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G.R. No. 213860 – Philippine Stock Exchange, Inc., Bankers Association of the Philippines, Philippine Association of Securities Brokers and Dealers, Inc., Fund Managers Association of the Philippines, Trust Officers Association of the Philippines and Marmon Holdings, Inc. *v.* Secretary of Finance, Commissioner of Internal Revenue and Chairperson of the Securities and Exchange Commission

Promulgated:

July 5, 2022

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LAZARO-JAVIER, *J.*:

CONCURRENCE and DISSENT

The pro-active approach of the Government in establishing a database of taxpayers with income from the securities market is commendable. The nobility of this endeavor cannot be questioned. Neither do I doubt petitioners' motivations in challenging the pertinent administrative rules. They raise important issues deserving of the Court's attention. Their debate has generated two important takeaways – on the requirements of notice, hearing, registration and publication of administrative rules, and the privacy interests of investors in the securities market.

I expound.

Notice, hearing, registration, and publication requirements for legislative rules

The erudite *ponencia* **characterizes** the assailed administrative issuances – Revenue Regulation No. 1-2014, Revenue Memorandum Circular No. 5-14 and the Securities and Exchange Commission Memorandum Circular No. 10-14 – as "**legislative issuances** in nature that change, if not

increase, the burden of those governed."[1] Thus, notice and hearing are required for their validity,[2] as required under the *Administrative Code of 1987*.

As concluded by the *ponencia*, the gauge for determining if a regulation requires prior notice and hearing is its substance or content.[3] Prior notice and hearing are required if the regulation substantially increases the burden of those governed, notwithstanding its nomenclature—despite the regulation being called or designated as interpretative.[4]

Using this **definition** as the **test** for determining *whether to require notice, hearing, registration, and publication of an administrative rule* would see the categorization thereof as a **spectrum** or **sliding scale**. At one end is the clear and categorical template of a **legislative** rule, while on the other is the clear and categorical template of an **interpretative** rule. In **between them** are ***shades of administrative rules*** – one rule could be **closer in the spectrum** to being either legislative or interpretative, *or* it could **share the characteristics** of both and therefore in some aspects could be a legislative rule though in others an interpretative rule. While these combinations could be varied, they are **not endless**. More important, the **spectrum** or **sliding scale** approach takes account of **nuances** in the characterization, or for that matter, characterizations of an administrative rule.

In *GMA Network Inc. v. Commission on Elections*,[5] the *Separate Concurring Opinion* of Associate Justice Arturo D. Brion bucked the pigeonholing of rules into the strict categories of interpretative and legislative rules.

True, the *ponencia* in *GMA Network* reverted to the legislative *versus* interpretative approach, but it seems to me that this reference was done **post-facto**, that is, **only after** the *ponencia* had **already decided to require** prior explanation, notice, and hearing to the rule change at issue. In other words, the **strict category approach** in the *GMA Network ponencia* was mentioned **only to solidify** the ruling *already requiring* these elements of due process.

It is also true that Justice Brion referred to the challenged rule in *GMA Network* as a **legislative** rule. **But two points** must be stressed –

(i) Justice Brion categorically defined **legislative rule** as **inclusive** of **interpretative** rules, that is, the **latter** being a *mere* **subset** of the former; and

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1 Decision, p. 20.
2 *Id.*
3 *Id.*
4 *Id.*
5 742 Phil. 174 (2014).

(ii) Justice Brion clearly identified **the circumstances** that **triggered** the **requirements** of prior registration, publication, notice and hearing.

GMA Network involved the validity of the **interpretative** rule of the Commission on Elections (COMELEC) regarding the airtime limitations for election campaign advertisements. Regardless of the administrative rule's typology as an **interpretative** rule, *GMA Network* required COMELEC **to provide** to the public an **ample explanation of its rationale prior to its adoption** as well as a **notice of this plan to adopt it**, and **to hear the public's comments pro and con**. *GMA Network* thus held:

