Republic of the Philippines
Department of Finance
Securities and Exchange Commission
Pasay City, Philippines

Sumitomo Metal Mining Philippine Holdings Corporation,

Petitioners,

versus

SEC EB Case No. 07-11-241

Corporation Finance Department,

Respondents.

DECISION

This refers to **SUMITOMO METAL MINING PHILIPPINE HOLDINGS CORPORATION**'s (SMMPH) appeal from the **CORPORATION FINANCE DEPARTMENT**'s (CFD) Order dated 7 July 2011 denying reconsideration of the penalty imposed against SMMPH for second violation of Rule 23 of the 2004 Implementing Rules and Regulations of the Securities Regulation Code (SRC Rules).

SRC Rule 23 implemented Section 23 of the Securities Regulation Code[1] (SRC). SRC Rule 23 provides, in part:

> **SRC Rules 23 - Reports to be Filed by Directors, Officers and Principal Stockholders**
>
> 1. Every person who is directly or indirectly the beneficial owner of ten percent (10%) or more of any class of any security of a company which satisfies the requirements of Subsection 17.2 of the Code, or who is a director or an officer of the issuer of such security, shall:
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> A. within ten (10) days after the effective date of the registration statement for that security, or within ten (10) days after he becomes such beneficial owner, director or officer, subsequent to the effective date of the registration statement, whichever is earlier, file a statement with the Commission, and with an Exchange if the security is listed on that Exchange, on Form 23-A indicating the amount of all securities of such issuer of which he is the beneficial owner.
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> B. within ten (10) days after the close of each calendar month thereafter, if there has been any change in such ownership during the month, file a statement with the Commission, and with an Exchange if the security is listed on that Exchange, on Form 23-B indicating his ownership at the close of the calendar month and such changes in his ownership as have occurred during that calendar month; and ...

In short, a beneficial owner of securities owning at least ten percent (10%) of securities in a company covered by subsection 17.2 of the SRC,[2] must file:

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1 Republic Act No. 8799, 8 Aug. 2000.

2 "The reportorial requirements of Subsection 17.1 shall apply to the following:

a) An issuer which has sold a class of its securities pursuant to a registration under Section 12 hereof: Provided, however, That the obligation of such issuer to file reports shall be suspended for any fiscal year after the year such registration became effective if such issuer, as of the first day of any such fiscal year, has less than one hundred (100) holders of such class of securities or such other number as the Commission shall prescribe and it notifies the Commission of such;

b) An issuer with a class of securities listed for trading on an Exchange; and

1. SEC Form 23-A (initial statement of beneficial ownership of securities) within ten (10) days from the approval of Registration Statement (RS); and
2. SEC Form 23-B (statement of changes in beneficial ownership of securities) - within ten (10) days after the close of each calendar month if there is a change in beneficial ownership.

On 18 November 2010, the Commission approved the RS of securities issued by Nickel Asia Corporation (NAC) in preparation for its Initial Public Offering (IPO) on 22 November 2010. It is undisputed that NAC is an issuer covered by SRC subsection 17.2.

Thus, under SRC Rule 23 (1)(A), existing beneficial owners, directors and officers of NAC are required to file their respective SEC Form 23-A not later than 28 November 2010.

It is not disputed that when the RS of NAC was approved, SMMPH was already the beneficial owner of 256,828,076 common shares of NAC, representing 19.169% of NAC's common shares prior to the offer.[3] In other words, SMMPH was a beneficial owner of at least ten percent (10%) of the securities issued by NAC.

Thus, pursuant to SRC Rule 23 (1)(A), SMMPH is required to submit its SEC Form 23-A not later than 28 November 2010. However, SMMPH failed to file its SEC Form-A with the Commission within the said deadline. This failure is a violation of SRC Rule 23.

Meanwhile, on 22 November 2010, the day of NAC's IPO, SMMPH purchased another 55,000,000 common shares of NAC representing 4.105% of the total common shares. The resulting increase, or change in SMMPH's beneficial ownership of NAC shares meant that, pursuant to SRC Rule 23(1)(8), SMMPH is required to submit its SEC Form 23-B covering the said acquisition not later than 10 December 2010. However, SMMPH also failed to file its SEC Form 23-B with the Commission within the said period. This failure is a second violation of SRC Rule23.

However, CFD did not immediately discover the first and second violations of SRC Rule 23 made by SMMPH.

SMMPH alleges that NAC undertook to file the required reports for and on behalf of its directors, officers, and beneficial owners, including SMMPH.[4] Indeed, pursuant to such arrangement, on 6 December 2010, NAC filed the respective SEC Forms 23-A for and on behalf of its directors, officers and beneficial owners.

