari* filed by Metropolitan Waterworks and Sewerage System (MWSS) challenging the Decision of the Court of Appeals (CA) which affirmed, with modification, the Decision of Branch 82 of the Regional Trial Court of Malolos, Bulacan (RTC), upholding the position of the Province of Bulacan that it is entitled to receive its share in the proceeds derived by MWSS from the utilization and development of water in the Angat Dam pursuant to Article X, Section 7<sup>1</sup> of the Constitution, in relation to Sections 289, 291, and 292<sup>2</sup> of the Local Government Code.

The *ponencia* grants the Petition. Reversing the assailed rulings, the *ponencia* finds that the MWSS is not liable to pay the Province of Bulacan. It notes that the requisites for a local government unit (LGU) to

<sup>1</sup> The provision reads:

Sec. 7. Local governments shall be entitled to an equitable share in the proceeds of the utilization and development of the national wealth within their respective areas, in the manner provided by law, including sharing the same with the inhabitants by way of direct benefits.

<sup>2</sup> The provisions state:

Sec. 289. *Share in the Proceeds from the Development and Utilization of the National Wealth.*— Local government units shall have an equitable share in the proceeds derived from the utilization and development of the national wealth within their respective areas, including sharing the same with the inhabitants by way of direct benefits.

.....  
Sec. 291. *Share of the Local Governments from any Government Agency or -Owned or -Controlled Corporation.* — Local government units shall have a share based on the preceding fiscal year from the proceeds derived by any government agency or government-owned or -controlled corporation engaged in the utilization and development of the national wealth based on the following formula whichever will produce a higher share for the local government unit[.]

.....  
Sec. 292. *Allocation of Shares.* — The share in the preceding section shall be distributed in the following manner:

- (a) Where the natural resources are located in the province:  
(1) Province – Twenty percent (20%)[.]



be entitled to a share in the proceeds of the utilization and development of national wealth are as follows: (1) there must exist a national wealth forming part of a natural resource; (2) the national wealth must be located within the LGU's territory; and (3) the proceeds must have been generated from the utilization and development of national wealth. These requisites do not concur in this case.<sup>3</sup>

*First*, the *ponencia* holds that dam water is appropriated water. It ceased to be part of the State's natural resource from the moment that the water from the Angat River was appropriated and impounded into the Angat Dam. Therefore, it can no longer be subject to national wealth tax.<sup>4</sup> This is consistent with the Court's ruling in *Initiatives for Dialogue and Empowerment through Alternative Legal Services, Inc. (IDEALS) v. Power Sector Assets and Liabilities Management Corporation*<sup>5</sup> that water ceases to form part of a natural resource once removed therefrom. The *ponencia* also remarks that "it would be highly unreasonable if national wealth tax were to be imposed on dam water given that it is already appropriated water" and "the water from the Angat River is subjected to appropriate tax upon its extraction and prior to its impounding."<sup>6</sup>

*Second*, the *ponencia* holds that the MWSS is not engaged in the utilization and development of water. The MWSS does not derive proceeds by the mere operation of the dam. Based on its Charter, the MWSS was created to perform regulatory functions, specifically to operate and maintain waterworks systems to ensure uninterrupted and sufficient supply and distribution of potable water to the consuming public. While the MWSS converts water in Angat Dam to good use, it is solely for the purpose of performing its governmental functions.<sup>7</sup> Furthermore, the concession fees received by MWSS are not *gross receipts or proceeds* within the meaning of Section 291 of the Local Government Code, to which the LGU is entitled to a share.<sup>8</sup>

I concur.

As held in *IDEALS*, water sourced from Angat Dam does not constitute "national wealth" as contemplated in the Constitution. In that case, this Court cited several opinions of the Department of Justice,

<sup>3</sup> See *ponencia*, p. 13.

<sup>4</sup> See *id.* at 13–20.

<sup>5</sup> 696 Phil. 486 (2012) [Per J. Villarama, Jr., *En Banc*].

<sup>6</sup> *Ponencia*, p. 18.

<sup>7</sup> See *id.* at 22.

<sup>8</sup> *Id.* at 26.

which consistently indicate that water ceases to be a “natural resource” once it is collected and extracted from its source, to wit:

The DOJ has consistently regarded hydropower generation by foreign entities as not constitutionally proscribed based on the definition of water appropriation under the Water Code, thus:

Opinion No. 173, 1984

This refers to your request for opinion on the possibility of granting water permits to foreign corporations authorized to do business in the Philippines[.]

[. . .]

