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G.R. No. 207246 ***(Jose M. Roy III, petitioner, vs. Chairperson Teresita Herbosa, The Securities and Exchange Commission, Philippine Long Distance Telephone Company, and the Philippine Stock Exchange, respondents; Wilson C. Gamboa, Jr., Daniel Cartagena, John Warren P. Gabinete, Antonio V. Pesina, Jr., Modesto Martin Y. Manon III and Gerardo C. Erebaren, petitioners-in-intervention; Philippine Stock Exchange and Shareholders' Association of the Philippines, Inc., respondents-in-intervention)***

Promulgated:

April 18, 2017

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CONCURRING OPINION

VELASCO, JR., *J.*:

I concur with the denial of the motion for reconsideration, which still fails to demonstrate any grave abuse of discretion committed by respondent Securities and Exchange Commission (SEC) when it issued Memorandum Circular (MC) No. 8.

For purposes of emphasis, I restate part of my *Concurring Opinion* to the main Decision:

> The petition is anchored on the contention that the SEC committed grave abuse of discretion in issuing MC No. 8. By grave abuse of discretion, the petitioners must prove that the Commission's act was tainted with the quality of whim and caprice.[1] Abuse of discretion is not enough. It must be shown that the Commission exercised its power in an arbitrary or despotic manner because of passion or personal hostility that is so patent and gross as to amount to an evasion of positive duty or to a virtual refusal to perform a duty enjoined or to act at all in contemplation of law.[2]
>
> With this standard in mind, the petitioner and petitioners-in-intervention failed to demonstrate that the SEC's issuance of MC No. 8 was attended with grave abuse of discretion. On the contrary, the assailed circular sufficiently applied the Court's definitive ruling in *Gamboa.*

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[1] *OKS Designtech, Inc. v. Caccam*, G.R. No. 211263 August 5, 2015.

[2] *Gold City Integrated Services, Inc. v. Intermediate Appellate Court*, G.R. Nos. 71771-73, March 31, 1989; citing *Arguelles v. Young*, No. L-59880, September 11, 1987, 153 SCRA 690; *Republic v. Heirs of Spouses Molinyawe*, G.R. No. 217120, April 18, 2016; *Olaño v. Lim Eng Co*, G.R. No. 195835, March 14, 2016; *City of Iloilo v. Honrado*, G.R. No. 160399, December 9, 2015; *OKS Designtech, Inc. v. Caccam*, G.R. No. 211263, August 5, 2015.

To recall, *Gamboa* construed the word "capital" and the nationality requirement in Section 11, Article XII of the Constitution, which states:

> SECTION 11. **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**, nor shall such franchise, certificate, or authorization be exclusive in character or for a longer period than fifty years. Neither shall any such franchise or right be granted except under the condition that it shall be subject to amendment, alteration, or repeal by the Congress when the common good so requires. The State shall encourage equity participation in public utilities by the general public. **The participation of foreign investors in the governing body of any public utility enterprise shall be limited to their proportionate share in its capital**, and all the executive and managing officers of such corporation or association must be citizens of the Philippines.[3]

The Court explained in the June 28, 2011 Decision in *Gamboa* that **the term "capital" in Section 11, Article XII refers "only to shares of stock entitled to vote in the election of directors."** The rationale provided by the majority was that this interpretation ensures that **control** of the Board of Directors stays in the hands of Filipinos, since foreigners can only own a maximum of 40% of said shares and, accordingly, can only elect the equivalent percentage of directors. As a necessary corollary, Filipino stockholders can always elect 60% of the Board of Directors which, to the majority of the Court, translates to control over the corporation. The June 28, 2011 Decision, thus, read:

> Considering that common shares have voting rights which translate to control, as opposed to preferred shares which usually have no voting rights, the term 'capital' in Section 11, Article XII of the Constitution refers only to common shares. However, if the preferred shares also have the right to vote in the election of directors, then the term "capital" shall include such preferred shares because **the right to participate in the control or management of the corporation is exercised through the right to vote in the election of directors. In short, the term "capital" in Section 11, Article XII of the Constitution refers only to shares of stock that can vote in the election of directors.**
>
> This interpretation is consistent with the intent of the framers of the Constitution to place in the hands of Filipino citizens the control and management of public utilities. As revealed in the deliberations of the Constitutional Commission, "capital" refers to the voting stock or **controlling interest** of a corporation xxx

The dispositive portion of the June 28, 2011 Decision in *Gamboa* clearly spelled out the doctrinal declaration of the Court on the meaning of "capital" in Section 11, Article XII of the Constitution, *viz.*:

> WHEREFORE, we PARTLY GRANT the petition and rule that the term **"capital"** in Section 11, Article XII of the 1987 Constitution **refers only to shares of stock entitled to vote in the election of directors**, and thus in the present case only to common shares, and not to the total outstanding capital stock (common and non-voting preferred shares). Respondent Chairperson of the Securities and Exchange Commission is DIRECTED to apply this definition of the term "capital" in determining the extent of allowable foreign ownership in respondent Philippine Long Distance Telephone Company, and if there

[3] Emphasis supplied.