However, NAC allegedly inadvertently forgot to file an SEC Form 23-A for and on behalf of SMMPH.[5]

Noticing that NAC filed these SEC Form 23-A's well beyond the deadline of November 28, 2010, CFD issued Show-Cause Letters, on December 13, 2010, directing the reporting officers, directors, and beneficial owners of NAC to explain why they should not be held liable for violation of SRC Rule 23 for their failure to file their respective SEC Form 23-As within 10 days from approval of the Registration Statement.

Specifically, the Show-Cause Letters were addressed to:

1. Manuel B. Zamora, Jr.
2. Gerard H. Brimo
3. Luis J. L. Virata
4. Takanori Fujimura
5. Takeshi Kubota
6. Fulgencio S. Factoran, Jr.

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c) An issuer with assets of at least Fifty million pesos (₱50,000,000.00) or such other amount as the Commission shall prescribe, and having Two hundred (200) or more holders each holding at least One hundred (100) shares of a class of its equity securities Provided, however, That the obligation of such issuer to file reports shall be terminated ninety (90) days after notification to the Commission by the issuer that the n umber of its holders holding at least one hundred (100) shares is reduced to less than One hundred (100)." SRC Subsection 17.2.

3 SMMPH submitted the pertinent excerpt of the RS as Annex B of its Memorandum of Appeal.

4 Appeal Memo. at 3.

5 *Id.*

7. Frederick Y. Dy
8. Michio Iwai
9. Emmanuel L. Samson
10. Martin Antonio G. Zamora
11. Rolando R. Cruz
12. Jose Roderick F. Fernando
13. Barbara Ann C. Migallos
14. Nickel Asia Holdings Corporation

CFD did not include SMMPH as a respondent in the Show-Cause Letters. Takanori Fujimura, president of SMMPH, was named as respondent in his capacity as a director of NAC.

On 22 December 2010, NAC received the CFD Show-Cause Letters. In a letter dated 6 January 2011, NAC responding, for and on behalf of the reporting directors, officers, and beneficial owners, admitted the late filing of the SEC Form 23-As.

NAC requested indulgence from the Commission and reasoned that the delay was caused by the "confluence of several factors among them, that time had to be taken to ensure that the Directors were fully informed of the nature of and import of signing the said forms; that several of them were traveling and that there was difficulty in obtaining their signatures; and that there was a misconception that all of the forms had to be filed at the same time."

NAC also admitted that it has yet to file the SEC Form 23-As for two directors and two other beneficial owners, including SMMPH, who were not named as respondents in the Show-Cause Letters. NAC pleaded that the Commission excuse such inadvertence and oversight. NAC represented that along with its letter, it was filing the SEC Form 23-As for the said four persons, including SMMPH. Indeed, NAC filed the SEC Form 23-A for and on behalf of SMMPH on 6 January 2011.

After considering NAC's response letter, CFD ruled that the reason offered by NAC was not sufficient to justify the late filing of the SEC Form 23-As. Thus, CFD issued a letter dated 24 January 2011, imposing the penalty of Reprimand to all directors, officers and substantial beneficial owners of NAC, including SMMPH for first violation of SEC Rule 23 due to late filing of SEC Form 23-A.[6]

This reprimand letter was served upon NAC at the 6th floor of NAC Centre, 143 Dela Rosa St., Legaspi Village, Makati City. There is no indication that CFD served the reprimand letter directly upon SMMPH.

On 10 May 2011, SMMPH filed SEC Form 23-B covering its subsequent acquisition of NAC shares in the month of November 2010.

However, the deadline for filing the SEC Form 23-B for SMMPH's subsequent acquisitions in November was on 10 December 2010. Thus, CFD issued a Show-Cause Letter dated May 19, 2011 directing the SMMPH to explain why it should not be cited for its second violation of SRC Rule 23 due to the late filing of its SEC Form 23-B.[7]

In its reply letter dated 30 May 2011, SMMPH explained that the delay was due to mere oversight, and assured the Commission that it fully intends to comply with all the required future disclosures and filings. SMMPH also stated that this was only its first violation.[8]

On 6 June 2011, CFD issued a letter to SMMPH ruling that the justification offered by SMMPH was without merit considering that the responsible persons are strictly mandated to comply with their obligations to report under the SRC and its implementing rules. CFD also clarified that it was already SMMPH's

6 Appeal Memo., Anx. C.
7 *Id.*, Anx. E.
8 *Id.*, Anx. F.

second violation of SRC Rule 23, the first violation being the late filing of its SEC Form 23-A. Hence, CFD assessed the penalty of P8,265,200.00 for SMMPH's second violation of SRC Rule 23 in accordance with SEC Memorandum Circular No. 6, series of 2005, (SEC MC 6- 2005).[9]