[W]hile the Water Code imposes a nationality requirement for the grant of water permits, the same refers to the privilege “to appropriate and use water.” This should be interpreted to mean the extraction of water from its natural source (Art. 9, P.D. No. 1067). **Once removed therefrom, they cease to be a part of the natural resources of the country and are the subject of ordinary commerce and may be acquired by foreigners** (Op. No. 55, series of 1939) . . . in case of a contract of lease, the water permit shall be secured by the lessor and included in the lease as an improvement. **The water so removed from the natural source may be appropriated/used by the foreign corporation leasing the property.**<sup>9</sup> (Emphasis in the original)

What is then clear in *IDEALS* ruling is that once the water is removed from its natural source, it ceases to be part of the natural resources of the country—therefore, it no longer forms part of the national wealth and becomes subject to ordinary commerce.

Moreover, I share the stance of Justice Alfredo Benjamin S. Caguioa, as incorporated in the *ponencia*, that the operations of MWSS do not involve the utilization and development of water resources.<sup>10</sup> It is settled that MWSS is a government-owned and -controlled corporation (GOCC) with its own Charter, Republic Act No. 6234.<sup>11</sup> Section 3 of Republic Act No. 6234 grants the MWSS the following powers and functions, among others:

- [a.] [C]onstruct, maintain, and operate dams, reservoirs, [and other facilities] for the purpose of supplying water to the inhabitants of its territory, for domestic and other purposes; and to purify,

<sup>9</sup> *Initiatives for Dialogue and Empowerment through Alternative Legal Services, Inc. (IDEALS) v. Power Sector Assets and Liabilities Management Corporation*, *supra* note 5, at 541–542.

<sup>10</sup> *See ponencia*, p. 20.

<sup>11</sup> Republic Act No. 6234 (1971), An Act Creating the Metropolitan Waterworks and Sewerage System and Dissolving the National Waterworks and Sewerage Authority, and for Other Purposes.

regulate and control the use, as well as prevent the wastage of water;

- [b.] [C]onstruct, maintain and operate sanitary sewerages[;]
- [c.] [F]ix periodically water rates and sewerage service fees[;]
- [d.] [C]onstruct, develop, maintain and operate such artesian wells and springs[;]
- [e.] [C]onstruct works across, over, through, and/or alongside any stream, water-course, canal, ditch, flume, street, avenue, highway or railway, whether public or private, as the location of said works may require[;]
- [f.] [A]pprove, regulate, and supervise the establishment, operation and maintenance of waterworks and deep wells within its jurisdiction operated for commercial, industrial and governmental purposes, and to fix just and equitable rates or fees that may be charged to customers thereof;
- [g.] [A]ssist in the establishment, operation and maintenance of waterworks and sewerage systems within its jurisdiction[; and]
- [h.] [A]pprove and regulate the establishment and construction of waterworks and sewerage systems in privately owned subdivisions within its jurisdiction[.]

MWSS was primarily created for the “proper operation and maintenance of waterworks system to insure an uninterrupted and adequate supply and distribution of potable water for domestic and other purposes and the proper maintenance of sewerage systems.” Its main function is to provide basic services to the public.<sup>12</sup> It is empowered to fix water rates and approve, regulate, and supervise the establishment, operation, and maintenance of waterworks and deep wells—which are currently done through their concessionaires. A significant portion of the functions of MWSS is, thus, similar to that of a regulator.

The enumeration of its powers and functions above clearly show that the MWSS is “vested with functions relating to public needs.”<sup>13</sup> Section 1 of Republic Act No. 6234 considers the operation and maintenance of waterworks and sewerage systems as *essential public services because they are vital to public health and safety*. Hence, the law declared it the policy of the State that the establishment, operation, and maintenance of waterworks systems be *supervised and controlled by*

<sup>12</sup> *Lopez v. Metropolitan Waterworks and Sewerage System*, 501 Phil. 115, 132 (2005) [Per J. Tinga, *En Banc*].

<sup>13</sup> GOCC Governance Act of 2011, sec. 3(o).

*the State.*<sup>14</sup> Notably, the Water Code acknowledged the increasing necessity for the government to intervene in improving the management of water resources.<sup>15</sup> These provisions are consistent with the State's constitutional mandate to promote the right to health of the people and to instill health consciousness among them.<sup>16</sup>

There is no question that the functions of MWSS are imbued with public interest and are geared towards public welfare. In the performance of its mandate, MWSS is not engaged in the utilization and development of national wealth. To my mind, these terms, as used in the pertinent provisions of the Constitution and the Local Government Code contemplate some kind of commercial endeavor that generates income or profit. This is not the thrust of the existence of MWSS, nor is it involved in such activities.