> There is **something basically wrong with that manner of explaining changes** in administrative rules. For one, it does not really provide a good basis for change. For another, **those affected by such rules must be given a better explanation why the previous rules are no longer good enough**. As the Court has said in one case:
>
> While stability in the law, particularly in the business field, is desirable, there is no demand that the NTC slavishly follow precedent. However, we think it essential, for the sake of clarity and intellectual honesty, that **if an administrative agency decides inconsistently with previous action, that it explain[s] thoroughly why a different result is warranted, or if need be, why the previous standards should no longer apply or should be overturned. Such explanation is warranted in order to sufficiently establish a decision as having rational basis. Any inconsistent decision lacking thorough ratiocination in support may be struck down as being arbitrary.** And **any decision with absolutely nothing to support it is a nullity**.
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> What the COMELEC came up with does not measure up to that level of requirement and accountability which elevates administrative rules to the level of respectability and acceptability. Those governed by administrative regulations are **entitled to a reasonable and rational basis for any changes in those rules** by which they are supposed to live by, **especially if there is a radical departure** from the previous ones.
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> x x x x
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> While it is true that the COMELEC is an independent office and not a mere administrative agency under the Executive Department, **rules which apply to the latter must also be deemed to similarly apply to the former, not as a matter of administrative convenience but as a dictate of due process**. And this assumes greater significance considering the important and pivotal role that the COMELEC plays in the life of the nation. Thus, whatever might have been said in Commissioner of Internal Revenue v. Court of Appeals, **should also apply mutatis mutandis** to the COMELEC **when it comes to promulgating rules and regulations which adversely affect, or impose a heavy and substantial burden on**, the citizenry in a matter that implicates the very nature of government we have adopted. (Emphases supplied)

Justice Brion's *Separate Concurring Opinion* astutely observed, correcting in large measure the *ponencia's* understanding of the applicable precedents, that **regardless of whether an administrative rule imposes a heavy or substantial burden**, Book VII, Chapter 2, Sections 3, 4, and 9 of the *Administrative Code of 1987* **requires not only prior notice and hearing** but also filing or registration and publication:

> SECTION 3. Filing. – (1) **Every agency shall file** with the University of the Philippines Law Center three (3) certified copies of **every rule adopted** by it. Rules in force on the date of effectivity of this Code which are not filed within three (3) months from that date shall not thereafter be the basis of any sanction against any party or persons.
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> (2) The records officer of the agency, or his equivalent functionary, shall carry out the requirements of this section under pain of disciplinary action.
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> (3) A permanent register of all rules shall be kept by the issuing agency and shall be open to public inspection.
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> SECTION 4. Effectivity. – In addition to other rule-making requirements provided by law not inconsistent with this Book, **each rule** shall become effective fifteen (15) days from the date of filing as above provided unless a different date is fixed by law, or specified in the rule in cases of imminent danger to public health, safety and welfare, the existence of which must be expressed in a statement accompanying the rule. The agency shall take appropriate measures to make emergency rules known to persons who may be affected by them.
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> x x x x
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> SECTION 9. Public Participation. – (1) If not otherwise required by law, **an agency shall, as far as practicable, publish or circulate notices of proposed rules and afford interested parties the opportunity to submit their views prior to the adoption** of any rule.
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> (2) In the fixing of rates, no rule or final order shall be valid unless the proposed rates shall have been published in a newspaper of general circulation at least two (2) weeks before the first hearing thereon.
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> (3) In case of opposition, the rules on contested cases shall be observed. (Emphases supplied)

For purposes of these provisions, Book VII, Chapter 1, Section 2(2) defines a **rule** as being **inclusive** of **interpretative** rules:

> (2) **"Rule"** means any **agency statement of general applicability** that implements or **interprets** a law, **fixes and describes the procedures in, or practice requirements** of, an agency, including its regulations. The term includes memoranda or statements concerning the **internal administration or management** of an agency **not affecting the rights of, or procedure available to, the public**. (Emphasis supplied)

According to Justice Brion, Sections 3, 4, and 9 are triggered –

> x x x when an agency issues a **legislative** rule [which includes *interpretative* rules], the issue of **whether compliance** with the notice and hearing requirement was **'practicable'** under the circumstances might depend on the **extent of the burden** or the **adverse effect** that the **new legislative rule imposes on those who were not previously heard.** Effectively, this is the rule that assumes materiality in the case x x x (Emphasis supplied)

This case law embodies the principles of the **spectrum** or **sliding scale** approach I have mentioned above.

In place of the **strict category** approach, the **spectrum** or **sliding scale** approach **starts** with the proposition that every administrative rule that **affects the rights, privileges,** or **interests** of an individual would **presumptively attract** the **requirements** of notice, hearing through an opportunity to comment, registration, and publication.