On 21 June 2011, SMMPH sent a request for reconsideration of the assessed penalties to the CFD. Among others, it argued that it had no participation in the first violation. SMMPH explained that it was its understanding that "NAC would be responsible for filing the Company's [SMMPH] SEC Form 23-A. The Company was not aware that the SEC Form 23-A was inadvertently filed beyond the prescribed period."[10]

Further, SMMPH claimed to have no knowledge, prior to the 6 June 2011 CFD assessment letter, of the penalty of Reprimand imposed upon it for the first violation. It argued that the lack of due notice and hearing rendered the finding of the first violation against it as defective for lack of due process. Thus, the second violation, that is the late submission of SEC Form 23-B, should now be considered as a first violation, and it merits the penalty of Reprimand only.

At the same time, SMMPH also submitted a letter from NAC, dated 17 June 2011, that also requests for the reconsideration of the imposition of penalty against SMMPH. NAC explained that the first violation of SMMPH, that is the late filing of SEC Form 23-A, was "due to sheer oversight and inadvertence, specifically as to the confusion as to who should file the same."[11]

NAC went on to state that "[l]ikewise, the belated filing of the Form 23-B can be attributed to the same oversight and inadvertence, as the events were so close in proximity, compounded by the unfamiliarity with SMM-PH with the requirements of Form 23-B."[12]

Thus, NAC prayed that the penalty against SMMPH be cancelled, or at least reduced to ten thousand pesos (P10,000.00).

Upon review of the reasons offered by SMMPH and NAC, CFD issued its letter dated 7 July 2011 denying the requests for reconsideration for lack of merit. CFD reasoned that SMMPH was duly notified of the first violation and the penalty of Reprimand through NAC. Further, CFD emphasized that intent is not an element of the violation, and the fact is that the required reports were filed late.[13]

Thus, SMMPH filed this present appeal based on the following grounds:

1. It was denied due process when it was not properly notified of its first violation of SRC Rule 23 (i.e., late filing of SEC Form 23-A).
2. It had no intention to conceal information from the Commission or the public.
3. The amount of the assessed penalty is excessive and confiscatory.

Considering the allegations and issues raised by SMMPH in this appeal, we will review not only the assessed penalty for the second violation, i.e. the late filing of SEC Form 23-B, but also the imposition of the penalty of Reprimand for the first violation of SRC Rule 23, i.e. late filing of SEC Form 23-A.

Upon deliberation, we find that the appeal has no merit.

SMMPH was not denied due process.

SMMPH reiterates that CFD failed to give it due notice and hearing on the late submission of SEC Form 23-A. And thus, the finding of the first violation against it is defective for lack of due process. Therefore, it

9 *Id.*, Anx. G.
10 *Id.*, Anx. H.
11 *Id.*
12 *Id.*
13 *Id.* Anx. A.

concludes that there was no first violation, and now the second violation, that is the late submission of SEC Form 23- B, should be considered as its first violation only.[14]

The essence of due process in administrative proceedings is the opportunity to explain one's side or seek a reconsideration of the action or ruling complained of, and to submit any evidence he may have in support of his defense.[15]

It is established that there was an ostensible agency relationship between SMMPH as principal and NAC as agent on the filing of SEC Form 23-A with the Commission. To recall, NAC undertook to file the required reports for and on behalf of its directors, officers, and beneficial owners, including SMMPH.[16] Indeed, on January 6, 2011, NAC wrote CFD admitting that NAC failed to file the SEC Form 23-A for SMMPH within the prescribed period, and that it was, on the said date, filing the same with its letter.[17] And, NAC pleaded the Commission, for and on behalf of SMMPH, to excuse the late filing since it was due to inadvertence and oversight.[18]

SMMPH confirms that it expected and authorized NAC to file the SEC Form 23-A for and on its behalf. In fact, SMMPH reiterates that "[i]t was the [SMMPH] understanding that NAC would be responsible for filing the Company's SEC Form 23-A."[19] Further, SMMPH even submitted NAC's 17 June 2011 letter to the CFD, where NAC again reiterated that the Commission should excuse the first violation of SMMPH, that is the late filing of SEC Form 23-A, since it was " due to sheer oversight and inadvertence".[20]

The Supreme Court has ruled that a corporation is held in estoppel from denying as against innocent third persons the authority of its officers or agents who have been clothed by it with ostensible or apparent authority.[21]

Since there was an apparent agency between NAC and SMMPH with respect to the filing of the SEC Form 23-A, CFD can be excused for failing to notify SMMPH directly of the first violation, and just giving notice upon SMMPH through NAC. It is reasonable to expect that notice to NAC constitutes notice to SMMPH not only because NAC was ostensibly acting as the agent of SMMPH, but also considering that SMMPH is a substantial beneficial owner of NAC such that in the ordinary course of business NAC is expected to forward communications to SMMPH. In fact, SMMPH's president Takanori Fujimura is a member of NAC's board of directors.[22] Thus, it is reasonable to deem that Service of the Show Cause and Reprimand Letters upon NAC is binding on SMMPH.