During the deliberations in this case, a position was raised that MWSS is responsible for harvesting, gathering, channeling, and impounding waters from their natural sources. Thus, the extraction of water from its natural source constitutes an act of utilization of a natural resource and national wealth as contemplated under Article X, Section 7 of the Constitution and Sections 289, 290, and 291 of the Local Government Code.

I respectfully disagree.

In the case of *Republic v. Provincial Government of Palawan*,<sup>17</sup> therein respondent Provincial Government of Palawan sought to claim its share in the proceeds of the Camago-Malampaya natural gas project on the basis of Article X, Section 7 of the Constitution. To resolve the issue, this Court examined the rationale behind Article X, Section 7—the same provision which the Provincial Government of Bulacan (Province of Bulacan), respondent in the present case, bases its claim:

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<sup>14</sup> Republic Act No. 6234 (1971), sec. 1 provides:

Sec. 1. *Declaration of Policy.* The proper operation and maintenance of waterworks system to insure an uninterrupted and adequate supply and distribution of potable water for domestic and other purposes and the proper operation and maintenance of sewerage systems are essential public services because they are vital to public health and safety. It is therefore declared a policy of the state that the establishment, operation and maintenance of such systems must be supervised and controlled by the state.

<sup>15</sup> The Water Code of the Philippines (1976), 4<sup>th</sup> Whereas Clause.

<sup>16</sup> CONST., art. II, sec. 15.

<sup>17</sup> 844 Phil. 453 (2018) [Per J. Tijam, *En Banc*].

MR. NATIVIDAD.

The history of local governments shows that the usual weaknesses of local governments are: 1) fiscal inability to support itself; 2) lack of sufficient authority to carry out its duties; and 3) lack of authority to appoint key officials.

Under this Article, are these traditional weaknesses of local governments addressed to [sic]?

MR. NOLLEDO.

Yes. The first question is on fiscal inability to support itself. It will be noticed that we widened the taxing powers of local governments. I explained that exhaustively yesterday unless the Gentleman wants me to explain again.

MR. NATIVIDAD.

No, that is all right with me.

MR. NOLLEDO.

There is a right of retention of local truces by local governments and according to the Natividad, Ople, Maambong, de los Reyes amendment, *local government units shall share in the proceeds of the exploitation of the national wealth within the area or region, etc[.]*

[...]

MR. OPLE.

In the hinterland regions of the Philippines, most municipalities receive an annual income of only about P200,000 so that after paying the salaries of local officials and employees, nothing is left to fund any local development project. This is a prescription for a self-perpetuating stagnation and backwardness, and numbing community frustrations, as well as a chronic disillusionment with the central government. The thrust towards local autonomy in this entire Article on Local Governments may suffer the fate of earlier heroic efforts of decentralization which, without innovative features for local income generation, remained a pious hope and a source of discontent. To prevent this, this amendment which Commissioner Davide and I jointly propose will open up a whole new source of local financial self-reliance by establishing a constitutional principle of local governments, and their populations, sharing in the proceeds of national wealth in their areas of jurisdiction. *The sharing with the national government can be in the form of shares from revenues, fees and charges levied on the exploitation or development and utilization of natural resources such as mines, hydro-electric and geothermal facilities, timber, including rattan, fisheries, and processing industries based on indigenous raw materials.*

But the sharing, Madam President, can also take the form of direct benefits to the population in terms of price advantages to the people where, say, cheaper electric power is sourced from a local hydroelectric or geothermal facility. For example, in the provinces reached by the power from the Maria Cristina hydroelectric facility in Mindanao, the direct benefits to the population cited in this section can take the form of lower prices of electricity. The same benefit can be extended to the people of Albay, for example, where volcanic steam in Tiwi provides 55 megawatts of cheap power to the Luzon grid.