With the **presumption in mind**, the reviewing court **must** then **review** the **circumstances of the rule-making power in question**, the **statutory provisions as context**, and the **nature of the matter that was decided**. Particularly, the **existence of a general duty** to meet the foregoing requirements will depend on the consideration of **three factors**:

1. The *nature of the rule* to be made by the administrative body, *i.e.*, *whether a purely legislative or interpretative rule or somewhere between them*;

2. The *relationship* existing between that administrative body and the individual or individuals affected, *i.e.*, *has there been ample representation of the latter in the discharge of the former's mandate, have these individuals impacted by the rule been historically marginalized or underrepresented*, among others; and

3. The *effect* of that rule on the individual's rights, *i.e.*, *were their legitimate expectations of the individuals that have been overturned by the rule, have the affected individual's rights, privileges or interests been further curtailed or marginalized, has the individual been oppressed to a greater degree*, among others.

If notice, hearing, and publication **are required**, the reviewing court **moves on** to the **next step** of **determining** the **precise content** of the required notice, hearing, and publication.

In other words, the reviewing court **must decide** if the **notice** requirement is **satisfied** by *informal modes of publication like social media notices*, *personal notification*, *notification by traditional publication on newspapers*, *posting of notices*, among others; if the **hearing** requirement **demands** a particular proceeding such as *a trial-type hearing*, *mere solicitation of proposals and counter-proposals and non-binding comments*, *a consultative meeting*, *a debate*; if the **publication** requirement is *mandatory*, and if yes, *the places and period of publication*, or if **publication** itself could be *conflated with the* **notice** requirement *thereby dispensing with the* **publication of administrative rule** in question.

Among the **factors** to be evaluated in arriving at the **content** of the **due process** requirements are:

1. The *nature of the administrative rule* being made and the process followed in making it;

2. In regards to both the statute and the rule, the *nature of the scheme* and the *terms* pursuant to which the rule-making body operates. Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the rule is determinative of the issue and further requests cannot be submitted;

3. The *importance of the rule* to the individual or individuals affected;

4. The *legitimate expectations* of the persons challenging the rule. If the claimant has legitimate expectations that a certain procedure will be followed, this procedure will be required;

5. The *choices of procedure* made by the rule-making body itself.

Ultimately, the **overarching standards** as to **whether to require the *due process* elements** (*i.e.*, whether notice, hearing, registration, and publication should be required) and **what** the **precise contents** of these requirements would be (*i.e.*, what type of notice, hearing, and publication would be required) are **fairness** and the **just exercise of power**. Both these **overarching standards** should **not** be diluted or obscured by the foregoing factors that are only intended to be helpful but not exhaustive.

This is the **more principled** and **holistic approach** to settle *whether an administrative rule should be subjected to the notice, hearing, registration, and publication requirements* as a **pre-requisite** of its validity and effectivity.

Applying the spectrum or sliding scale approach to the issuances in question.

Existence of the requirements. Guided by the above-mentioned three factors (the *nature of the rule* to be made by the administrative body, the *relationship* existing between that administrative body and the individual or individuals affected, and the *effect* of that rule on the individual's rights), while the assailed issuances interpret who and what should be reported as payees of the income on securities, since these issuances **changed a long-standing rule** and the issuances **have imposed penalties on non-compliance** with this rule change, the issuances are **closer to the legislative side** of the spectrum or sliding scale. It also cannot be denied that the securities market is a **highly-specialized** and **focused activity**.

While there may be **different types of investors**, **most** if not all of them would be **educated** and **have economic power**. The market, nonetheless, is controlled by intermediaries – brokers and a clearing house system – which **ordinary** investors have **no capacity to change** or **influence**.

The rule change also has profound and adverse consequences.

First, the impacted persons are **not really** the **powerful** intermediaries **but** the **relatively powerless investors**. Second, the **tax consequences** of additional incomes to an employee-investor, for example, are to increase the latter's tax bracket and tax payable apart from the withholding tax that is already imposed upon the employee-investor. Third, the **anonymity** afforded by the **prior rule** is removed by the rule change – this is a **distressing outcome** to those who **legitimately expected** not to be named as payees of the dividend income. The result is a breach to their **zone of privacy** that the prior rule gave to each of them.