More importantly, SMMPH was given ample opportunity to explain its side and seek reconsideration of the first violation for the late submission of SEC Form 23-A.

First, on 6 January 2011, when NAC belatedly submitted the SEC Form 23-A of SMMPH, NAC pleaded, for and on behalf of SMMPH, that the Commission excuse the late filing explaining that it was due to inadvertence and oversight.[23]

14 Appeal Memo. at. 8–10.
15 Larin v. Exec. Sec., 345 Phil. 962, 977 (1997), *citing* Midas Touch Food Corp. v. NLRC, 392 Phil. 1033 (1996).
16 Appel Memo. at 3.
17 NAC's Letter dated 6 Jan. 2011 to CFD.
18 *Id.*
19 Appeal Memo. at 3; Anx. H.
20 Anx. H.
21 Rural Bank of Milaor (Camarines Sur) v. Ocfemia, G.R. No. 137686, 8 Feb. 2000.
22 Based on General Information Sheet of NAC and SMMPH for 2010 & 2011, on file with the Commission.
23 NAC's Letter dated 6 Jan. 2011 to CFD.

The CFD considered the explanation offered by NAC on behalf of SMMPH and on 24 January 2011, found that it does not justify noncompliance with SRC Rule 23 since reporting persons are strictly mandated to comply with their obligations under the SRC. [24]

Second, after CFD, through its 06 June 2011 Letter, directly informed SMMPH of the Reprimand for late filing of SEC Form 23-A,[25] SMMPH responded in its Request for Reconsideration dated 21 June 2011 that it "had no participation in the first violation" and that "[i]t was the Company's [SMMPH] understanding that NAC would be responsible for filing the Company's SEC Form 23-A. The Company was not aware that the SEC Form-23-A was inadvertently filed beyond the prescribed period.".[26]

At the same time, SMMPH also submitted the 17 June 2011 letter of NAC to the CFD where NAC reiterated that the Commission should excuse the late filing of SMMPH's SEC Form 23-A, or the first violation of SMMPH since it was "due to sheer oversight and inadvertence."[27]

CFD reviewed the justifications offered by SMMPH and NAC, and subsequently issued the assailed 7 July 2011 letter finding that such justifications are without merit since the SRC and its implementing rules require strict compliance.[28]

These two instances clearly show that the CFD afforded SMMPH with due process.

In any case, in this present appeal, we have reconsidered the previous justification offered by SMMPH and NAC, and all further allegations and arguments submitted by SMMPH in its Memorandum of Appeal and Rejoinder Memorandum about the late submission of SMMPH's SEC Form 23-A. By doing so, any procedural defects on the due process requirements have been cured.

It must be emphasized that it is settled that the requirements of due process can be satisfied by subsequent hearing.[29]

In the case of Assistant Executive Secretary For Legal Affairs, Office of the President v. Court of Appeals,[30] the respondent Appellate Court ruled that the Decisions of the Office of the President were vitiated by failure to accord due process of law to private respondent Mendoza because he was: (1) not made a party to the administrative case; (2) not served with a copy of the 10 February 1969 Decision; and (3) not notified of proceedings before the 13 May 1969 Decision nor served a copy thereof.

The Supreme Court reversed the Court of Appeals' ruling, and instead, held that:

> The foregoing observations [of the Court of Appeals] do not justify the conclusion arrived at. After the Office of the President had rendered its Decision dated 13 May 1969, MENDOZA filed a letter- protest on 1 August 1969 with the BOL. The latter office directed him to file his protest with the Office of the President, which he did. On 28 September 1971, MENDOZA's request for reconsideration was denied by said Office. So that, *even assuming that there was absence of notice and opportunity to be present in the administrative proceedings prior to the rendition of the 10 February 1969 and 13 May 1969 Decisions by the Office of the President, such procedural defect was cured when MENDOZA elevated his letter protest to the Office of the President, which subjected the controversy to appellate review but eventually denied reconsideration. Having thus been given a chance to be heard with respect to his protest there is sufficient compliance with the requirements of due process.*
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> There is no merit likewise to the point raised by petitioners that they were not informed by respondent Judge of the petition by private respondent to set aside the writ of execution. The order granting such petition was

24 Reprimand Letter dated 24 Jan. 2011; Appeal Memo. Anx. C.
25 Appeal Memo. Anx. G.
26 Appeal Memo. at 3; Anx. H.
27 *Id.*
28 Appeal Memo., Anx. A.
29 BERNAS, JOAQUIN. THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 108 (1996 ed.) *citing* Asst. Exec. Sec. v. Court of Appeals, G.R. No. 76761, 9 Jan. 1989 & Central Bank v. Court of Appeals, 220 SCRA 563 (1993).
30 G.R. No. 76761, 9 Jan. 1989.