The existing policy of slapping uniform fuel adjustment taxes to equalize rates throughout the country in the name of price standardization will have to yield to a more rational pricing policy that recognizes the entitlement of local communities to the enjoyment of their own comparative advantage based on resources that God has given them. And so, Madam President, I ask that the Committee consider this proposed amendment.<sup>18</sup> (Emphasis supplied)

A reading of the deliberations of the Constitution quoted above reveals that the conjunctive term “utilization and development” was intended to mean more than how it is commonly used and understood. The framers repeatedly used the term “exploit” in explaining the rationale behind Article X, Section 7 of the Constitution. The term “exploit” or “exploitation” is generally defined as “to take advantage of” or to “make use of meanly or unjustly for one’s own advantage or profit.”<sup>19</sup>

Evidently, it is necessary that raw water must be, to some extent, exploited by MWSS or used by MWSS to its advantage in order to fall within the purview of Article X, Section 7 of the Constitution, and consequently, Articles 289, 291, and 292 of the Local Government Code. However, MWSS does not exploit natural resources for its advantage. Rather, it delivers essential services that are so vital to public health and safety that it is required by law to be supervised and controlled by the State itself.<sup>20</sup> Justice Caguioa aptly pointed out that the provision of essential public services does not constitute utilization and development of national wealth.<sup>21</sup> It follows that the Province of Bulacan is not entitled to any proceeds from the activities of MWSS. To rule otherwise would be *akin* to charging or imposing a tax<sup>22</sup> on a government instrumentality for

<sup>18</sup> *Republic v. Provincial Government of Palawan*, *supra* note 17, at 511–512.

<sup>19</sup> Merriam-Webster Dictionary, “exploiting,” available at <https://www.merriam-webster.com/dictionary/exploiting> (last accessed on September 18, 2023).

<sup>20</sup> Republic Act No. 6234 (1971), sec. 1.

<sup>21</sup> See J. Caguioa, Concurring Opinion, p. 27.

<sup>22</sup> LOCAL GOVERNMENT CODE, sec. 234(c) exempts from real property tax all machineries and equipment that are actually, directly and exclusively used by local water districts and government-owned or -controlled corporations engaged in the supply and distribution of water and/or generation and transmission of electric power.

discharging public service in faithful compliance of its statutory mandate.

It is likewise my humble opinion that granting the Province of Bulacan a share in the proceeds of the utilization and development of water located within its territorial boundaries would inevitably diminish consumer welfare, as it will necessarily affect the concession fees received by MWSS, and by association, lead to the increase of the rates charged on consumers.

A perusal of the provisions of the concessionaire agreements of MWSS is necessary to fully comprehend the implications of the grant of proceeds from the utilization and development of the national wealth to the LGUs. The original Concession Agreement<sup>23</sup> of MWSS with Manila Water Company, Inc. (Manila Water) for the East Service Zone reveals that it has completely “contracted” out services to Manila Water (as its concessionaire) to provide uninterrupted and adequate supply and distribution of potable water in the designated service areas. Article 2.1 of the Concession Agreement provides:

#### 2.1 Grant of Concession

On the terms and subject to the conditions set forth herein, MWSS hereby grants to the Concessionaire, as contractor to perform certain functions and as agent for the exercise of certain rights and powers under the Charter, the sole right to manage, operate, repair, decommission and refurbish the Facilities in the Service Area, *including the right to bill and collect for water and sewerage services supplied in the Service Area* (the “Concession”). (Emphasis supplied)

Meanwhile, the Revised Concession Agreement<sup>24</sup> explicitly outlines the scope of the rights and obligations granted to Manila Water as a concessionaire:

##### 2.1.1 Scope of Grant

The MWSS, subject to its to [sic] authority under its Charter, hereby assigns to the Concessionaire, the following rights and obligations solely in relation to the Service Area:

<sup>23</sup> See the original Concession Agreement (1997) available at [https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/ManilaWater\\_ConcessionAgreement\\_EN.pdf](https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/ManilaWater_ConcessionAgreement_EN.pdf) (last accessed on September 18, 2023).

<sup>24</sup> The Revised Concession Agreement available at <https://www.manilawater.com/storage/files/9/manila-water-enterprise/Shareholder%20Information/2021-03-31%20-%20MWCI-MSS%20Revised%20Concession%20Agreement.pdf> (last accessed on September 18, 2023).

- (a) finance, design and construct the Facilities, except as otherwise provided in this Agreement;
- (b) undertake the operation and maintenance of the Facilities in the Service Area;
- (c) treat Raw Water and wastewater in the Service Area;
- (d) provide and manage the services to the Customers;
- (e) *bill and collect payment from the Customers for the services;*
- (f) source Raw Water from catchment areas, watersheds, springs, wells and reservoirs in the Service Area, subject to the applicable Authorizations from the relevant Government Authorities; and
- (g) provide connections to public sewer and septic and [sic] sanitation cleaning as sewerage services. (Emphasis supplied)

A concessionaire agreement is mutually beneficial to both parties involved. In the case of MWSS, it receives payment in the form of annual concession fees from its concessionaire, while the concessionaire is granted the rights to the operation and management of the facilities, and the right to bill and collect payment from the consumers.<sup>25</sup>

The annual concession fee under both the original and the Revised Concession Agreements consists of two main components: maturing payments on the existing loans of MWSS, and an annual budget to be determined on the first business day of every year.<sup>26</sup> *This concession fee is likewise treated as an expenditure of the concession.* Meanwhile, the standard rates that the concessionaire may bill and collect from the customers are generally defined in the Concession Agreement itself. However, these standard rates may be subject to several adjustments.