> is a violation of Section 11, Article XII of the Constitution, to impose the appropriate sanctions under the law.[4]

The motions for reconsideration of the June 28, 2011 Decision filed by the movants in *Gamboa* argued against the application of the term "capital" to the voting shares alone and in favor of applying the term to the total outstanding capital stock (combined total of voting and non-voting shares). Notably, none of them contended or moved for the application of the capital or the 60-40 requirement to "each and every class of shares" of a public utility, as it was **never an issue in the case**.

In resolving the motions for reconsideration in *Gamboa*, it is relevant to stress that the majority **did not modify** the June 28, 2011 Decision. The *fallo* of the October 9, 2012 Resolution simply stated--

> WHEREFORE, we DENY the motions for reconsideration WITH FINALITY. No further pleadings shall be entertained.

Clearly, the Court had no intention, express or otherwise, to amend the construction of the term "capital" in the June 28, 2011 Decision in *Gamboa*, much less in the manner proposed by petitioner Roy. Hence, no grave abuse of discretion can be attributed to the SEC in applying the term "capital" to the "voting shares" of a corporation.

The portion quoted by the petitioners is nothing more than an obiter dictum that has never been discussed as an issue during the deliberations in Gamboa. As such, it is not a binding pronouncement of the Court[5] that can be used as basis to declare the SEC's circular as unconstitutional.

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Thus, the zealous watchfulness demonstrated by the SEC in imposing another tier of protection for Filipino stockholders cannot, therefore, be penalized on a misreading of the October 9, 2012 Resolution in Gamboa, which neither added nor subtracted anything from the June 28, 2011 Decision defining capital as "shares of stock entitled to vote in the election of directors."

It must also be stressed that the Decision in *Gamboa* was issued pursuant to this Court's symbolic function. It was meant as a definitive ruling for the education of the bench, bar, and the public in general on the meaning of the word "capital" in Section 11, Article XII of the Constitution, and not as a resolution exclusively applicable to a particular public utility. Accordingly, instead of resolving the charges against PLDT, the Court directed the SEC to "apply this definition of the term 'capital' in determining the extent of allowable foreign ownership in respondent [PLDT]."

Presently, the SEC clarified that it "has not yet issued a definitive ruling anent PLDT's compliance with the limitation on foreign ownership

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[4] Emphasis supplied.

[5] *Ocean East Agency, Corp. v. Lopez*, G.R. No. 194410, October 14, 2015.

imposed under the Constitution and relevant laws." It is, therefore, premature and presumptuous for this Court to adjudge as erroneous a ruling that is still to be rendered by the SEC.

Least of all, not being a trier of facts nor specially equipped to investigate the intricacies of corporate structures and the identities of capital market participants, this Court cannot declare a corporation as non-compliant with the nationality requirement by, without more, a mere cursory review of its General Information Sheets. With the drastic consequences of such a ruling, which includes the possible revocation of its franchise, all parties affected---the corporate public utility, its investors both in equity and debt, and all its other stakeholders--- deserve more than a passing treatment by this Court. The SEC, the government agency specifically tasked to review corporate matters, is better-suited to fairly rule, after a full-blown investigation, on the compliance by corporate public utilities with the nationality requirement.

Furthermore, in *Gamboa*, this Court construed "capital" as equivalent to the "**shares of stock entitled to vote in the election of directors**" and so, sustaining the petitioner's contention that it is through voting that control over a corporation is exercised, it ruled that 60% of the **voting shares** or the "**shares of stock entitled to vote in the election of directors**" in corporate public utilities are reserved for Filipinos. Thus, the June 28, 2011 *Gamboa* Decision emphatically stated, *viz.*:

> Indisputably, **one of the rights of a stockholder is the right to participate in the control or management of the corporation. This is exercised through his vote in the election of directors because it is the board of directors that controls or manages the corporation. In the absence of provisions in the articles of incorporation denying voting rights to preferred shares, preferred shares have the same voting rights as common shares.** However, preferred shareholders are often excluded from any control, that is, deprived of the right to vote in the election of directors and on other matters, on the theory that the preferred shareholders are merely investors in the corporation for income in the same manner as bondholders. In fact, under the Corporation Code only preferred or redeemable shares can be deprived of the right to vote. Common shares cannot be deprived of the right to vote in any corporate meeting, and any provision in the articles of incorporation restricting the right of common shareholders to vote is invalid.
>
> Considering that common shares have voting rights which translate to control, as opposed to preferred shares which usually have no voting rights, the term capital in Section 11, Article XII of the Constitution refers only to common shares. However, **if the preferred shares also have the right to vote in the election of directors, then the term capital shall include such preferred shares because the right to participate in the control or management of the corporation is exercised through the right to vote in the election of directors. In short, the term capital in**

Section 11, Article XII of the Constitution refers only to shares of stock that can vote in the election of directors.

Thus, the Court cannot now feign that the construction in *Gamboa* of the term "capital" is confined and limited only to "common shares," to the exclusion of voting preferred shares. Adopting this regrettably myopic view will certainly revise and alter the final decision and resolution in *Gamboa*.

For the foregoing, I vote to deny with finality the present Motion for Reconsideration.

PRESBITERO J. VELASCO, JR.
Associate Justice

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CLERK OF COURT, EN BANC
SUPREME COURT