> the subject of a motion for reconsideration, The motion for reconsideration was thereafter denied. *Under the circumstances, the failure to give notice to petitioners had been cured. That is a well-settled doctrine.* Their complaint was that they were not heard. They were given the opportunity to file a motion for reconsideration. So they did. That was to free the order from the alleged infirmity. Petitioners then cannot be heard to claim that they were denied procedural due process. (Emphasis supplied.)

Indeed, the Supreme Court has consistently affirmed and applied this doctrine. For example, in the case of Autencio v. Mañara,[31] the Supreme Court held that:

> In administrative cases, a fair and reasonable opportunity to explain one's side suffices to meet the requirements of due process. A formal or trial-type hearing is not always necessary. For the purpose of ascertaining the truth, an investigation will be conducted, during which technical rules applicable to judicial proceedings need not always be adhered to. *And where the party has the opportunity to appeal or seek reconsideration of the action or ruling complained of, defects in procedural due process may be cured.* (Emphasis supplied.)

And, in the case of Philippine Economic Zone Authority v. Pearl City Manufacturing Corporation[32] the Supreme Court ruled that:

> In any event, the *Court agrees with petitioners that any procedural defect in the proceedings before the PEZA Board was cured when the PCMC appealed PEZA Board Resolution No. 04-236 before the OP.* Petitioners were also able to move for the reconsideration of the adverse ruling of the OP. In Autencio v. Mañara, the Court ruled that *where the party has the opportunity to appeal or seek reconsideration of the action or ruling complained of, defects in procedural due process may be cured.* Likewise, in Gonzales v. Civil Service Commission, the Court ruled that any seeming defect in the observance of due process is cured by the filing of a motion for reconsideration and that denial of due process cannot be successfully invoked by a party who has had the opportunity to be heard thereon. (Emphasis added.)

To reiterate, in the present case, SMMPH was subsequently given the opportunity to be heard on the issue of whether it deserves to be penalized for its late filing of SEC Form 23-A, its first violation of SRC Rule 23, through the following:

1. NAC's 06 January 2011 Letter to the CFD, pleading, for and on behalf of SMMPH, that the Commission excuse the late filing explaining that it was due to inadvertence and oversight.[33]
2. SMMPH's Request for Reconsideration dated 21 June 2011, filed with the CFD, stating that SMMPH "had no participation in the first violation" and that "[i]t was the Company's [SMMPH] understanding that NAC would be responsible for filing the Company's SEC Form 23-A. The Company was not aware that the SEC Form-23-A was inadvertently filed beyond the prescribed period."[34]
3. NAC's 17 June 2011 letter to the CFD, submitted by SMMPH, where NAC reiterated that the Commission should excuse the late filing of SMMPH's SEC Form 23-A, or the first violation of SMMPH since it was "due to sheer oversight and inadvertence.[35]
4. SMMPH's Appeal to the Commission En Banc, filed on 22 July 2011. In its Memorandum of Appeal, SMMPH alleges that it had no intention to conceal information and the delay of its filings of its SEC Form 23-A was due to inadvertence and mere oversight.[36]

Thus, there can be no doubt that any procedural infirmities have been cured.

In any case, absolving SMMPH of its first violation due to the alleged failure of the CFD to give notice would be abhorrent to public policy in that it could give way to unscrupulous arrangements wherein a government officer can deliberately fail to give notice to a violator to absolve the latter from compliance with the laws and regulations. We cannot countenance such possibilities.

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31 G.R. No. 152752, 19 Jan. 2005.
32 G.R. No. 168668, 16 Dec. 2009.
33 NAC's Letter dated Jan 6, 2011 to CFD.
34 Appeal Memo. at 3; Anx. H.
35 *Id.*
36 Appeal Memo. ¶ 47.

At this point, it must be emphasized that under the SRC and its implementing rules, the requirement to file reports and disclosures within the prescribed periods is absolute. And, the undeniable fact is that SMMPH failed to submit its SEC Form 23-A within the prescribed period — the SEC Form 23-A that was due on 28 November 2010 was only filed on 6 January 2011, or 39 days later. Any procedural, or technical lapses committed by the CFD cannot erase or cure that violation — i.e., that SMMPH did not file its SEC Form 23-A within the prescribed period.