Adjustments may be made yearly based on the concessionaire's operational performance (i.e., when the agreed service obligation standards and targets have been met) and its historical cash flows.<sup>27</sup> An Extraordinary Price Adjustment may be made where the concessionaire has incurred significant additional costs as a result of an event of *force majeure* which are not covered by insurance.<sup>28</sup> The Concession Agreement likewise provides a policy for rate rebasing determination,

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<sup>25</sup> The [Original] Concession Agreement, arts. 2.1 and 6.4; The Revised Concession Agreement, arts. 2.1, 2.1.1, and 6.4.

<sup>26</sup> The [Original] Concession Agreement, art. 6.4; The Revised Concession Agreement, art. 6.4.

<sup>27</sup> The Revised Concession Agreement, art. 9.2.

<sup>28</sup> *Id.* at art. 9.3.

which permits the concessionaire to recover the expenditures it incurred over the term of the concession, and to earn a reasonable rate of return.<sup>29</sup> It is clear then that the rates charged upon the consuming public are somewhat dependent on the cash flows of the concession and its expenditures.

Primarily a regulator, the primary source of income of MWSS comes in the form of concession fees from its various concessionaires, and the disposition of its income is limited to the payment of its contractual and statutory obligations, expansion and development, and enhancement of its efficient operation.<sup>30</sup> As correctly pointed out by Justice Caguioa, to suddenly ask MWSS to earmark portions of its concession fees as payment to several LGUs will necessitate an increase of the annual concession fees, insofar as the variable annual budget is concerned. This creates a ripple effect. Higher concession fees equate to higher expenditures, which under the Concession Agreement may justify increase in the standard rates chargeable to the consumers.<sup>31</sup>

The Court must exercise utmost caution in deciding this case, as a decision to uphold the national wealth tax against MWSS will undoubtedly encourage similarly-situated LGUs to claim their alleged share in the proceeds of the utilization and development of waters within their territory. It follows that the reallocation of portions of the concession fees of MWSS for payment to several LGUs will increase the chargeable water rates, to the ultimate detriment of the consumers. *Thus, while the Court acknowledges the LGU's constitutionally-granted fiscal autonomy, its rights must be placed in perspective and not taken in isolation of our existing legal regimes. In any event, the promotion of public welfare remains an overriding consideration.*

In gist, I have made the following points in the above discussion:

1. As provided in *IDEALS*, water ceases to be a "natural resource" once it is collected and extracted from its source.
2. Operations of the MWSS do not involve the utilization and development of water resources.

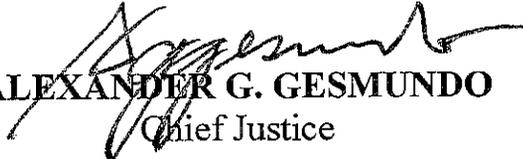
<sup>29</sup> *Id.* at art. 9.4.

<sup>30</sup> Republic Act No. 6234, sec. 13.

<sup>31</sup> J. Caguioa, Concurring Opinion, p. 11.

- a. Deliberations of the 1987 Constitution show that the framers repeatedly used the term “exploit” in explaining the rationale behind Article X, Section 7 of the Constitution. The term “exploit” or “exploitation” is generally defined as “to take advantage of” or to “make use of meanly or unjustly for one’s own advantage or profit.”
  - b. The MWSS is an instrumentality of the State that performs essential public services. In the performance of its duties, it cannot be considered as utilizing or exploiting the nation’s wealth for its own advantage or profit.
3. Affirming the national wealth tax will create a twin ripple effect: (a) it will influence and encourage similarly-situated LGUs to claim their alleged share in the proceeds of the utilization and development of waters in their territory as part of the nation’s wealth, which, in turn, (b) will lead to the increase of the concession fees and water rates, to the ultimate detriment of the consuming public.

**ACCORDINGLY**, I vote to **GRANT** the Petition.

  
**ALEXANDER G. GESMUNDO**  
Chief Justice