Had the issuances been *subjected to notice*, *hearing*, *registration,* and *publication*, the individual investors would have had **at least the opportunity** to make an **informed choice** as to *whether to continue with their investments* or *to withdraw altogether from the securities market* to avoid their respective personal data from being included in the Bureau of Internal Revenue's Alphabetical List.

Content of the Requirements. Hence, it **behooved** the Bureau of Internal Revenue and the Securities and Exchange Commission **to have notified** and **solicited comments** not only from the intermediaries and the issuing corporations but the public at large, especially sectors of the public **probably** or **likely** to invest in securities. These issuances **should have also been filed** with the National Administrative Registry and published. The **exact content** of these procedural protections **do not have** to approximate a

trial-type procedure. The *notices* need **not** have been served individually or in the manner of summons or subpoenas. It *would have been enough* **that** stakeholders are **notified informally but effectively through social media** and **given an adequate opportunity to comment** on the issuances, and these **comments are duly considered before** the issuances are **finalized** and **enforced**.

In view of the foregoing, the challenged issuances **should have complied** with the **statutory requirements** of Book VII, Chapter 2, Sections 3, 4, and 9 of the *Administrative Code of 1987* on **prior notice** and **hearing** and also **filing** or **registration** and **publication**. The **above-stated factors** point to the **practicability** and **necessity** of doing so.

Following the ruling in *GMA Network*, I concur with the *ponencia* that the **assailed issuances are void** due to **non-compliance** with the **foregoing statutory requirements**.

Implications to data privacy

I, however, **disagree** with the *ponencia* that the **collection** and **processing** of **personal information** by the clearing authority, dealers and brokers, and listed companies are **covered** by provisions of the ***Data Privacy Act of 2012***. The reason is stated in Section 4 of the said Act:

> SECTION 4. Scope. – This Act applies to the processing of all types of personal information and to any natural and juridical person involved in personal information processing including those personal information controllers and processors who, although not found or established in the Philippines, use equipment that are located in the Philippines, or those who maintain an office, branch or agency in the Philippines subject to the immediately succeeding paragraph: Provided, That the requirements of Section 5 are complied with.
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> This Act **does not apply** to the following:
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> x x x x
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> (e) **Information necessary in order to carry out the functions of public authority** which includes the **processing of personal data for the performance by the independent central monetary authority and law enforcement and regulatory agencies** of their constitutionally and statutorily mandated functions. Nothing in this Act shall be construed as to have amended or repealed Republic Act No. 1405, otherwise known as the Secrecy of Bank Deposits Act; Republic Act. No 6426, otherwise known as the Foreign Currency Deposit Act; and Republic Act No. 9510, otherwise known as the Credit Information System Act (CISA) x x x (Emphasis supplied)

While the **personal information** sought to be collected and processed are **not directly necessary** for the assessment and collection of withholding taxes on the income on dividend payments, they are **nonetheless relevant** to the **creation of an expanded and effective tax database** for the Bureau of Internal Revenue's purposes.

As both taxation and police power measures, the assailed issuances have a **direct correlation** to the Bureau of Internal Revenue's mandate. These issuances assist in the **creation of such tax database** for the **efficient implementation** of the State's **taxation** power. At the same time, they **satisfy the test for valid police power measures** as **tools** of the State's power of taxation: (1) the *interests of the public* generally, as distinguished from those of a particular class, *require* the exercise of the State's police power, and the *means employed are reasonably necessary* for the accomplishment of the purpose and not unduly oppressive upon individuals.[6]

As I have said, the **noble public objectives** of the assailed issuances cannot be denied, and **neither** can one say that the personal information demanded are **not proportional** to the accomplishment of the noble public objectives.

Had the issuances been **subjected to the requirements** of notice, hearing, registration, and publication, the **data privacy objection** would have been **easily obviated** even without resorting to Section 4(e) above-quoted. The stakeholders would have been totally apprised of this development and they would have been able to make the necessary adjustments, especially the individual investors most impacted by this new requirement.

Disposition

ACCORDINGLY, I vote to **grant** the petitions and declare Revenue Regulation No. 1-2014, Revenue Memorandum Circular No. 5-14, and the Securities and Exchange Commission Memorandum Circular No. 10-14 void, for having been issued in violation of Book VII, Chapter 2, Sections 3, 4, and 9 of the *Administrative Code of 1987*.

AMY C. LAZARO-JAVIER
Associate Justice

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6 *Chavez v. Romulo*, 475 Phil. 486 (2004).