Proof of intention to conceal information is not essential for a violation.

Maximum efficiency in the capital markets is achieved when people can make rational investment decisions. And, people make decisions based on what they know. Thus, it is crucial that all investors, whether large institutions or private individuals, should have access to certain basic facts about an investment prior to buying it, and so long as they hold it. The steady flow of timely, comprehensive, and accurate information allows investors to make sound decisions that facilitates efficient capital formation that is important to a nation's economy.

Thus, Section 2 of the SRC, provides that it is the policy of the State to, among others, *"ensure full and fair disclosure about securities, minimize if not totally eliminate insider trading and other fraudulent or manipulative devices and practices which create distortions in the free market."*

To achieve this policy, SRC Rule 23 requires insiders, particularly directors, officers and principal stockholders of the issuer to file: (1) SEC Form 23-A, the initial statement of beneficial ownership of securities within ten (10) days from the approval of RS; and (2) SEC Form 23-B, the statement of changes in beneficial ownership of securities, within ten (10) days after the close of each calendar month if there is a change in beneficial ownership.

The rationale for requiring the filing of SEC Form 23-A and SEC Form 23-B within the respective prescribed periods is to prevent *any possibility* of abuse in insider trading.[37]

Insider trading undermines investor confidence in the fairness and integrity of the securities markets. Substantial beneficial owners of the securities, directors and officers of the issuer, because of their relationship to the issuer, have access to insider information that could be used in making short-swing profits. To maintain fairness and stability in the securities market, such insider information must be disclosed as soon as practicable to the investing public. Time is of the essence since as long as material information remains undisclosed to the public, persons who are privy to the information remain in an advantageous position, and there is always potential for insider trading.

Thus, the requirements for timely disclosure are absolute, and do not admit any exemptions, otherwise, the rationale for the requirements would obviously be defeated, or easily circumvented.

Indeed, in other jurisdictions such as the United Sates, courts have always recognized the absolute nature of statutes and regulations requiring reports and disclosures from insiders such as major stockholders and top management personnel designed to prevent insider trading.[38] The disclosure requirements are absolute because they are precisely designed to make it difficult for insiders to realize the type of unfair advantage the statutes and regulations seek to prevent, and allow monitoring of insiders' trading activities to ensure compliance with trading restrictions.[39]American courts have confirmed that reportorial/disclosure requirements for insiders are absolute and not dependent upon showing of actual unfair use.[40] Further, courts have ruled that the omission of the required disclosure itself is a badge of fraud and deceit.[41]

37 SECURITIES AND EXCHANGE COMMISSION, HISTORY OF THE SECURITIES REGULATION CODE 38 (2001).
38 69 Am Jr. 2d. Sec. Reg. F. § 527.
39 *Id.*
40 69 Am Jr. 2d. Sec. Reg. F. § 528.
41 *Id.*

In fact, American courts have held that actual intent is not necessary - it is unimportant that there was no actual attempt to defraud investors, and it is nevertheless a violation for as long as material information has been withheld in the face of insider trading.[42]And, motive for non-disclosure or false disclosure is irrelevant in light of the possibility of its direct impact on the market.[43]

In the present case, it is undisputed that SMMPH failed to submit its SEC Form 23-A and SEC Form 23-B within the respective prescribed periods. SEC Form 23-A that was due on 28 November 2010 was filed only on 06 January 2011, or 39 days later; and the SEC Form 23-B that was due on 10 December 2010, was filed only on 10 May 2011, or 151 days later.

The excuse offered by SMMPH for its late compliance on both occasions was that it was due to inadvertence and oversight, and there was no intention on its part to conceal information.[44]

Such excuse has no merit. Again, the requirement is made in absolute terms such that proof of intent is irrelevant. Violation of SRC Rule 23 is not a *mala in se* felony such that good faith and lack of criminal intent could be used as a defense. In any case, the failure to submit the required reports within the prescribed period manifests intent to conceal information.

Moreover, *excuses such as inadvertence or oversight are self-serving, and unverifiable.* If such excuses were allowed, then the whole system of reportorial requirements designed to ensure transparency and fairness in the securities market would be easily undermined.

The penalty imposed is not excessive or confiscatory,

The assessed penalty of ₱8,265,200 against SMMPH is based on SEC MC 6-2005 that provides that the penalty for second violation of SRC Rule 23 due to late filing of statement of beneficial ownership (SEC Form 23-A/B) is 1% of the amount of each purchase or disposition, or ₱10,000 per transaction, whichever is higher plus ₱100 per day of delay.

SMMPH argues that the penalty is excessive and confiscatory because it exceeds the maximum amount authorized under Section 54 of the SRC. SMMPH believes that Section 54.1 (ii) of the SRC prescribes the maximum amount of fine that the Commission may impose for violations of the SRC and its implementing rules.

SRC, Section 54 provides:

SEC. 54. Administrative Sanctions.

54.1. If, after due notice and hearing, the Commission finds that: (a) There is a violation of this Code, its rules, or its orders; ... it shall, in its discretion, and subject only to the limitations hereinafter prescribed, impose *any or all of the following sanctions* as may be appropriate in light of the facts and circumstances: ...

(ii) A fine of no less than Ten thousand pesos (₱l0,000,00) nor more than One million pesos (₱1,000,000.00) plus not more than Two thousand pesos (₱2,000.00) for each day of continuing violation; ...

(v) *Other penalties* within the power of the Commission to impose. (Emphasis supplied.)

Where the law does not distinguish, neither do we distinguish.[45] The phrase "other penalties" is not qualified, and is meant to include pecuniary and non-pecuniary penalties.

42 SEC v. Texas Gulf Sulfur Co., 394 U.S. 976.
43 Heit v. Weitzen, 395 U.S. 903.
44 Appeal Memo., Anx. G for the first violation (SEC Form 23-A) and Appeal Memo. ¶ 47 for the second violation (SEC Form 23-B).
45 Colgate-Palmolive Phil. Inc. v. Gimenez, G.R. No. L-147874, 8 Jan. 1961 *citing* Ligget & Myers Tobacco Company v. Collector of Int. Rev., 15 O.G. No. 4831.

We believe that the language of SRC, Section 54, taken as a whole, indicates that Congress conferred sufficient authority to the Commission to impose "other penalties" beyond the specific limits indicated under item (ii) of the provision. This grant of discretion to the Commission recognizes the fact that securities regulation is a dynamic field, and the amount of fine imposed must be regularly updated to the appropriate magnitude so that persons regulated would not consider the assessment of fine as simply the costs of doing business, and thus ignore compliance.

Indeed, in the case of Soriano v. Laguardia,[46] the Supreme Court En Banc explained that "the investiture of supervisory, regulatory, and disciplinary power would surely be a meaningless grant if it did not carry with it the power to penalize the supervised or the regulated as may be proportionate to the offense committed, charged, and proved."

The petitioner in *Soriano* argued that the Movie and Television Review and Classification Board (MTRCB) erred in promulgating the Implementing Rules and Regulations of Presidential Decree No. 1986, prescribing a schedule of penalties for violation of the provisions of the decree, since the decree itself does not expressly prescribe the imposition of, or authorize the MTRCB to impose, penalties against violators.

The Court held that MTRCB is authorized to promulgate the schedule of penalties since Section 3 (k) of the decree mandates the MTRCB "to exercise such powers and functions as may be necessary or incidental to the attainment of the purpose and objectives of [the law]."

The same reasoning applies to the Commission.

Again, it must be emphasized that under Section 2 of the SRC, it is the policy of the State to, among others, *"ensure full and fair disclosure about securities, minimize if not totally eliminate insider trading and other fraudulent or manipulative devices and practices which create distortions in the free market."*

To achieve this policy, Section 5.1 of the SRC provides that the Commission has the following powers and functions, among others:

> (d) *Regulate*, investigate or supervise the activities of *persons to ensure compliance*; ...
>
> (f) *Impose sanctions* for the violation of laws and the rules, regulations and orders issued pursuant thereto;
>
> (g) *Prepare, approve, amend or repeal rules*, regulations and orders, and issue opinions and provide guidance on and *supervise compliance with such rules*, regulations and orders; ...
>
> (n) Exercise such other powers as may be provided by law as well *as those which may be implied from, or which are necessary or incidental* to the carrying out of, the express powers granted the Commission *to achieve the objectives and purposes of these laws.* (Emphasis supplied.)

These powers provide sufficient basis for the Commission to adopt SEC MC 6- 2005 that prescribes penalties beyond the limits provided under Section 54.1 (ii) of the SRC.

To ensure full and fair disclosure about securities, minimize if not eliminate insider trading, the Commission, pursuant to its powers, promulgated SEC MC No. 6-2005 imposing penalties based on amount of the transaction involved (e.g., 1% of the amount of each purchase, etc.). It is necessary to base the penalty on the amount of the transaction involved because otherwise, the persons regulated could easily shoulder the penalty as a business expenses, and they will not be encouraged to comply since the gains they would potentially receive from violating the rule far outweigh the penalty imposed for the violation.

Consider for example that in the present case, the transaction involved the amount of ₱825,000,000.00.[47] If the penalty were restricted to limits prescribed under Section 54.1 (ii) of the SRC, that is, one million pesos (₱1,000,000.00) plus not more than two thousand pesos (₱2,000.00) for each day of continuing violation, as argued by SMMPH, then the penalty loses its deterrent effect. In a securities transaction involving hundreds of millions of pesos, the potential financial gains from non-disclosure of information and insider trading will be far greater than the penalty of just over One million pesos. The

46 G.R. Nos. 164785 & 165636, 29 Apr. 2009.
47 Appeal Memo., Anx. D.

potential reward for noncompliance will far outweigh the penalty for violation. If this situation were sustained, then clearly, the objective of the SRC to ensure full and fair disclosure about securities and eliminate insider trading will be utterly defeated.

Thus, the language and the spirit of the law justify the penalties provided under SEC MC No. 6-2005.

Lastly, SMMPH alleges that its investments in the Philippines have greatly contributed to the Philippine economy, and thus it argues that the penalty against it is unfair and contrary to Government's policy of attracting and protecting foreign investments.

While we acknowledge the company's contribution to the economy, we cannot agree with such reasoning. SMMPH is not excused from regulations designed to prevent insider trading, and ensure fairness in the securities market. It must be emphasized that consistent with the principle of equal protection of the laws, all corporations doing business in the country should be treated equally.

In conclusion, the facts are:

First, SMMPH did not file its SEC Form 23-A within the prescribed period on November 28, 2010. It was only on January 6, 2011 that NAC filed the SEC Form 23-A on behalf of SMMPH; and

Second, SMMPH did not file its SEC Form 23-B within the prescribed period on December 10, 2010. SMMPH only filed the said SEC Form 23-B on 10 May 2011.

SMMPH has reasoned that its late compliance on both occasions should be excused since it was only due to inadvertence and oversight, and it had no intention to conceal information.

As extensively discussed earlier, we found that such excuses do not justify non-compliance with the SRC Rule 23.

WHEREFORE, premises considered, the instant appeal is hereby DISMISSED for lack of merit.

We hereby **FIND** that **SUMITOMO METAL MINING PHILIPPINE HOLDINGS CORPORATION** is in violation of SRC Rule 23 on two (2) instances, namely:

1. Late filing of SEC Form 23-A due on 28 November 2010; and
2. Late filing of SEC Form 23-B due on 10 December 2010.

In accordance with SEC Memorandum Circular No.6-2005, the penalty of **REPRIMAND** is hereby **IMPOSED** for the first violation, and the penalty of **"1% of the amount of each purchase or disposition, or ₱10,000 per transaction, whichever is higher plus ₱100 per day of delay"** is hereby IMPOSED for the second violation.

SUMITOMO METAL MINING PHILIPPINE HOLDINGS CORPORATION is hereby **ORDERED** to pay the assessed penalty for the second violation amounting to Eight Million Two Hundred Sixty-Five Thousand Two Hundred Pesos (₱8,265,200.00) within fifteen (15) days from receipt of this Decision.

SO ORDERED.

Pasay City, Philippines, 10 October 2017.

The dispositive part is as follows:

"**WHEREFORE**, premises considered, the instant appeal is hereby DISMISSED for lack of merit.

We hereby **FIND** that **SUMITOMO METAL MINING PHILIPPINE HOLDINGS CORPORATION** is in violation of SRC Rule 23 on two (2) instances, namely:

a. Late filing of SEC Form 23-A due on 28 November 2010; and
b. Late filing of SEC Form 23-B due on 10 December 2010.

In accordance with SEC Memorandum Circular No.6-2005, the penalty of **REPRIMAND** is hereby **IMPOSED** for the first violation, and the penalty of **"1% of the amount of each purchase or disposition, or ₱10,000 per transaction, whichever is higher plus ₱100 per day of delay"** is hereby IMPOSED for the second violation.

SUMITOMO METAL MINING PHILIPPINE HOLDINGS CORPORATION is hereby **ORDERED** to pay the assessed penalty for the second violation amounting to Eight Million Two Hundred Sixty-Five Thousand Two Hundred Pesos (₱8,265,200.00) within fifteen (15) days from receipt of this Decision.

SO ORDERED."

Pasay City, Philippines, 10 October 2017.

TERESITA J. HERBOSA
Chairperson

ANTONIETA F. IBE
Commissioner

EPHYRO LUIS B. AMATONG
Commissioner

BLAS JAMES G. VITERBO
Commissioner

EMILIO B. AQUINO
Commissioner